170 YEARS OF TEXAS CONTRACT LAW

<http://www.orsinger.com/PDFFiles/170-Years-of-Texas-Contract-Law.pdf>

Richard R. Orsinger
richard@ondafamilylaw.com
http://www.orsinger.com

Orsinger, Nelson, Downing & Anderson, LLP

San Antonio Office:
1717 Tower Life Building
San Antonio, Texas 78205
(210) 225-5567
http://www.orsinger.com

and

Dallas Office:
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400
http://www.ondafamilylaw.com

State Bar of Texas
History of Texas Supreme Court Jurisprudence 2013
Austin, April 11, 2013

Chapter 9

Special thanks to my paralegal, Diane Wiles, for research and assistance with this Article.

[Endnotes are web-enabled]

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present);
Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

One of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey (2003-2010)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2011); Appellate Law (2007-2011)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009 & 2011)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)

—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); *Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code* (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review! (Appeal and Mandamus) (2012)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012)

Table of Contents

170 Years of Texas Contract Law

by

Richard R. Orsinger
Board Certified in Family Law
& Civil Appellate Law by the
Texas Board of Legal Specialization

I. INTRODUCTION. Some hold the view that promises of future performance played no part in primitive society, where consensual economic transactions were concluded immediately, mainly based on barter. They say that the role of contracts grew, and thus the need for Contract Law grew, out of a more complex stage of economic life, where promises required delayed performance.[1] In medieval Europe, land was the basis of economic life. As time progressed, the economy developed a vigorous trade in commodities and goods, which gave rise to the need for money and credit.[2] Industrialization required the moving of raw materials to manufacturing centers for processing, and then the moving of finished products to markets where the goods could be sold. As economic activities became more complex, and involved more capital and more labor, and involved greater distances and greater spans of time and greater risks, the need for businessmen to be able to rely on others to make and keep promises led to the development of a law that would enforce promises of future performance. This was Contract Law.

Historians disagree about the relative importance of particular individuals versus broad societal trends in shaping events. This Article considers the impact of both broad trends and committed individuals on the development of Contract Law. Perhaps the absence of one or several prominent individuals might not have altered the way Contract Law developed. It is impossible to know. But the fact remains that certain persons did leave significant imprints on the development of Contract law, and their individual contributions are noted in this Article.

Harvard Law School Dean Roscoe Pound described the law in this way:

> Law is a practical matter. Legal traditions have persisted largely because it is less wasteful to keep to old settled paths than to lay out new ones. If one were laying out streets anew in the older portion of one of our modern cities that dates back to colonial times, and were proceeding solely on the basis of convenience of travel from place to place, proper accommodation for use of the streets by public utilities and light and air for the buildings that now rise on each side, we may be sure that the map would look very different. Often the streets got their form by chance. They were laid out at the fancy of this man or that according to his ideas for the moment, or, laid out by no one, they followed the lines of travel as determined by the exigencies of the first traveler. Today it may well be more wasteful to relay these lines than to put up with the inconvenience of narrow, crooked, irregular ways. Many legal paths, laid out in the same way are kept to for the same reason. When the first case on the new point called for decision, judge or jurist, seeking to decide in accordance with reason, turned to a staple legal analogy or to an accepted philosophical conception and started the legal tradition in a course which it has followed ever since.

Pound, *Juristic Science and Law*, 31 Harv. L. Rev. 1047, 1058-59 (1918). This Article attempts to chart the course of Texas Contract Law in the context of its origins in the Spanish law, and the Common Law of England, and as it responded to the societal and legal changes that impacted Contract Law over the last 170 years. The task is too great to present in one paper, and too much to accomplish in a few months. However, this is a start.

II. INTELLECTUALIZING CONTRACT LAW. There are dangers in attempting to intellectualize the law. In simplifying the subject we may ignore complexities that are important. In rationalizing the law, we may be projecting the way we think, and not observing things the way things really are.

A. CATEGORIZATION. In law, as in every other intellectual endeavor, we proceed by categorization and identification. We create mental frameworks where each thing has its proper place, and we resolve a problem that comes before us by fitting the problem into its place in the mental framework. A leading psychiatrist has said: "A categorical approach to classification works best when all members of a . . . class are homogeneous, when there are clear boundaries between classes, and when the different classes are mutually exclusive."[3] The development of the law in England and America has been a continuing process of creating and adapting a framework suitable for distinguishing between different kinds of claims, and which would allow lawyers and judges to fit cases into their proper categories within that framework. The history of law reflects that over time the boundaries of legal categories get stretched to accommodate new cases, but in doing so the categories can lose their original integrity. When boundaries cannot be stretched enough, then new categories are created. Sometimes these new categories supplant old categories; sometimes

they coexist with the old. Once in a great while an entire categorical framework must be abandoned, and a new one substituted. When this happens, history shows, vestiges of the old categories persist in the new categories, and cling to life well past their usefulness.

In the history of the Common Law of England (brought to Texas not so much by the 1840 Act of the Texas Congress as by the training and experience of the American lawyers who repatriated to this country), the development of Contract Law was a lengthy process of adapting to the demands that a changing society put on a rigid legal system.[4] Ingenious lawyers, and sympathetic judges, bent and stretched the law in order to rectify wrongs, and in the process they slowly expanded the law. The distinction between criminal law and civil law, and the distinction between tort law and contract law, seem obvious to us now, perhaps even inescapable, but it was not always so. Many of the things we now think about Contract Law, as modern as they may seem, are as much a product of early English Common Law as we are a product of the DNA of our ancestors. This study of Texas Contract Law will begin with its roots in the Common Law of England. Then, in America, in the late Nineteenth Century, law professors reformulated the theory of Contract Law, using a quasi-scientific approach to identify underlying principles, thought to be universal, that once identified could lead to certainty of outcome and thus predictability. As soon as this scientific jurisprudence gained footing, it was immediately put under attack by social scientists, by Progressives, and later Legal Realists, as elevating theory over practical considerations or worse, as masking an exploitative political and economic order. It was not until the 1960s, that Texas Contract Law was successfully attacked and reformed to eliminate discrimination against married women. Over the last 100 years, there have been many efforts to develop a new intellectual framework of Contract Law, to replace the one that developed in the late 1800's and early 1900's, but the effort has been largely ineffectual.

B. ANALOGICAL, INDUCTIVE, AND DEDUCTIVE REASONING. The logicians divide reasoning into three types: analogical, inductive, and deductive. American Contract Law has been through phases dominated by each of three forms of reasoning.

1. Analogical Reasoning. Analogical reasoning is an analytical process that attempts to associate a new item with a familiar item that has already been classified, or that attempts to associate a new problem with a familiar problem that has already been solved. If the new and the old items are judged to be sufficiently similar, then the classifications or rules that apply to the old item or problem are applied to the new one. This process of learning by association is applied by adults teaching children how make sense of the world, and to the astronomer classifying a new solar system in a distant galaxy discovered with a more powerful telescope. Some writers have argued that both deductive and inductive logic are, at their core, based on analogical reasoning.[5] Reasoning by analogy is often used whenever a legal dispute does not clearly fall under an existing rule of law, so that the judge must compare the new case to various older cases until s/he finds the closest fit, then use the rule from the old case to resolve the new one. Professor Edward Levy argued, in his famous book, An Introduction to Legal Reasoning (1949), that all case-based reasoning is reasoning by analogy.

Analogical reasoning is facilitated by the inclusion of hypothetical examples in an instructive text, such as occurs in illustrations placed after sections of Restatements of the Law or sections of a uniform law. These examples are paradigm examples, sometimes drawn from actual cases, and they are used as models to be compared to the case before the court, to see how closely the case at hand compares to the model. These illustrations are denuded of all "non-essential" facts, which opens the approach to the criticism that the surrounding circumstances, which influence the court's decision in important ways, are ignored, thus overemphasizing legal theory while ignoring the role played by the court''s sense of justice, given the facts of the case.

2. Inductive Reasoning. Inductive reasoning is, in one sense, moving from the particular to the general. Inductive reasoning operates by examining multiple occurrences, then using creativity, or intuition, or statistical analysis, or some methodical process of exhausting possibilities, to propose an explanatory or unifying principle that explains these multiple occurrences. Once discerned, this new principle is then stated as a hypothesis that is subjected to testing in order to determine its validity.[6] The famous British philosopher John Stuart Mill wrote:

> Induction, then, is that operation of the mind, by which we infer that what we know to be true in a particular case or cases, will be true in all cases which resemble the former in certain assignable respects. In other words, Induction is the process by which we conclude that what is true of certain individuals of a class is true of the whole class, or that what is true at certain times will be true in similar circumstances at all times.[7]

Inductive reasoning drew its inspiration from Francis Bacon (1561-1626), the Attorney General and Lord Chancellor of England who championed observation as the basis for constructing an accurate understanding of the world. Professor Stephen Feldman, in his article *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387, 1401 (1997), described Baconianism in law in this way:

> The nineteenth-century American understanding of Baconian science (not only legal science) was characterized by observation, generalization, and classification. A Baconian perspective was grounded on faith in human sense experience so that careful observation could reveal truth. Then, from multiple observations of the relevant phenomena, humans could generalize and induce ultimate principles of nature. Finally, those

principles could be classified and ordered into a rational system.

Once the underlying principles are inductively determined, they are thereafter applied in a deductive fashion to resolve cases.[8] The impact of the use of the inductive approach on development of the Law of Contracts is discussed in Section X.B.5 below.

3. Deductive Reasoning. Deductive reasoning is based on formal logic, where one reasons from premises to a conclusion. As envisioned by Aristotle and accepted since, deductive logic takes two forms: the syllogism and the deductive inference. In the syllogism, a major premise is linked to a minor premise and, if the two premises are true, then the conclusion necessarily follows. In the deductive inference, a connection is established between a premise and a conclusion, so that the conclusion necessarily follows from the premise. The normal form of the deductive inference is: "if P is true, then Q necessarily follows"; or, more simply, "P implies Q." With a deductive inference, establishing the truth of the premise automatically proves the conclusion. Applying deductive reasoning to law, in the syllogistic approach a legal rule may be seen as the major premise, and the facts of the case the minor premise. If it is determined that the facts of the case fall within the legal rule (i.e., the minor premise links to the major premise), then the legal result (i.e., the syllogistic conclusion) follows with certainty. However, we more habitually think in terms of deductive inferences, and in law we see the premise as the legal rule and the conclusion as the final legal determination. Example: "a person who promises to buy a horse must pay if the horse is delivered" (the inference); in this case Jones promised to pay Smith $500 for his horse and Smith delivered his horse to Jones (the premise is true); so Jones must pay Smith $500" (the conclusion necessarily follows).

C. DANGEROUS FALLACIES IN REASONING. Over the last two millennia logicians have identified certain erroneous methods of thinking, or fallacies. There are two fallacies that are most pertinent to the present discussion.

1. The Danger of Faulty Analogy (Analogical Reasoning). The Fallacy of Faulty Analogy occurs when one assumes that because two things being compared are similar in some known respects, that they are therefore similar in other unknown respects. Faulty analogy is analogical reasoning whose inductive probability is low because the similarities relied upon to draw the connection between the items being compared are tenuous or are not relevant to the comparison. In case-based reasoning, the analogy is based on comparing the facts of two cases. The closer the facts, the sounders the analogy. The more the facts vary, the weaker the analogy becomes. But it is not just the facts of the cases that count. The context of the situations is also important. As the context varies, so the analogy weakens.

2. The Danger of Hasty Generalization (Inductive Reasoning). The Fallacy of Hasty Generalization is inferring a conclusion about an entire class of things based on knowledge of an inadequate number of class members. Stated differently, a hasty generalization is an unwarranted conclusion that a sample of a population is representative of the entire population, so that qualities of the sample reliably suggest identical qualities of the general population.[9] Two common ways that the Fallacy of Hasty Generalization occurs is through the Fallacy of the Small Sample and through Sampling Bias. The Fallacy of the Small Sample occurs when the sample size is too small to justify the conclusion drawn.[10] Sampling Bias occurs when the sample is not randomly chosen, so that the selection process itself might skew the representativeness of the sample and thus weaken inferences that are drawn from the sample.[11] Applied to the development of modern American Contract Law in the late 1800s, the entire class of things being studied consisted of all contractual relationships. The sample of class members was drawn mainly from published opinions of state supreme courts and federal appellate courts. Published appellate opinions were only a small part of contract disputes that reached our trial courts. Even trial court cases were only a part of the contract disputes that were resolved through some formal dispute resolution mechanism (including trial and arbitration). The cases resolved through formal dispute resolution mechanisms excluded contract disputes that were resolved by the parties themselves. And the contracts that were disputed were only a small part of the total number of contracts that were created on a daily basis. It is fair to ask whether appellate court decisions are really a secure foundation to establish binding rules on how contracts are formed in society, and how contract disputes should be resolved. Perhaps we should instead collect statistics on how parties go about entering into contracts and what they do when contract disputes arise. The risk of Hasty Generalization is evident. The group of appellate decisions from which the principles of modern Contract Law were derived was not a random sample of the entire population of contracts, and it may represent too small a sample because the sample excluded cases not appealed, cases not tried, and contracts not litigated.

D. PARADIGM SHIFTS. Philosopher of science Thomas Kuhn, in his book The Structure of Scientific Revolutions (1962), proposed the idea of paradigm shifts in the progress of scientific thought. For Kuhn, a paradigm is a fundamental view shared by the scientific community. As time passes, anomalies occur that cannot be explained by the current paradigm. They are initially ignored, or blamed on observational error, and later on exceptions are introduced into the paradigm to accommodate the anomalies. Eventually, the exceptions become so glaring that the existing paradigm must be abandoned and a new one adopted. Sometimes a paradigm shift can be attributed to one discovery, or one publication. An example of a sudden paradigm shift would be Isaac Newton's conception that material objects have mass and momentum, coupled with the idea that a change in speed or in the direction of movement results from the application of an external

force to an object. From that Newton concluded that mass produces a gravitational force that causes objects to move toward one another, and he offered a mathematical formula that accurately quantified this gravitational attraction. Another sudden paradigm shift would be Albert Einstein's suggestion in 1905 that mass could be converted into energy, and his famous formula that accurately quantified the conversion ($E = mc^2$), which led to the atomic bomb in 1945 and nuclear-powered electricity generation in the 1970s. Or Einstein's revelation in 1916 that mass did not emit a gravitational force, but instead bent the space and time in which bodies exist and through which they travel, which displaced Newton's theory but the practical consequences of which may not be realized for several more centuries. These events caused sudden shifts in the prevailing scientific paradigm.

Paradigm shifts can occur more slowly. An example would be the slow process by which the earth-centered universe envisioned by Aristotle was eventually replaced by the sun-centered solar system model. Over time, astronomical observations progressed to the point that the orbits of the sun and other planets could not be explained by circular orbits around the earth. Around 150 A.D., Claudius Ptolmy introduced an elaborate set of epicycles into the planets' orbits, which better matched the observations to the earth-centered theory and maintained its viability for another 1,400 years. Nicholas Copernicus published a credible work in support of a sun-centered solar system in 1543, and the theory received a significant boost from Johann Keppler's publication in 1609 of a model, based on precise observations by Tycho Brahe, suggesting that Mars moved around the sun in an elliptical orbit, and Galileo Galilei's discovery in 1610, using the telescope, that Jupiter had four moons and that Venus exhibited phases like earth's moon, and that the sun had sunspots reflecting that the sun rotates. Galileo was prosecuted, and forced to recant, and kept under house arrest for his views, but the solar system model eventually prevailed. Another slow paradigm shift occurred with the theory of evolution of life on earth, which developed from Maupertuis (1751), to Buffon (1766), to Lamarck (1809), and it received its final push with Charles Darwin's publication in 1859 of his theory of natural selection as the method by which evolution worked. Even now, 154 years later, the issue of evolution is not entirely settled in American popular thought, but in the scientific community the paradigm has shifted toward evolution.

1. Paradigm Shifts in Contract Law. Like science, Anglo-American Contract Law has had its own paradigm shifts. The first paradigm shift actually began in the 1100s before Contract Law developed, when English Law, with its roots in both Germanic and Roman law and tradition, entered the era when Royal writs were used to remove court actions from local courts to Royal courts. Over a long period of time, the writ practice developed into a newer paradigm, the "forms of action," which determined what remedies the courts would offer for various wrongs. Another paradigm shift began in the late 1700s, when legal treatise writers beginning with William Blackstone began to offer explanations of the law that were not just a description of available remedies, but that instead suggested underlying principles of what actions created rights and obligations, and when and how those rights and obligations would be enforced, or relieved, by courts. The shift to the current paradigm in Contract Law occurred when law professors and legal treatise-writers in the late 1800s and early 1900s moved away from classifying contract cases based on analogical similarities in fact patterns and instead explained Contract Law in terms of underlying principles, inductively discerned, somewhat (they thought) like laws of physics, including offer-and-acceptance, the requirement of contractual consideration, and the requirement of mutuality of obligation. This is the current paradigm of Contract Law as it is applied in American courts. However, this paradigm was put under assault, almost as soon as it arose, by law professors wielding law review articles as weapons, who believed that Contract Law and court decisions were not governed solely, or even principally, by neutral principles of law, but instead reflected ad hoc solutions to the problems presented by particular cases, or worse manifested perspectives molded by the judges' socioeconomic class, or even worse perpetuated a system that allowed the politically-powerful and economically-strong to exploit their advantage over weaker parties, or exhibited the preconceptions of old, white, propertied men regarding other races and the other gender. Since 1900, legal philosophers and legal writers, and occasionally an appellate judge, have offered up new theories to explain what Contract Law is or should be. These efforts have not been successful in bringing about a paradigm change. The principles of Contract Law that were expounded beginning in the 1870s, with some elaborations, are still applied by the courts in resolving actual disputes.

In a larger sense, however, our entire Anglo-American conception of compensating harm has had a 1,000 year cycle that started in the 1100s, when the English started developing particularized remedies to rectify wrongs. Later the English created forms of action, which determined the remedies that were available. Later these forms of action became paramount, and fitting the claim into the right form of action became more important than finding the best remedy for the injury. When the English forms of action were transplanted to American soil, after a time they became recognized as causes of action. At the present time, we are having increasing difficulty fitting new problems into the existing framework of causes of action and correlating the remedies that are or should be available.

There are signs that the existing approach to compensating harm is in existential trouble. Technology is changing the needs and demands of people faster than 10-year uniform law drafting projects can keep up with. The tried-and-true "legal fictions" that allow us to ignore inconvenient facts are harder to justify to critics who are not enthralled with prevailing legal doctrine. The fact that property transfers and contractual relationships can give rise to duties that, when

breached, give rise to tort damages, suggests that the traditional separation of property law, contract law, and tort law is no longer holding firm.

When the next paradigm shift in Contract Law occurs, it will not likely be the result of the general acceptance of a new moral philosophy applied to private parties who invoke governmental sanctions to enforce private promises. There are three fundamental changes can be singled out as possible causes of a paradigm shift in Contract Law. One is a shift in focus away from the origin of the wrong to the nature of the injury suffered. The second is the transition of the economy from the provision of goods to services to information. The third is the rise of contract rights as a new form of property that can be bought, sold, invaded, misappropriated, damaged, and destroyed.

2. The Shift From Types of Claims to Types of Remedies. One significant symptom of a systemic problem with the current property law/contract law/tort law paradigm is the inability of judges to adequately distinguish between claims that could sound in property law, or contract law, or tort law, or two or three of the three. The traditional approach of announcing broad rules, and then creating exceptions on an ad-hoc basis when the rule does not work, is not leading to a consistent methodology. The courts seem to be moving in the direction of looking at the injury to be compensated to determine whether a claim lies in property law, contract law, or tort law. That reverses the way the paradigm is supposed to work. Under the current paradigm, the nature of the claim is supposed to determine the remedy available, not the reverse. If, in fact, we can best distinguish property claims, contract claims, and tort claims, based on the type of injury suffered, then ultimately we may need to abandon a framework based on the nature of the claim and create in its stead a framework based on the nature of the injury suffered. Such a new paradigm could in fact be much simpler than criss-crossing the connections of the old framework of property law, contract law, and tort law, but it would require us to refocus our attention away from the ancient writs, the English forms of action, and our traditional causes of action, and to abandon the traditional distinctions between property law claims versus contract claims versus tort claims, and to classify claims instead based on the type of injury suffered and the remedies the law provides as compensation.

3. The Shift From Goods to Services to Information. It is long been noted that the world's economy is engaged in a quickening progression away from the transfer of tangible personal property to the transfer of services and increasingly to the transfer of information. Intel and IBM proved that computers were the wave of the future. Bill Gates proved that designing software was more profitable than manufacturing computers. Steve Jobs proved that more money can be made by selling information to people who purchase his telephones than can be made either by making computers or by designing software alone. Much information, whether publications, music, or movies, is protected by Federal copyright law, giving rise to a new form or property, called "intellectual property." Intellectual property may be to tomorrow's world what real property was to feudalism, and what commodities and later manufactures were in the days of world-wide trade. In America, intellectual property "rights" derive from Federal statutes more than state property law, so the dominant Contract Law of the future may be the law that applies to the leasing and transfer and misappropriation of intellectual property and not the Contract Law that applies to state-law-derived property rights in physical things. Whether the fundamental Contract Law that applies to the leasing and transfer and invasion of intellectual property rights will be state or Federal, or whether the law governing such events will be Contract Law at all, or will instead be Federal intellectual property law, enforced by Federal courts, remains to be seen.

4. Contract Rights Have Become Property. Modern Contract Law grew out of the need to regulate the transfer of possession (i.e. a lease) or ownership (i.e., a deed) of land and later personal property. From that, Contract Law progressed to the point that a contract is now seen as creating a new form of property, i.e., a contract right. With the rise of secondary markets for home mortgages, car loans, and student loans, contractual rights and obligations have themselves become personal property, to be bought and sold in a world-wide market, as if they were commodities. The "commodification" of contract rights and obligations breaks the "relational and situational" ties[12] between the original contracting parties, and moves contractual inquiries about the formation and interpretation of contracts away from a subjective assessment of the circumstances surrounding the original contracting and into the realm of what a reasonable third party would believe the words and actions of the contracting parties to mean. The protections that the law affords to assignees of contract rights and obligations thus become essential to the marketability of those rights and obligations, and the benefit of maintaining the marketability of contract rights and obligations introduces policy considerations that may outweigh the policies that developed during a time when contract suits were designed to balance the interests of just the original contracting parties.

Additionally, the development of derivative contracts, that pay upon default of the underlying independent contract, overlays a second, or third, or fourth layer of contractual rights and obligations that are dependent upon, but do not derive from, the original underlying bilateral contract. Derivatives originated as an ex post guarantee by a third party of the performance of an underlying contract, given in exchange for a fee. It was a form of insurance. But derivative rights and obligations themselves have become marketable, and speculators buy them and sell them in order to profit from fluctuations in value. This type of activity is little more than "educated gambling," where the speculators are essentially betting on winners and losers. To people who invest in derivatives for profit, the underlying

contractual relationship is only important insofar as it affects the price at which derivatives can be bought and sold.

Courts will have to strain to adapt traditional "bilateral" Contract Law principles to contract disputes between assignees of the original contracting parties, and to contract disputes adjudicated in the context of derivative contracts that will be breached if the underlying contract is not performed. Will the court's decision on enforcing a contract be affected if the parties to the lawsuit are not the original contracting parties? If contract rights and obligations are routinely assigned, what happens to the defenses of lack of consideration or failure of consideration for, or fraudulent inducement of, the original underlying obligation? Will the impact that a ruling might have on derivative contracts affect the decision to enforce or not enforce an underlying contract? Will the need for a liquid secondary market in contractual rights and obligations outweigh the rules and the policies that apply just between contracting parties? Will parties to a derivative contract have the right to intervene in a lawsuit involving the enforceability of the underlying contract? Will the person required to pay on a derivative obligation have a claim in tort or contract or equitable subrogation against the party who breaches the underlying contract, even though no privity of contract exists? Will the determination of damages for breach of contract move away from the assessment by a jury to the more objective and easily determined change in market price of the assigned contract interests or the derivative guarantees of performance? The need to answer these types of questions may put such a strain on the existing paradigm, which is already 130 years old (if not up to 1,000 years old), that it will have to be abandoned, and a new one adopted.

III. THE DEVELOPMENT OF THE COMMON LAW. Texas is a Common Law jurisdiction. Much of Texas' Common Law has its source in English Common Law. In particular, Texas' Common Law of contracts reaches far back into the English Common Law. So this study of Texas Contract Law will look at the development of the Common Law of England. A study of the early Common Law of England is entirely a study of legal procedure.[13]

A. ANGLO-SAXON BRITAIN. According to William Blackstone, as a result of successive invasions, the customs of the indigenous people of Britain were intermixed with the practices of the Romans, the Picts, the Saxons, and the Danes, but there was never a formal exchange of one system of laws for another.[14] By the beginning of the Eleventh Century, England had three principal systems of law: the law of the ancient Britons, which prevailed in some midland counties and west toward Wales; the law of the Saxons, in the south and west of England; and Danish law, in the midlands and along the eastern coast of the island.[15] The last Saxon king, Edward the Confessor, extracted from these separate systems a sketchy but uniform law for the entire Kingdom, and so it was when William of Normandy established the beachhead for his subjugation of England, at the Battle of Hastings in 1066.[16]

B. AFTER THE NORMAN CONQUEST. At the time of the Norman Conquest, which began at Hastings in 1066 and stretched out for four awful years, the law of England was a loosely-integrated form of feudalism, based primarily on an hierarchy of mutual obligation between the common man and his local lord, between the local lord and his overlord, and between the overlord and the king. Upon the success of his cross-Channel invasion of England, William the Conqueror replaced the Anglo-Saxon overlords with his military cohorts, while leaving the basic structure of Anglo-Saxon feudalism in place. The pre-existing political structure of Anglo-Saxon England was so decentralized that a succession of Norman kings struggled to impose Norman ways across England with uneven effect. William the Conqueror brought with him the French language, the Roman Catholic church, and the vestiges of Roman Civil law. But to use Blackstone's words, the English Common Law "weathered the rude shock of the Norman Conquest,"[17] and the foundation of modern English law was thus an amalgam of pre-Norman institutions and France's version of Canon Law and Roman Civil Law. Because England was, as-it-were, on the periphery of the civilized world, even after the Norman Conquest English law developed independently from the law developing on the Continent of Europe. Just like the English language generally, English legal writing of this era reflected a mix of Anglo-Saxon, Roman, and French concepts and terms. Additionally, post-Conquest England suffered from a succession of absentee-kings, dethronements, and institutional struggles as the kings consolidated power at the expense of the feudal lords, all of which impeded the development of a uniform, top-down legal superstructure. To a greater extent than elsewhere in Europe, in England the law accepted by the population developed from the bottom up, based on the rulings of individual judges in specific cases that eventually gained acceptance as the proper way of doing things.

C. HENRY II. Henry II, in the 1100s, succeeded in making inroads into the legal authority of local lords, by promulgating statutes that centralized the English legal system through establishing a "permanent court of professional judges," and by sending "itinerant judges throughout the land," and by establishing new legal procedures such as Royal writs that allowed the removal of court actions from local courts to Royal courts.[18] Henry II's efforts centralized the legal process and made it uniform, and thus "common" in the sense of shared throughout the realm. However, Henry II's changes were more to the structure of the legal system and not the content of the laws, so that the individual decisions of judges still developed the Common Law incrementally.[19] The Common Law of England evolved into a mixture of disconnected Royal decrees and enactments of Parliament (many merely codifying existing accepted practices), court rulings recorded in inaccessible registers, local practices that varied widely, and settled customs developed by people as they went

about their daily lives without the benefit of legal oversight.[20]

D. THE YEAR BOOKS. The Year Books are law reports of legal decisions made by medieval English courts. The Year Books were kept from around 1268 to 1535. The Year Books are the oldest example of what we might call English case reports. The recording of judicial decisions in these Year Books was not comprehensive (like it is today). The case reports are written in a mixture of English, Latin, and French. The case reports are sketchy, and sometimes recount in very abbreviated terms what the lawyers and the judges said to each other in arguing and deciding the case. The focus of the case reports is primarily procedural, and the underlying substantive law can be discerned largely by seeing which fact patterns were considered actionable and which were not.

E. THE GREAT LEGAL COMMENTARIES ON ENGLISH LAW. Periodically, a legal thinker would undertake to organize and summarize the law of England. The first of these was Ranulf de Glanville,[21] the Chief Justiciar (i.e., prime minister) for Henry II of England, reputed author of the first treatise on English law, entitled Treatise on the Laws and Customs of the Kingdom of England (1188). The Treatise detailed the complicated practice of writs, which were used to remove legal disputes from a local court (dominated by the local noble) to one of the King's courts.[22] Around 1260, Henry de Bracton[23] wrote a treatise in Latin, entitled On the Laws and Customs of England. As a clerk to William de Raley, an important judge during the time of King Henry III, Bracton had access to the records of case dispositions, which he used to annotate the statements of principles contained in his book. Bracton thus facilitated the development of the doctrine of stare decisis. The next commentator of consequence was a person now called "Britton," although his historical identity has not been established. The name Britton is attached to an untitled comprehensive statement of laws that was published 1291-1292 by the authority of Edward I, in an effort to regularize the law across England and Ireland under his ultimate authority. Edward I gave notice in the Prologue to the work that all contrary local laws were preempted.[24] This 615-page book, written in Law French,[25] gives a comprehensive listing of the remedies available from the courts, and through them the rights they vindicated.[26] In 1481, Sir Thomas Littleton published a three-volume work on real property rights, called The Tenures (written in Law French).[27] In 1523, Christopher St. German published his treatise Dialogue Between Doctor and Student, which discussed remedies available from the Court in Chancery.[28] In 1530, John Rastell published the first English law dictionary, with terms listed in alphabetical order, that continued to be republished until 1819.[29] Henry Finch's The Art of Law was published in the 1580s in Law French, and was republished in 1621.[30] John Cowel was a professor of civil law at Cambridge, who in 1607 wrote The Interpreter, a dictionary of legal terms that was suppressed and burned, and resulted in his imprisonment.[31] Spelman published his Glossarium of Anglo-Saxon and Latin legal terms in 1626.[32] From 1628 to 1644, Edward Coke published four volumes of Institutes on the Lawes of England.[33] Blount published his Nomo-Lexicon Law Dictionary in 1670. From 1765 to 1769, William Blackstone published his still-famous Commentaries on the Law of England. See Section XIII below. Kellham published a Dictionary of the Norman or Old French Language in 1779. Another grouping of legal treatises arose, called "abridgements," which contained explanations, or one-sentence digests of case holdings, relating to various legal principles that were listed in alphabetical order, making them useful as reference works for lawyers and judges but not suitable for self-study of the law. Important legal abridgments were: Statham's Abridgment (1489),[34] Fitzherbert's Grand Abridgement of the Law (1516),[35] Brooke's Grand Abridgement (1570),[36]Hughes' Grand Abridgment of the Law (1573), Rolle's Abridgment (1668),[37] Jacob's New Law Dictionary (1729), and Viner's Abridgment (1742-53).[38]

Blackstone's Commentaries can be seen as the birth of the modern view of English Common Law. Blackstone was the first of a succession of legal writers who attempted to make modern sense out of outdated legal procedures and legal ideas that had persisted since the Middle Ages.[39] Blackstone's treatise started as a series of lectures he wrote and read to college students and members of the public for an admission fee. His lectures were so popular that he was selected by Cambridge University to be the first professor anywhere to teach the Common Law of England. Blackstone took the Common Law, which was segmented into forms of action, and "reinvented" it according to principles he thought were more fundamental. He shared these principles with his listeners and his readers. Contract Law as such was very limited in Blackstone's time, and his commentary treats contracts as a means to transfer interests in property. Other writers followed in Blackstone's footsteps, publishing ever-more comprehensive treatises of the English Law of Contracts. In many respects, however, they were attempting to retroactively impose a structure that appealed to their modern minds and reflected their modern times but that did not truly reflect the structure of the Common Law as it developed. This subject is discussed further in Section V. below.[40]

IV. THE OLD ENGLISH WRIT SYSTEM. According to Blackstone, who wrote in the late 1700s, the Romans introduced forms of action patterned after the Greeks, and "made it a rule that each injury should be redressed by its proper remedy only."[41] This practice continued on the European continent, and in England.[42] In medieval England, valid claims were associated with particular writs, written in Latin and directing the defendant to perform some duty or else to appear in court to answer for the failure. The English system of writs not only identified the nature of the claim, but it also determined the forum of the litigation. Royal writs removed a dispute from the jurisdiction of local courts to Royal courts staffed by appointees of the King, whose revenues went to the crown. The writ system thus reflected a transition of English law from a period

dominated by local courts to a period dominated by courts of national scope. The development of national courts facilitated the development of uniform laws throughout England which eventually became the Common Law of England.

As best we can tell from our present vantage point, the old system of initiating litigation by issuing a Royal writ came into existence during the reign of the Plantaganet monarch Henry II (1154-1189), and grew to ascendancy by the reign of Edward I (1272-1307).[43] During Edward I's reign, legal proceedings started with the issuance by the King's Chancery department of a Royal writ, written in Latin, and bearing the King's seal.[44] If the claim presented to Chancery was a recognized one then, upon simple request and the payment of a fee, the Chancery clerk would issue one of the many "writs of course."[45] This writ would then be filed in the appropriate court, which invested the court with jurisdiction over the law suit.[46] The writ ordered the defendant to be summoned to court to answer the plaintiff's charge.[47] In that era, the writs were very particularized. For example, one writ was used if your crops were trampled by your neighbor's cow, another if your crops were trampled by the neighbor's swine. When the claim could not be fit into one of the many well-established writs of course, it failed[48] until the Second Statute of Westminster was promulgated in 1284 during the reign of Edward I, which gave the Chancery department the power to issue new types of writs "in consimili casu," or in analogous cases.[49] Each writ issued by Chancery was evaluated by the law courts in which the claim was filed, and these law courts disallowed many of the new writs. The Chancery was cautious about creating new causes of action or new remedies, but the writs in consimili casu did provide a vehicle for the rules of liability to expand over time. With this innovation, new writs began to appear, and the scope of allowable causes of action began to slowly expand.

V. THE OLD COMMON LAW FORMS OF ACTION. Although the writ procedure persisted (with vestiges in Texas procedure even today), with the passage of time the legal focus in England shifted from the particulars of the writ to the underlying form of action. With this shift in focus, the purport of the lawsuit was determined less by the exact wording of the writ and more by nature of the claim asserted. Even so, it was still necessary to state a claim in such a way that it fit a recognized form of action, for if it did not, the claim would be dismissed.

The choice of the form of action through which to state a claim was influenced not only by the nature of the claim. Different forms of action offered different remedies. And the remedy could also be affected by the court in which the claim was filed.[50] So, in seeking legal relief, the English lawyer had to consider the nature of the claim, the remedy, *and* the proper court, given the facts of the case.

The modern reader must consider that, prior to the late 1700s, the Common Law of England was not based on distinctions between tort law or contract law, or the differences between the various tort claims or the various contract claims. It was based on the forms of action, each with its own set of rules.[51] Berkley law professor James Gordley has suggested that Common Law judges, during the era of the forms of action, decided cases not by applying abstract principles in a deductive fashion. Instead, he suggested, they decided cases by "looking for resemblances to clear cases in which an action would surely lie."[52] Professor Gordley is essentially describing the difference between deductive reasoning[53] and analogical reasoning.[54] The treatise writers up to the 1870s tended to group cases together according to similarities in their facts (i.e., analogically). In the late 1800s, in America, however, legal writers brought the tools of inductive logic to bear, studying a large number of contract cases in order to discern what they thought were unifying principles. These principles were declared to be legal axioms, with their corollaries, and it was thought that they could be applied to the facts of any case, in deductive fashion, to arrive at a correct result.

The problem is that some of the principles of Contract Law are not based on logic at all. Instead, they are vestiges of the terms of writs or the forms of action from which Contract Law developed, or they are civil law concepts borrowed from Roman or French law by judges or commentators to fill gaps in English Common Law. Any study of the Law of Contracts would do well to identify these echoes of history that continue to reverberate in the current-day Law of Contracts, where they sometimes interfere with, and sometimes defeat, a just result. The reader may groan at the idea of spending time on the distinctions between Trespass, Covenant, Debt, Deceit, Trespass on the Case, and Assumpsit–perhaps an unwelcome reminder of first year law school. However, Professor Maitland famously is reported to have said: "The forms of action we have buried, but they still rule us from their graves."[55] It is important to understand the forms of action as a way of better understanding the Law of Contracts brought to Texas with the westward migration.

A. DEBT. One of the earliest forms of action not relating to real property was Debt-Detinue,[56] which appeared in Glanvill's writing in 1188.[57] The action was for either a return of a specific chattel (Detinue) or in the alternative fungible items or a certain sum of money (Debt).[58] At this time, a suit for Debt was seen as a suit to recover possession of coins.[59] In the early 1200s, the Debt component to recover money broke off into a separate remedy.[60] The form of action for Debt eventually became a claim for payment of a fixed sum stated in the instrument or contract sued upon, not dependent on an after-calculation to determine the amount.[61] A claim in Debt was the shortest remedy for suit upon a deed or instrument under seal.[62] The form of action for Debt was also available against someone who agreed to pay a specified price for goods delivered but failed to pay.[63] However, where the price was not fixed in the contract, suit had to be brought as a special action on the case.[64] By the 1700s, actions on Debt were

seldom brought except for written contracts under seal.[65] There were two principal disadvantages to claims in Debt. The first is that the plaintiff could recover only the exact amount of the debt stated in the contract. If the evidence established any lesser recovery, then the entire claim failed.[66] In other words, if the proof varied from the claim, the case was lost.[67] This was not true of a claim brought under the form Indebitatus Assumpsit (see Section V.F below), which by its nature was a claim for an indeterminate amount.[68] The second disadvantage to Debt was that the defendant had the right of compurgation, or "wager of law," where the defendant could defeat a claim by denying the claim under oath and getting a specified number of other persons to swear that they believed the defendant's oath. The right of compurgation fell into disuse and was finally abolished in England in 1833. An important aspect of the form of action for Debt was the conception that the claim for the fixed sum of money was viable only if there were a quid pro quo.[69] This was a seed for the concept that later developed of contractual consideration, a concept that eventually rose to controlling significance in the 18th Century. However, the requirement of a quid pro quo was not met by a mere exchange of promises.[70]

In Slade's Case, for the first time the King's Bench allowed a writ for Indebitatus Assumpsit to collect a debt, based on the implication that where a debt existed the law would imply a promise to pay it. There was no right to compurgation for this new writ, so Assumpsit supplanted Debt as the preferred remedy.[71]

Under English law, the statute of limitation for asserting a claim in Debt was 6 years. *Robinson v. Varnell*, 16 Tex. 382, 1856 WL 4908, *5 (Tex. 1856) (Wheeler, J.). Under Texas law, the claim of Debt as such did not exist, and all suits for breach of contract were treated alike. Therefore a statute of limitation applying to "actions of debt" did not refer to the form of action for Debt under English law. Under Texas law at the time, the statute of limitation was two years on an oral contract and four years on a written contract. *Id.* at *5.

B. COVENANT. The action in Covenant appeared in the first half of the Thirteenth Century as a suit to collect lease payments on land.[72] By the start of the Fourteenth Century, the rule had developed that the action of Covenant was available to recover for breach of an agreement, but only if the agreement was "under seal."[73] In its original conception, a seal was an imprint made by pressing a metal seal or signet ring into hot wax, melted onto a document, leaving an impression that was also called "a seal." A pendant seal was a seal attached by ribbon to a document. The metal seal was unique to a particular person, and the purpose of the seal was to authenticate the signature. Blackstone explained that the writ of Covenant directed the sheriff to command the defendant to keep his covenant with the plaintiff (which was not specified in the writ) or show good cause why he did not.[74] Where the promise was to convey real property, specific performance was an available remedy.[75] Maitland called Covenant "one of the foundations of our law of contract."[76] Covenant came into existence before the requirement of contractual consideration arose, and consideration was never a component of this form of action, so a suit in Covenant could enforce a contract under seal even absent consideration.[77] This law continued into the Twentieth Century. *See Cairo, T. & S.R. Co. v. U.S.*, 267 U.S. 350, 351 (1925) (Brandeis, J.) ("The plaintiff's agreement embodying the release was under seal. Hence, it is binding even if without a consideration."). After the requirement of consideration took hold, the exception for documents under seal came to be explained by the suggestion that consideration was not required because the affixing of the seal reflected sufficient intent to be bound by the agreement. Other courts created a legal fiction that the seal created an irrebuttable presumption of consideration. *See Knott v. Racicot*, 442 Mass. 314, 327 (2004) (discontinuing the presumption of consideration arising from a seal). The significance of a seal has been legislatively nullified in most but not all states. In 1858, the Texas Legislature adopted a statute saying that no scroll (i.e., printed seal) or private seal shall be necessary to the validity of any contract, bond, or conveyance, whether respecting real or personal property, except such as are made by corporations; nor shall the addition or omission of a scroll or seal in any way affect the force and effect of the same.[78] With the elimination of the distinction of a seal, the Covenant form of action was essentially abolished, and along with it the ability to enforce a contract that was not supported by consideration. See Section XVII.A. The special distinction of contracts under seal was abolished for sales of goods in U.C.C. Section 2-203, "Seals Inoperative."

Under English law, the statute of limitation for asserting a claim in Covenant on a sealed contract was 20 years. *Robinson v. Varnell*, 16 Tex. 382, 1856 WL 4908, *5 (Tex. 1856) (Wheeler, J.). Since the remedy available under Texas law was not dependent on the form of action, the 4-year statue of limitations applied to all claims on written contracts, regardless of how they would have sounded under English law.

C. TRESPASS. Cambridge University Professor F.W. Maitland called "Trespass" the "fertile mother of actions."[79] Many writers who have considered the subject think that, as people progressed from savagery to civilized society, rulers and later governments attempted to sublimate the natural desire for revenge for wrongs into ruler-imposed corporal punishment, imprisonment, or execution. That developed into fines paid to the ruler for wrongs, which in turn progressed to the requirement of paying compensation to victims of wrongdoing.

The writers are not uniform in the view of how a money damage claim for Trespass came about.[80] We do know, however, that in the early Fourteenth Century the claim of trespass had become a cause of action for damages that resulted from the unlawful use of force (i.e., committed *vi et armis* or contra pacem).[81] Enterprising lawyers began to use Trespass *vi et armis* to bring suit for flawed performance of a contractual undertaking. There are many instances where this effort was rejected

by the courts, because the duty at issue arose from an agreement.[82] There are other instances where a trespass *vi et armis* was alleged, and the claim was allowed, but the facts suggest that a claim for negligent performance of a contractual duty was the real substance of the claim, and not an intentional wrong.[83] In the celebrated Humber Ferry case of 1348, the court allowed a trespass claim against a ferryman who overloaded his ferry and caused the plaintiff's horse to drown. This is clearly a negligent contract performance case that was allowed to proceed as a Trespass.[84] Eventually, the distortion of Trespass to cover cases of unintentional wrongs, or of harm caused without force, was eliminated by the creation of a new form, called "Trespass on the Case." See Section V.E. below.

D. DECEIT. The Common Law form of action known as Deceit was a claim brought for "deceitful contract-making, especially against sellers who made false warranty of the goods sold.[85] The first such action was brought in 1382 against a person who sold a blind horse.[86] By the 1500s, it was not necessary to prove that the seller intentionally lied; it was sufficient that the buyer was deceived.[87] A breach of warranty claim was not seen as enforcing a contractual promise, since the goods had been delivered and thus the contract had been performed.[88] Instead, the claim in Deceit for breach of warranty was seen as a remedy for having been misled.[89]

A claim of warranty was an important exception to the general rule in sales transactions of caveat emptor.[90] Because of caveat emptor, without a warranty, the sale of defective goods was not actionable. By the 1400s, a claim based on warranty was not available if the falsity of the representation was evident "to the senses."[91] Nor did the law of warranty bind a seller to a promise as to the future.[92] Thus, a warranty was not treated like a promise or a covenant. It related to a statement of fact about a present condition. But another reason to distinguish a claim of Deceit based on warranty from a breach of promise remedied in Covenant was to avoid Covenant's requirement of a "deed" or written agreement.[93] It should be noted that early English courts permitted the imposition of liability on purveyors of food or drink that sickened people, without proof of a verbal warranty (an instance of what we now call strict liability).[94]

E. TRESPASS ON THE CASE. After the Second Statute of Westminster was promulgated in 1284[95] during the reign of Edward I, the writ of Trespass (for harm to body or property) began to expand to embrace not only harm caused by use of unlawful force but also bodily harm or harm to property caused by negligence. Where illegal force was not used, the writ would issue for Trespass on the Case, meaning a Trespass-like harm that could not be rectified as a genuine Trespass. In some instances, the person injured by negligence was not a bystander, but was instead a party who contracted for services that were negligently performed. Early on, courts rejected claims for negligent performance of a contractual obligation, on the ground that the duty arose from an agreement. An assumed duty would not support a claim for Trespass on the Case. As time passed, that changed.

In 1369, William of Waldon sued J. Marechal in Trespass or action on the Case for negligent treatment of a sick horse. The justification for bringing the action on the Case was that Trespass did not lie because the wrong was not "against the peace" (contra pacem), and Covenant did not lie because there was no deed. The Court of Common Pleas[96] found that a remedy was available for Trespass on the Case.[97] In 1409, the Court of Common Pleas rejected a lawsuit brought against a carpenter who had made an oral promise to build a house by a certain date but failed to make any house at all. The court held that the claim sounded in Covenant and no written contract was proved.[98] This case reflected the inadequacy of Trespass on the Case to address a failure to perform a contractually-assumed duty that did not result in physical injury or damages to property. That type of claim eventually found its home in the later-developed form of action called Assumpsit. This highlights a distinction worth noting: these early Trespass cases involved misfeasance of a job performed. In other words, Trespass was available for a job poorly done (i.e., misfeasance), but not for a job undone (i.e., nonfeasance).[99]

In sum, Trespass on the Case was an extension of traditional Trespass, which was limited to direct injury[100] to a person or to personal property in a person's possession.[101] By the late Eighteenth Century, a suit for violation or breach of an express contract was brought as an action on the Case with no reference to Trespass.[102] Out of an action on the Case grew the immediate forerunner of a contract claim: Assumpsit.

F. ASSUMPSIT. *Assumpsit super se* is a Latin term that means "he took upon himself." Assumpsit began as an extension of a claim for Trespass on the Case.[103] According to Harvard Law School Dean James Barr Ames,[104] who wrote The History of Assumpsit, the distant forerunners of Assumpsit were claims such as the ferryman who overloaded his boat and caused the plaintiff's horse to drown,[105] or a veterinary surgeon who had killed a horse through negligence[106] or doctor who undertook to cure a person but did so unskillfully, or a blacksmith who lamed a horse while shoeing it, or a barber who undertook to shave a beard and injured the patron's face.[107] The early Trespass claims were for damages for injury to person or personal property, resulting from misfeasance, and were in the nature of tort claims, but all were based on a duty of care voluntarily assumed by the defendant in a commercial transaction.[108] It is noteworthy that this class of claims did not require proof of consideration, which is a signature feature of a contract claim today.[109]

The category of claims that could be asserted through Assumpsit expanded slowly over many decades, so what one says about Assumpsit depends on the time period in question. Assumpsit eventually subdivided in subcategories. *Express Assumpsit* involved a specific promise, oral or written. *Implied assumpsit* was a promise attributed to a party because of the

circumstances. *General Assumpsit* or *Common Assumpsit* was a promise to pay a debt. *Special Assumpsit* was a claim for expectation damages resulting from a promise to pay a debt.

Indebitatus Assumpsit became the preferred method for collecting a debt, because in Assumpsit there was no right to compurgation, or wager of law (like there was under Debt), and the amount to be recovered did not have to be specified in the contract sued upon, (as required for Debt), thus allowing a partial recovery when the amount of the claim was not determinable in advance.[110] Also Indebitatus Assumpsit did not require a contract under seal (required for Covenant), and in fact did not require that the contract be in writing. By Blackstone's time, the law was that the plaintiff suing on a promissory note could sue in Express Assumpsit to recover *the value of the note*.[111] Also, in Blackstone's time if a builder promised to build and roof a house by a certain time, and he failed to do so, he could be sued in an action on the Case to recover the injury caused by the delay.[112]

The claim recognized in Texas law, of "money had and received," sounded in Assumpsit. *Briggs v. Rodriguez*, 236 S.W.2d 510 (Tex. 1951) (Norvell, J.).

Additional reading:

- J.B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1 (1888).
- George F. Deiser, *The Origin of Assumpsit*, 25 Harv. L. Rev. 428 (1912).

G. THE DEMISE OF THE FORMS OF ACTION. American states began to abandon the English system of forms of action, beginning with New York's enactment of the Field Code in 1848. In England, the English Judicature Code of 1873 abandoned the old forms of action and unified law and equity courts into one court system. Under these reforms, litigants were required only to state their claims in their pleadings and prove them in court. Thus, the old emphasis on fitting within a recognized form of action was eliminated, but the forms of action lived on as recognized causes of action in the new era.

H. THE TEXAS EXPERIENCE. Texas took its pleading practices from Spanish law, where the emphasis was on pleading facts and not the category of claim involved. The Supreme Court of the Republic of Texas said pleadings are intended to be "the statement in a legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those facts, intended to be relied on, as the support or defense of the party in evidence." *Mims v. Mitchell*, 1 Tex. 443, 1846 WL 3635 (1846) (Wheeler, J.) [emphasis omitted]. Chief Justice Hemphill phrased it: "the unmeaning fictions of the common law are abrogated, and facts only are to be alleged in the pleadings." *Garrett v. Gaines*, 6 Tex. 435, 1851 WL 4014, *8 (Tex. 1851) (Hemphill, C.J.). In *Pridgin v. Strickland*, 8 Tex. 427, 1852 WL 4002, *6 (Tex. 1852) (Lipscomb, J.), Justice Lipscomb wrote "neither the action of trover nor detinue is known to our forum, and that our petition, in its structure, is more analogous to a bill in chancery or to a special action on the case than to any other forms known in other systems of jurisprudence." In *Fowler v. Poor*, Dallam 401 (1841) (Hemphill, C.J.), the Supreme Court concluded that in adopting the Common Law, the Legislature expressly excluded the Common Law system of pleading. *Accord*, *Whiting v. Turley*, Dallam 453 (1842) (Hutchinson, J.); *Bradley v. McCrabb*, Dallam 504 (1843) (Hemphill, C.J.).

Notwithstanding Texas' more flexible approach to pleading, Texas law necessarily recognized some claims as valid causes of action, and others that were not. The recognized claims were largely inherited from the forms of action under English law. In present-day Texas, the categories of claims are criminal, tort, contract, equitable, and statutory–much broader categories than existed under the writ system and forms of action in English law. But the problem still persists that the distinctions between these categories can blur in certain cases, with consequences for the remedy available.

VI. THE ROOTS OF TEXAS LAW: SPANISH, MEXICAN, LOUISIANAN, AND COMMON LAW. In Texas, prior to independence from Mexico, the applicable law was the Siete Partidas, and the Novísima Recopilación, and the most authoritative treatise on this law at the time was Febrero Novísimo.[113] Even after Texas' independence was established, the Spanish and Mexican laws continued to determine the effect of conveyances of land titles and contracts made prior to independence,[114] and for a short period the statute of limitations on contractual enforcement.[115] Louisiana law was adopted to govern probate proceedings in Texas.[116]

The meaning and effect of the Spanish law were matters of law for the court to determine, not questions of fact for a jury. The practical necessity of this approach was later explained by Chief Justice Taney in *U.S. v. Turner*, 52 U.S. 663, 668 (1850) (Taney, C.J.):

> . . . if the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that State would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdicts of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend.

The same considerations applied to Texas courts litigating Spanish and Mexican land titles. The Texas Supreme Court could not take judicial notice of evidence in other cases pertaining to a land title (even the same land title), but the Court could consider the evidence of Spanish law presented in the trial court and

could also judicially notice the Spanish laws in force at the time of the events in question. *Dittmar v. Dignowity*, 78 Tex. 22, 14 S.W. 268, 268 (1890) (Stayton, C.J.).

A similar approach was taken by the Supreme Court of the Republic of Texas to Louisiana law, which was relevant because of Louisiana's similar reliance on Spanish law. The Texas Justices had access to Louisiana case law, and in some cases the Justices looked to the Louisiana case law for guidance on the content and interpretation of treaties, Spanish law, Louisiana statutes, etc. The Texas Supreme Court sometimes informed itself of the details of Louisiana law, without reliance on expert witnesses or other evidence of Louisiana law developed in the trial court.

A. SIETE PARTIDAS. The Siete Partidas was a compilation of the laws of the Kingdom of Castile and León, part of what is now the Kingdom of Spain.[117] Originally called *Libro de las Leyes* (Book of Laws), the work came to be known by the number of its subdivisions (seven parts). The work was written in Spanish, not Latin. Traditional history tells us that the work was constructed from mid-1250s to the mid-1260s, by a commission of four jurists who were personally supervised by King Alphonso X. Previous efforts to standardize the law of the Kingdom of Castile and León were more in the nature of promulgating standardized local laws, somewhat akin to America's present-day uniform state laws. The Siete Partidas was more in the nature of a superior law, somewhat akin to our present-day preemptive Federal legislation. The Siete Partidas had legal force until in 1836 Texas adopted the Common Law of England as its criminal law and as to juries and evidence, and adopted the Common Law of England in civil proceedings generally in 1840.[118] The Siete Partidas continued to be the applicable law after 1840, with regard to contracts, and to land titles, and mineral rights granted during the periods of Spanish and Mexican rule.

In *Edwards v. Peoples*, Dallam 359, 360-61 (1840) (Mills, J.), Justice Mills applied Spanish law to resolve a suit to set aside the sale of a diseased slave, in an action called a "redhibitory action." Under Spanish law, a redhibitory action was a suit to nullify a sale because defects in the article sold made the item unusable. The Court cited two Louisiana Supreme Court cases, that were controlled by a Louisiana statute, as authority for the rule that a redhibitory action would not lie if the vendor "proclaims the defect of the thing sold," or if the defect was so apparent that "the vendee would be necessarily compelled to observe the same." *Id.* at 360. Justice Mills cited the Moreau-Lislet/Carleton translation of the Siete Partidas[119] for the rule that, where the vendor was not aware of the defect, the buyers' remedy was a reduction in sales price. In the case at bar, Justice Mills pointed out that under Spanish law the judge determines damages, but under the jury system in Texas the jury decides, and "[t]his court will never interfere with the verdict of a jury unless manifestly contrary to law and evidence." *Id.* at 360. In *Selkirk v. Betts & Co.*, Dallam 471, 1842 WL 3637 (1842) (Hutchinson, C.J.), the law of Spain was applied to promissory notes executed in 1839 (before the English Common Law was adopted for civil matters in Texas). In *Garrett v. Gaines*, 6 Tex. 435, 1851 WL 4014, *8 (Tex. 1851) (Hemphill, C.J.), the Court applied Spanish law to a contract entered into in 1836. See *Miller v. Letzerich*, 121 Tex. 248, 254, 49 S.W.2d 404, 408 (1932) (Cureton, C. J.) (the validity of contracts and land grants predating the adoption of the Common Law of England governs such contracts and land grants).

Additional reading:

- Marilyn Stone, *Las Siete Partidas in America: Problems of Cultural Transmission in the Translation of Legal Signs*, pp. 281-290, in Marshall Morris, Translation and the Law (John Benjamins Pub. Co. 1999).

B. THE NOVISIMA RECOPILACION. The Recopilación de las Leyes de los Reynos de las Indies was a four-volume collection of laws adapting the laws of Spain to its colonies (including Mexico), originally promulgated by King Don Carlos II in 1681. A Novisima Recopilación de las Leyes de España was published by Charles V in twelve books in 1805-1807.

C. THE FEBRERO NOVISIMO. The Febrero Novísimo was a treatise on Mexican law published in Valencia, Spain by Jose Febrero in 1829. Texas Supreme Court Chief Justice John Hemphill appears to have started with a copy of Siete Partidas, but he did not have access to Febrero Novisimo until the 1842 term of court and the Novisima Recopilacion until after 1843.[120]

D. THE 1827 CONSTITUTION OF COAHUILA AND TEXAS. The Constitution of Coahuila and Texas was adopted on March 11, 1827.[121] It is unknown to what extent this constitution became the law of Texas, but it is certain that the despots who exercised political power from Mexico City had no respect for its terms. This constitution had little impact on Texas law.

E. INTRODUCING THE COMMON LAW TO TEXAS. The Common Law of England became the law of Texas in criminal matters from the outset, under The Declaration with Plan and Powers of the Provisional Government of Texas (1836), adopted in the Convention that began on March 1, 1836.[122] No civil judicial system was provided for under the provisional system of laws. The 1836 Constitution of the Republic of Texas, art. IV, § 13, adopted in September 8, 1836, provided:

> SEC. 13. The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.[123]

On December 20, 1836, Sam Houston, as President of the Republic of Texas, signed an act adopting the Common Law of England, "as now practiced and understood . . . in its application to juries and to evidence . . . ."[124] However, the Texas Congress did not adopt the Common Law of England into Texas civil law until January 20, 1840. That statute said:

> Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the Common Law of England, so far as it is not inconsistent with the Constitution or acts of Congress now in force, shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by the Congress.[125]

Pas. Dig. Art. 804. Section 2 of the 1840 Act repealed all laws existing in Texas prior to September 1, 1836, excepting provisional laws adopted by the Provisional Revolutionary Government and laws relating to land grants and mineral rights. The Act also expressly carried forward the Spanish conception of community property as the marital property law of Texas, which gave both spouses *ownership* of community property but which gave the husband *management rights* over the community property during marriage. See Section XXXXIII below. On February 5, 1840, a statute was enacted that "the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer . . . "[126]

The Texas Congress's directive to adopt the Common Law of England in civil court proceedings was implemented incrementally, as cases were decided. The Legislature's directive could not be taken literally. At the time, England was a monarchy, with primary legislative power residing in the Parliament. The Parliament was made up of the House of Commons, consisting of representatives elected from geographical districts, and the House of Lords, consisting of men who inherited their legislative positions from their fathers. The House of Lords also served as the ultimate judicial authority, but it had no clear power to override either Royal decrees or laws enacted by Parliament. In contrast, Texas was a Republic founded on a written constitution that was patterned after the United States Constitution, where the political powers of the executive, the legislative, and the judicial branches were constrained by internal checks and balances, and where the government in its entirely was constrained by constitutional limits on the power of government generally and the division of authority between the Federal government and the constituent states. The United States Constitution, and the similar constitutions of American states, imparted a constitutional dimension to American court decisions that was absent from, or only implicit in, the English court decisions.

Another point of uncertainty was the fact that the Common Law of England in some respects developed through the judicial application of Royal decrees and acts of Parliament stretching back six centuries, and the Texas Congress could not have envisioned a full-scale adoption of English statutory law. In *Cleveland v. Williams*, 29 Tex. 204, 1867 WL 4513, *4 (Tex. 1867) (Coke, J.), the Court held that the Common Law of England in force in Texas did not include England's Statute of Frauds adopted during the reign of Charles II, which had been adopted "in nearly all the states of the Union except Texas." In *Paul v. Ball*, 31 Tex. 10 (1868) (Lindsay, J.), the Court said: "It is a singular fact, that, although this state has adopted the common law by express legislative enactment, yet, unlike most, if not all, of the states which have adopted the common law, we have not, as they have, also adopted all English statutes of a general nature, up to a particular period, not repugnant to or inconsistent with the constitution and laws of the state. Hence our rules of construction and interpretation must be predicated upon the common law, upon our statutes, and upon the general policy embodied in our varied form of government." The Supreme Court reconfirmed this view in *Southern Pac. Co. v. Poster* 331 S.W.2d 42, 45 (Tex. 1960) (Norvell, J.) , when it said: "No English statutes were adopted".

At the appellate level, determining the Common Law of England and other American states was a legal determination for the court and not a factual determination for the jury. To determine the Common Law, early Texas Supreme Court opinions examined appellate decisions of the United States Supreme Court, appellate decisions from courts of American states, and American treatises or commentaries on the law, which in turn were based on appellate decisions from the Supreme Courts of the United States and various American states, and appellate decisions from English courts. The Texas Supreme Court also periodically relied on English treatises or commentaries on the Common Law of England. Occasionally the Texas Supreme Court would cite to an English case.

As to the statutory and case law of other states, a dichotomy existed. Trial courts could "learn" the laws of sister states, statutory or decisional, only through evidence presented in court. *Hill v. George*, 5 Tex. 87, 1849 WL 4063, *3 (1849) (Cravens, S.J). The Texas Supreme Court however, could "learn" the *case* law of other states by reading appellate opinions and learned treatises. *See United States v. Mitchell*, 2 Dall. 348 (U.S. 1795) (the U.S. Supreme Court consulted Blackstone's Commentaries to determine English law).

As for the statutory law of other American states, judicial notice was not generally used by Texas trial or appellate courts. In *Hill v. McDermot* Dallam 419, 4212-22 (1841) (Hutchinson, J.), the Supreme Court refused to take judicial notice of the common law in force in Georgia. The Court wrote: "We are presumed to know what doctrines of the common law pertain to the jurisprudence of Texas, but this presumption does not carry our judicial knowledge beyond the limits of the republic as to any doctrine or rule of municipal law of any kind in use in a foreign state. . . . We are to notice officially the *jus gentium*, but not the internal or municipal laws of other countries. These last must be

proved--written laws by authenticated copies, and unwritten ones by the oral testimony of those skilled in them." In *Crosby v. Huston*, 1 Tex. 203, 1846 WL 3613 (1846) (Hemphill, C.J.), the Court said: "Where the validity, nature, obligation and interpretation of a contract depend on the laws of a foreign country, these laws must be proved before they can become guides for judicial action." In *Bradshaw v. Mayfield*, 18 Tex. 21 (1856) (Hemphill, C.J.), the Supreme Court refused to take judicial notice of the common law of Tennessee when it had not been proved up in the trial court.

The earliest learned legal treatises cited by American courts were American treatises that drew heavily from English court decisions and treatises on English law. This served to incorporate English Common Law doctrines into American Common Law. Still, the courts of American states who had, prior to the creation of Texas, adopted the Common Law of England had arrived at the conclusion that the Common Law adopted in their jurisdiction was actually the Common Law of England as applied in America. So it happened in Texas, where the Supreme Court decisions more frequently cited to Common Law principles articulated in prior decisions by the U.S. Supreme Court and the appellate courts of various American states, as opposed to the decisions of English courts. Couple that with the practicality that the early justices, of the Supreme Court of the Republic of Texas and later the Supreme Court of the State of Texas, were all trained as lawyers in American states, and one–Abner S. Lipscomb (see Section IX.C.7 below)–had served for fifteen years on the Alabama Supreme Court before coming to Texas, and it can be said that the Common Law adopted in Texas was really the constitutional Common Law of America, which was derived from the Common Law of England. This point was confirmed in *Grigsby v. Reib*, 105 Tex. 597, 600-601,153 S.W. 1124, 1124-25 (Tex. 1913) (Brown, C.J.):

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

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

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

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

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

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

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

F. THE COMBINING OF LAW AND EQUITY COURTS. England had separate court systems, one that had power to grant legal relief (i.e., damages) and one that had power to grant equitable relief (i.e., rescission, specific enforcement, injunction.) Texas from the outset combined law and equity courts into a single court system. The rejection of the English separation between law and equity courts was included in the August 27, 1845 Constitution, Art. IV, § 10. As a consequence of this fusion of law and equity, a complaining party could seek both legal and equitable relief against all concerned parties in one lawsuit in one court. *Miller v. Alexander*, 8 Tex. 36, 1852 WL 3904, *5-6 (1852) (Wheeler, J.). Also, the fusion avoided a multiplicity of suits, that was sometimes required by English procedure.[127] However, many of the English distinctions between legal and equitable remedies

continued to be recognized in Texas courts, the main difference being that the plaintiff in Texas did not have to elect a legal or equitable remedy at the time the case was filed. Additionally, the English idea carried through to Texas, that equitable relief was available only when legal relief was not available.

An early Texas case distinguishing law and equity was *Smith v. Fly*, 24 Tex. 345, 1859 WL 6433 (Tex. 1859) (Wheeler, C.J.), where suit was brought to reform a deed for mutual mistake, and to recover compensation for a deficiency in the amount of land conveyed. The defendant asserted that the statute of limitations had expired on this claim, which he characterized as a legal claim for money paid by mistake, sometimes called a claim for "money had and received." The plaintiff asserted that this was not a legal claim for money mistakenly paid, but rather a claim in equity to correct for a mistake in the deed. *Id.* at *4-5. The Supreme Court found that the claim was in equity, and acknowledged that statutes of limitations do not apply to equitable claims, but the Court nonetheless applied the statute of limitations to the proceeding, as a matter of equity. *Id.* at *5.

VII. LACK OF REFERENCE SOURCES IN EARLY TEXAS. It was an unhappy consequence of living beyond the frontier that Texas' early lawyers and Supreme Court Justices, who themselves were district court judges as well, did not have complete law libraries. As noted in Section VII above, the early Justices of the Supreme Court of the Republic of Texas had incomplete collections of Spanish and Mexican law. A Louisiana-sponsored English translation of the Siete Partidas, by L. Moreau-Lislet and Henry Carleton, appeared in 1820. While Chief Justice Hemphill is said to have studied the Spanish language and Spanish and Mexican law, citing to laws written in Spanish in judicial opinions written in English posed a challenge. In *Garret v. Nash*, Dallam 497, 409 (Tex. 1843) (Hemphill, C.J.), Justice Hemphill quoted extensively in Spanish from the Siete Partidas, as well as from the Spanish commentator José Febrero. However, the Court did not have a copy of the Recopilacions, so Justice Hemphill turned to the Institutes of the Civil Laws of Spain by Aso and Manuel, as well as a treatise by the commentator Juan Sala, Illustraction del derecho real de Espana (Mexican ed. 1832), which he quoted in Spanish, and concluded that the version of Febrero in his possession was out-dated on the point of law in question.[128] In *Scott v. Maynard*, Dallam 548, 552 (Tex. 1843) (Hemphill, C.J.), Chief Justice Hemphill was forced to cite the Louisiana case of *Savenet v. Breton* (La. 1830), for an interpretation of Febrero Novisimo in a community property case, because he did not have access to Febrero; treatise. However, Chief Justice Hemphill was able to cite directly to Febrero in *Smith v. Townsend*, Dallam 569, 572 (1844) (Hemphill, C.J.), indicating that he had acquired a copy of Febrero in the interim. In *Holdeman v. Knight*, Dallam 566, 567 (Tex. 1844) (Jones, J.), Justice Jones wrote that the Court was compelled to look to the appellate cases of Louisiana to determine the Spanish law governing foreclosures. In *Gautier v. Franklin*, 1 Tex. 732 (1847) (Hemphill, C.J), the Court had difficulty in determining from Spanish and Mexican authorities what the statute of limitations was on private contracts, so the court adopted the Louisiana Supreme Court's view on that question. In *Garrett v. Gaines*, 6 Tex. 435, 1851 WL 4014, *8 (Tex. 1851) (Hemphill, C.J.), the Chief Justice remarked that the only copy of the Siete Partidas he had was the work of Aso and Manuel incorporated into the first volume of White's Recopilacion. And even sources of Anglo/American law were incomplete. In *Chevallier v. Straham*, 2 Tex. 115, 1847 WL 3513, *2 (1847) (Hemphill, C.J.), the Court noted, in a case involving the definition of a common carrier, that "[t]he solution of this question is not unattended with some difficulty, as some of the most important authorities on one of the particular points to be decided are not accessible to the court." In *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915, *8 (Tex. 1851) (Hemphill, C.J.), the Court wrote that a North Carolina Supreme Court case was not accessible to the court, so the Court relied upon the discussion of that case in a North Carolina court of appeals opinion. In contract disputes, early Texas lawyers and justices cited cases from England, and cases decided by the U. S. Supreme Court and the Supreme Courts of American states, and cited a variety of treatises like Kent's Commentaries (1826-1830), Story's treatise on Bailments (1832), and sometimes Blackstone's Commentaries. (1765-1769).

It was not until 1879 that West Publishing Company offered its first regional case reporter, the North Western Reporter.[129] West's approach was not to publish selective decisions, but instead to publish all appellate court opinions. This started a trend that grew into a nationwide case reporting system that not only enriched the West family for generations but also made the appellate opinions of all state and federal courts readily available to lawyers and judges across America. This approach to publishing resulted in a giant growth in the body of published appellate opinions in the latter part of the Nineteenth Century, leading to a condition which Professor Grant Gilmore described in this way: "There were simply too many cases, and each year added its frightening harvest to the appalling glut."[130] In contrast to the limited access to case law in early Texas, lawyers and judges now are bedeviled with too much case law.

VIII. LEARNING THE LAW. Nowadays the path to a law license is a four-year undergraduate degree, a three-year law degree, and passing a state bar exam. Previously, a law license could be gained after a period of apprenticeship in a law office, or by self-study which was called "reading the law." To better understand the circumstances of Nineteenth Century Texas Supreme Court Justices, it is worthwhile noting the path to the practice of law in America. Virginia lawyer Peyton Randolph studied law at the Middle Temple of London's Inns of Court and joined the Bar in 1743. Virginia lawyer George Wythe read law in his uncle's law office and joined the Bar in 1746.[131] Virginia lawyer Patrick Henry studied the law while serving victuals at his father-in-law's inn that was across the highway from the Hanover County Courthouse.

Thomas Jefferson, James Monroe, and Henry Clay, apprenticed under Williamsburg, Virginia lawyer George Wythe. John Rutledge of South Carolina studied law at the Middle Temple, in London, and in 1760 was admitted to the Bar in England, before returning to America and establishing a practice in Charleston.[132] Virginia lawyer Edmund Randolph read the law in the office of his father John Randolph and his uncle Peyton Randolph. James Monroe studied law under Thomas Jefferson.[133] Edmund Pendleton apprenticed at age 13 to the clerk of the court of Caroline County, Virginia, and was admitted to the Bar at age 20, in 1745.[134] John Adams (one of America's great lawyers) graduated from Harvard College and apprenticed for two years in the office of James Putnam in Worcester, Massachusetts before being admitted to the Bar in 1761.[135] James Wilson was born in and attended universities in Scotland, emigrated to America in 1766,[136] obtained a degree from Philadelphia College, [137] studied law in the offices of John Dickinson, and was admitted to the Pennsylvania Bar in 1767.[138] Charles Cotesworth Pinckney graduated from Oxford University (where he heard William Blackstone lecture), and was admitted to the English Bar in 1768, and the South Carolina Bar in 1770.[139] John Marshall's legal education consisted of reading Blackstone's Commentaries and attending six weeks worth of lectures given by George Wythe at William and Mary College;[140] he joined the Virginia Bar in 1780.[141] William Wirt studied the law under Virginia attorney Benjamin Edwards,[142] and was admitted to the Virginia bar in 1792.[143] Henry Clay read the law with George Wythe and was admitted to the Virginia bar in 1797.[144] Roger B. Taney graduated from Dickinson College in Pennsylvania in 1795, apprenticed under Annapolis Judge Jeremiah Townley Chase for three years, and was admitted to the Maryland Bar in 1799. Joseph Story apprenticed under Samuel Sewall (then a congressman and later chief justice of Massachusetts) in Marblehead, Massachusetts,[145] and later under Samuel Putnam in Salem,[146] and was admitted to the Bar in Salem, Massachusetts in 1801. Daniel Webster graduated from Dartmouth College in 1801 and apprenticed under Thomas W. Thompson in Salisbury, New Hampshire,[147]and later under Boston attorney, Christopher Gore,[148] and was admitted to the Massachusetts Bar in 1805.[149] John C. Calhoun earned a degree from Yale College, studied law at Tapping Reeve Law School in Litchfield, Connecticut, and was admitted to the South Carolina Bar in 1807. William Barret Travis apprenticed under James Dellet, a lawyer in Claiborne, Alabama, and was admitted to the Bar sometime before 1828.[150] Charles Sumner graduated from Harvard Law School in 1833, and was admitted to the Massachusetts Bar in 1834.[151] Abraham Lincoln read the law on his own in New Salem, Illinois,[152] and was admitted to the Illinois Bar in 1837.[153] Rutherford B. Hayes read the law in Columbus, Ohio and then went to Harvard Law School, where he obtained an L.L.B. and was admitted to the Ohio Bar in 1845.

America's first professorship in law was established at William and Mary College in Williamsburg, Virginia, in 1779.[154] Virginia Governor Thomas Jefferson appointed his mentor George Wythe to the position. The first law school in America was the Litchfield Law School, a private school founded in Connecticut in 1784, which closed in 1833. New York Chancellor James Kent was appointed the first professor of law at Columbia College in New York City, in 1793.[155] In 1802, Yale College, in New Haven, Connecticut, established its first professorship of law for undergraduates.[156] Harvard College, in Boston, Massachusetts, established its first undergraduate professorship of law in 1815.[157] Harvard Law School was founded on May 17, 1817.[158] In 1826, David Daggett became the first Professor of Law at Yale Law School.[159] Yale Law School claims a founding date of 1824,[160] but Yale granted its first L.L.B in 1843.[161] Columbia Law School, in New York City, was founded in 1858.

The ascendancy of law schools as the preferred and ultimately only entree into the legal profession originated under Christopher Columbus Langdell, Dean of Harvard Law School beginning in 18____. Texas' first law curriculum was established at Austin College in 1855, which graduated four students and ended after one year.[162] From 1857 to 1872 Baylor University offered a two-year law curriculum.[163] The University of Texas established its school of law in 1883, offering a two-year law curriculum.[164] Other permanent law schools in Texas were: Baylor University School of Law (revived in 1919); South Texas College of Law (est. 1923); Southern Methodist University School of Law (est. 1925); St. Mary's University School of Law (est. 1934); the University of Houston College of Law (est. 1947); Texas Southern University School of Law (est. 1947); Texas Tech University School of Law (est. 1964); and Texas Wesleyan University School of Law (est. 1993).[165]

The first written bar exams in America were implemented in 1870.[166] In 1871, New York state passed a law requiring that new lawyers complete three years' apprenticeship or one year of law school, plus pass a public examination.[167] The exam requirement was waived for graduates of Albany and Columbia Law Schools (the so-called "degree privilege").[168] The American Bar Association was founded in 1878.[169] The Texas Legislature recognized a degree privilege from 1891 to 1903, and from 1905 through 1937.[170] The American Association of Law Schools was founded in 1900.[171] The Law School Admission Test (LSAT) was first used for admitting students in 1948.[172]

As to law reviews: the American Law Register was established in 1852; the Albany Law Journal in 1870;[173] Harvard Law Review in 1887; Yale Law Journal in 1891[174]; Columbia Law Review in 1901, the Michigan Law Review in 1902; Northwestern's Illinois Law Review in 1906.[175] The Texas Law Review was founded in 1922.[176]

IX. EARLY TEXAS SUPREME COURT JUSTICES. The early justices of the Supreme Court of the Republic of Texas had a formative impact on Texas law, including Texas Contract Law. To study them and

what influenced them, is to study the roots of Texas law. But when the law is being announced by courts, it is announced only to resolve an actual controversy, and judges must wait for a controversy to reach their court before they can pronounce the law. Also, the stare decisis effect applies only to legal principles that are necessary to resolve the controversy. Disquisitions on the law that go beyond what is necessary to resolve the controversy are called dictum, and dictum is not binding on subsequent courts. Many judges, operating in many different contexts, contributed to the growth of the Common Law over time.

A. SUCCESSIVE SUPREME COURTS. The 1836 Constitution of the Republic of Texas established a Supreme Court consisting of a chief justice and eight associate justices, who were the eight district court judges of the Republic.[177] The Chief Justice was appointed by the Texas Congress.[178] The trial judges/associate justices and the Chief Justice were elected "by joint ballot of both Houses of Congress."[179] Under the 1845 Constitution of the State of Texas, the Texas Supreme Court was reduced to one chief justice and two associate justices, all of whom were appointed by the Governor to serve six years terms, subject to confirmation by two-thirds of the Senate.[180] In 1850, the Constitution was amended to provide for popular election of Supreme Court justices. In 1861, Texas adopted a new Constitution upon secession from the United States of America, that had the same terms for the judiciary as did the Constitution of 1845.[181] In 1866, Texas adopted a constitution, according to the dictates of Presidential Reconstruction, which provided for the popular election of five justices to serve for ten year terms, and who were to elect from among themselves a chief justice.[182] In September 1867, U.S. Army Major General Sheridan removed the five sitting justices from the Texas Supreme Court, and appointed five new justices. In 1869, yet another Constitution was promulgated by military authorities pursuant to the Reconstruction Acts of Congress. Under the 1869 Constitution, the Governor, subject to confirmation by the Senate appointed three justices to staggered nine-year terms on the Supreme Court.[183] In 1874, the Constitution was amended to increase the number of Justices to five.[184] In 1876, Texans adopted a new Constitution, which established both a Supreme Court and a Court of Appeals. The Supreme Court consisted of a Chief Justice and two Associate Justices, elected for six year terms.[185] In 1945, the Texas Constitution was amended to increase the number of justices on the Supreme Court from three to nine, and the commissioners of the Supreme Court Commission of Appeals became Supreme Court Associate Justices. Since that time, the Texas Supreme Court has consisted of one Chief Justice and eight Justices, each holding 6-year terms.

B. THE EARLY TERMS OF COURT. The first term of the Supreme Court of the Republic of Texas was the Fall 1840 term, convened by Chief Justice Thomas J. Rusk, and attended by half of the district judges who were also Associate Judges of the Supreme Court, including Justices William J. Jones, John T. Mills, A.B. Shelby, and John Hemphill.[186] During the 1840 session, the Supreme Court heard eighteen cases.[187] The Court also met in 1842, 1844, and 1845.

C. JUSTICES OF THE SUPREME COURT OF THE REPUBLIC OF TEXAS.

1. Rusk. Thomas Jefferson Rusk, the first active Chief Justice of the Supreme Court of the Republic of Texas, was born in South Carolina on December 5, 1803.[188] He acquired his secondary education through self-study, with the assistance of his family's landlord, statesman John C. Calhoun. Calhoun helped Rusk get a job in the Pendleton County district clerk's office, where he read the law and was admitted to the Bar in 1825.[189] Rusk practiced law until 1834, when the wealth he had invested in a gold mine was embezzled. Rusk chased the swindlers to Nacogdoches, Texas, but found that they had gambled his money away.[190] Rusk was befriended by Sam Houston, and Rusk decided to stay and joined in the Texas Revolution. Rusk participated in the defense of the canon at Gonzales ("Come and take it"). The provisional revolutionary government named Rusk Inspector General of the Army for the Nacogdoches District. Rusk signed the Texas Declaration of Independence, attended the Constitutional Convention, and was named Secretary of War by the *ad interim* government.[191]` Rusk fought at the battle of San Jacinto, and took command of the Texas Army for five months after Sam Houston went to New Orleans for treatment of his shattered ankle.[192] When Houston became the first president of the Texas Republic, Rusk served for a few weeks in his cabinet as Secretary of War.[193] Rusk served in the Constitutional Convention of 1836, and in two sessions of the Texas Congress.[194] In 1837, Rusk was elected by the Texas Congress as major general of the Texas militia, where he both directed and led a succession of military engagements against allied forces of Cherokee Indians and partisans loyal to Mexico.[195] On December 12 of 1838, Rusk was elected by the Congress as Chief Justice of the Supreme Court.[196] Rusk was the third Chief Justice, but the first to call the Supreme Court into active session, which occurred on January 13, 1840.[197] He resigned effective June 30, 1840, to return to law practice.[198] Rusk was elected president of the Convention of 1845 that approved the annexation of Texas to the United States.[199] In 1846, after Texas' annexation to the United States, Rusk and Sam Houston were elected by the Texas Legislature as the first Texas Senators, Rusk garnering more votes than Houston.[200] A year after the death of his wife, and suffering from a tumor, Rusk committed suicide in 1857.[201] While Chief Justice, Rusk authored the Supreme Court's first opinion touching on contract law, *Whiteman v. Garrett*, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.), in which the court allowed the seller to recover against the buyer on a bond to sell land.

2. Hemphill. In December of 1840, by a narrow vote of the Texas Congress, John Hemphill became Chief Justice of the Supreme Court of the Republic of Texas. When Texas was annexed to the United States in March of 1846, Hemphill became the first Chief Justice of the

state Supreme Court. He served as Chief Justice of the Texas Supreme Court from 1846 to 1858. In 1859, Hemphill was elected to the United States Senate and served there until he was expelled by resolution on July 11, 1861, when Texas seceded from the Union.[202]

Hemphill was born in South Carolina in 1803. His parents had immigrated from Ireland. His father was a Presbyterian minister. Hemphill attended college at Jefferson College, a Presbyterian school founded by three Princeton graduates, 30 miles south of Pittsburgh, Pennsylvania.[203] After graduating second in his class, Hemphill returned to South Carolina where he taught school for a few years. In 1828 he went to work in a law office in Columbia, South Carolina, and in 1829 he went to law practice. In the ensuing years, Hemphill became involved in politics and newspaper publishing, adopting a strident pro-slavery and states' rights viewpoint. He was stabbed three times in a brawl and shot in a duel. In 1835, Hemphill left South Carolina to fight with the U.S. Army in conflict against the Seminole Indians in the Florida swamps, but he returned seriously ill with liver damage that plagued him the rest of his life. In 1838 Hemphill moved to Texas. In 1840, after less than two years in Texas, the Congress of the Republic of Texas elected Hemphill to serve as the district judge for the Fourth Judicial District. This appointment also made him an associate justice of the Texas Supreme Court. Article IV, Section 4 of the 1836 Constitution of the Republic of Texas provided: "The judges, by virtue of their offices, shall be conservators of the peace, throughout the Republic."District Judge Hemphill took this commission to heart. While a judge he was involved in the legendary Council House Fight in 1840 in San Antonio, an indoor/outdoor confrontation that resulted in the deaths of forty-three Indians, Anglo settlers, and a Mexican. During the fracas, Hemphill was attacked by a Comanche Indian, and it is reported that Hemphill produced a Bowie knife from under his black robe and dispatched his assailant. In 1840 Hemphill was elected by the Texas Congress to be Chief Justice of the Supreme Court of the Republic of Texas.[204] Hemphill replaced Sam Houston as U.S. Senator on March 3, 1859. Hemphill left the U.S. senate upon Texas' secession, and he was elected as a Texas representative to the first Confederate Congress, where he had a hand in drafting the constitution for the Confederate states. Hemphill died in January of 1862. Hemphill's contract cases are discussed throughout this Article.

3. Scurry. Richardson A. Scurry served as a Justice of the Republic of Texas from 1840 to 1841.[205] Scurry was born in Tennessee in 1811. Scurry's father was a lawyer, and Scurry apprenticed under a Tennessee judge, and was admitted to the Bar in 1830 at age 19. Scurry arrived in Texas in time to fight at the Battle of San Jacinto. He then practiced law in Clarksville, Texas. President Houston appointed him district attorney of the First Judicial District, and in 1840 the Texas Congress elected him to serve as district judge of the Sixth Judicial district, which made him a member of the Texas Supreme Court. Scurry served in the Texas Congress and the United States Congress. He was later adjutant general of the Confederate Army. Scurry died in 1862. During the Supreme Court's 1840 term, Scurry wrote *Knight v. Huff*, Dallam 425 (1841) (Scurry, J.) (reversing judgment upon finding that offset in estate administration and cattle purchase claims should be allowed since it conformed with intent of the contracting parties).

4. Hutchinson. Anderson Hutchinson served on the Supreme Court of the Republic of Texas from 1841 to 1843. He was born in Greenbriar County, Virginia in 1798. His father was the clerk of the county court and he studied law while helping his father. He practiced law in Tennessee, Alabama and Mississippi until 1840 when he and his wife moved to Austin. In 1841 he was appointed judge of the Fourth or Western District. Hutchinson has been described as one of the most scholarly lawyers and legal writers to sit on a Texas bench.[206] In 1842 Hutchinson was captured by Adrain Woll's forces and marched to Perote prison, for six months as a prisoner. Hutchinson was released in March 1843. Upon release Hutchinson took a U.S. Navy ship home, and having his fill of frontier life, he returned to Mississippi. In June of 1843 he tendered his resignation as district judge to President Sam Houston. In 1848 he published the *Mississippi Code*. He died in 1853.[207] Hutchinson wrote a number of contract cases cited in this Article.

5. Morris. Richard Morris served on the Supreme Court of the Republic of Texas from 1841 to 1844. Morris was born in Hanover County, Virginia in 1815, son of a prominent Virginia lawyer and legislator. Morris was educated at Burke High School in Richmond and attended the University of Virginia for two years, then returned to Richmond to work in his father's law office. He studied law at the University for one more semester, then joined the Virginia Bar. He moved to Texas in 1838. Morris practiced law in Houston and then Galveston, and was appointed district judge of the First Judicial District in 1841 at age twenty-six. As a result of this appointment Morris became a justice on the Supreme Court of the Republic of Texas. Morris sat in on three sessions of the Supreme Court before dying of yellow fever in Galveston on August 19, 1844, at the age of twenty-nine.[208]

Morris wrote the Opinion in *Allcorn v. Sweeney*, Dallam 494 (1843) (Morris, J.) (reversing a judgment for the defendant in an action on promissory note, holding that where a party enforces contractual penalties for non-performance, the original position of the parties before the penalty should be restored as much as possible).

6. Baylor. Robert Emmett Bledsoe Baylor served on the Supreme Court of the Republic of Texas from 1841 to 1846. Baylor was born in Kentucky in 1793. He apprenticed the law in the office of his uncle, a lawyer and Congressman. Baylor fought in the War of 1812, and was elected to the Kentucky Legislature in 1810 and 1819. Baylor relocated to Alabama, where he was elected to the Alabama Legislature and in 1828 to the

U.S. Congress. In 1839, Baylor underwent a religious conversion and became a Baptist minister, and then relocated to Texas. In 1845, he helped found Baylor University in Independence, Texas, and taught constitutional law there. In 1841, Baylor was elected by the Texas Congress to be judge of the Third Judicial District, which made him a justice of the Supreme Court. He served 23 years on the Supreme Court. He died in 1873.[209]

7. Lipscomb. Abner S. Lipscomb served on the Texas Supreme Court from 1846 to 1856.[210] Born in 1789 in South Carolina, Lipscomb studied law under the famous statesman John C. Calhoun, then in 1811 moved to Alabama Territory. When Alabama became a state in 1819, Lipscomb became a Justice on Alabama's Supreme Court. He served as Chief Justice of that Court from 1823 until 1834, when he went back into law practice. In 1839, Lipscomb moved to the Republic of Texas, where he served as Secretary of State. Lipscomb was appointed to the State Supreme Court in March of 1846, and was re-elected in 1851 and 1856. He died in office in 1856.[211] During his tenure on the Supreme Court, Justice Lipscomb authored many contract decisions that are discussed throughout this Article.

8. Wheeler. Royal Tyler Wheeler served on the Supreme Court of the Republic of Texas from 1844 to 1845, and continued to serve on the state Supreme Court from 1845 to 1858. Born in Vermont in 1810, Wheeler grew up in Ohio where he joined the Bar. In 1837, Wheeler moved to Fayetteville, Arkansas where he practiced law, eventually becoming an Arkansas Supreme Court justice.[212] In 1839 he married and moved to Nacogdoches, Texas, where he practiced law with C.L. Anderson, then vice-president of the Republic of Texas.[213] In 1842 he became District Attorney, and in 1844 he was appointed as District Judge, which made him an associate justice of the Supreme Court of the Republic of Texas. When Texas became a state, Governor J. Pinckney Henderson appointed Wheeler to the state Supreme Court.[214] Rutherford B. Hayes (later the 19th President of the United States) visited Wheeler in Texas in 1849, and described Wheeler's judge's chambers as a log cabin fourteen foot square, with a bed, a table, five chairs, a washstand and a "whole raft" of books and papers.[215] Wheeler was re-elected as Associate Justice in 1851 and 1856, and was appointed to Chief Justice after Hemphill was elected as a Texas Senator. Wheeler was elected Chief Justice in August 1858. Wheeler committed suicide in 1864.[216] Justice Wheeler wrote many contract decisions that are discussed throughout this Article.

9. Interesting Articles.

• James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 Tex. L. Rev. 305 (1986).

• Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 St. Mary's L. J. 17, 23 (2008).

D. PRE-CIVIL WAR STATEHOOD. Texas became a state of the United States of America on December 29, 1845. The first Governor was J. Pinckney Henderson. Henderson appointed three justices to the Supreme Court of Texas: John Hemphill, Abner Lipscomb, and Royall Wheeler. Many of the contract opinions of Chief Justice Hemphill and Justices Lipscomb and Wheeler are discussed throughout this article.

1. Roberts. Oran Milo Roberts served on the Texas Supreme Court from 1857 to 1862 and then again from 1864 to 1866. Roberts was born in South Carolina in 1815. He was raised in Alabama and educated at home until he was seventeen. He graduated from the University of Alabama in 1836 and was admitted to the bar in 1837. Roberts moved to Texas in 1841. He became a district attorney and then a district judge, and was elected in 1857 to fill Abner S. Lipscomb's place on the Texas Supreme Court. In 1861 Roberts was elected president of the Constitutional Convention that voted for secession. He resigned his bench in 1862 to fight in the Confederate Army. He replaced Royall T. Wheeler as Chief Justice of the Texas Supreme Court in November 1864. At the conclusion of the war, he resigned his bench and practiced law in Smith County. In 1874, Governor Richard Coke reappointed him as Chief Justice of the Texas Supreme Court, a position he continued to hold after the adoption of the Constitution of 1876. In 1878, Roberts was nominated as the Democratic candidate for governor, whereupon he resigned his bench. He was elected governor that same year.[217] Some of Roberts' contract case opinions are discussed throughout this Article.

E. CIVIL WAR PERIOD. Texas seceded from the United States of America by the Ordinance of Secession,[218] adopted by the Secession Convention on February 2, 1861, and ratified by public vote on February 23, 1861. Texas joined the Confederate States of America on March 1, 1861. The people of Texas amended the constitution in 1861, after Texas left the Union. Under the Constitution of 1861, the Texas Supreme Court consisted of one chief justice and two associate justices. As the war progressed, the court system was suspended.[219] The last battle of the Civil War was fought on May 13, 1865 at Palmito Ranch, in Cameron County, outside Brownsville, Texas. In that battle, the Confederate forces under Colonel John Salmon (Rip) Ford defeated the Union forces. The surrender of belligerent forces in Texas occurred on May 28, 1865.[220] On June 2, 1865, General Edmund Kirby-Smith formally surrendered Confederate forces in Texas at Galveston, Texas to General Edmund J. Davis (later elected a Reconstruction Governor of Texas). The articles of capitulation were signed aboard the USS Fort Jackson in Galveston Bay, ending hostilities in Texas. The existing secessionist state government ceased to function on June 8, 1865.[221] On June 17, 1865, A. J. Hamilton was appointed as provisional governor by U.S. President Andrew Johnson.[222] Hamilton took control of the state on September 26, 1865.[223] President Johnson proclaimed

the civil war to have ended in Texas on August 20, 1866.

1. Moore. George F. Moore served on the Texas Supreme Court from October of 1862 to June of 1881, with skipped intervals. Moore was born in Georgia in 1823.[224] He was educated at the University of Alabama and Virginia and began studying law in 1840. Moore was admitted to the bar in 1844.[225] He moved to Alabama and then to Crockett, Texas in 1846.[226] Moore moved to Austin in 1856, and then to Nacogdoches.[227] He was elected to the Texas Supreme Court in 1863, and when Chief Justice O.M. Roberts resigned from the Supreme Court to join the Confederate Army, Moore became Chief Justice.[228] Moore was reelected to the Court under the Constitution of 1866. Moore was removed from the Court by Major General Philip Sheridan in September 1867, but was reappointed in 1874 by Governor Coke. He was re-elected in 1875, and was elected as Chief Justice in 1878.[229] He served until 1881.[230] Moore's contract opinions are discussed in this Article.

F. RECONSTRUCTION. After the Civil War ended, Texas went through a phase of Presidential reconstruction, pursuant to conditions imposed by President Andrew Johnson. In 1866, Texas adopted a new Constitution, and in the following election James W. Throckmorton was elected the 12th Governor of Texas. Throckmorton took control of the Capitol on August 13, 1866, and on August 20 President Johnson declared that the insurrection in Texas had ended.[231] The Constitution of 1866 established a Supreme Court consisting of five justices serving ten year terms. The persons elected as justices were George F. Moore (selected by other justices as Chief Justice), Richard Coke, Stockton P. Donley, Asa H. Willie, and George W. Smith.[232] This court sat for only three terms in December 1866, January and April of 1877. The 1866 Constitution did not permit freed slaves to vote. In March and July of 1867, the United States Congress enacted three reconstruction statutes, which placed Louisiana and Texas in the Fifth Military District and authorized the military commanders to remove state officials who impeded Reconstruction. Governor Throckmorton drew the ire of the military commander in Texas, Major General Charles Griffin, because of the Governor's lenient attitude toward former Confederates and his attitude toward freedman's civil rights.[233] On September 10, 1867, the commander of the Fifth Military District, Major General Phillip Sheridan, removed a large number of state and local Texas officials, including Governor Throckmorton and Chief Justice Moore and Associate Justices Coke, Donley, Willie, and Smith. On July 30, 1867, Major General Sheridan appointed Elisha M. Pease as Governor and Amos Morrill as Chief Justice, and Livingston Lindsay, Colbert Caldwell, Albert H. Latimer, and Andrew J. Hamilton as associate justices of the Supreme Court of Texas (now called the "Military Court"). The Congressional Reconstruction Constitution was adopted in 1869, empowering the governor to appoint a chief justice and two associate justices to staggered nine-year terms. Republican Governor Edmund J. Davis appointed Lemuel D. Evans as Chief Justice, and Moses B. Walker and Wesley B. Ogden as Associate Justices.[234]

1. Coke. Richard Coke was born in 1824 in Virginia. He graduated with a law degree from the College of William and Mary in 1848.[235] He moved to Waco, Texas in 1850 and opened a law practice. He was a delegate to the Secession Convention at Austin in 1861. He joined the Confederate Army as a private and in 1862 raised a company that became part of the 15th Texas Infantry and served as its Captain for the rest of the war. He was appointed a Texas District Court judge in 1865 and in 1866 was elected as an associate justice of the Texas Supreme Court. He was removed, along with the four other Justices, in September 1867 by Major General Philip H. Sheridan. In 1873, Coke ran for Governor as a Democrat and won by a wide margin.[236] The "Semicolon" court ruled his election invalid in a habeas corpus proceeding styled *Ex Parte Rodriguez*, 39 Tex. 705 (1863). Governor-Elect Coke ignored the decision, and by stealth occupied the second floor of the State Capitol. Governor Edmund J. Davis marshaled armed forces on the first floor of the Capitol, and appealed to President Ulysses S. Grant for federal support. Grant refused to intervene, so Davis resigned early and Coke was sworn in as Governor on January 13, 1874. Coke's contract decisions are discussed throughout this Article.

2. Willie. Asa H. Willie was born in 1829 in Washington, Georgia. Willie was orphaned at age four and was educated in private schools near his home until 1846, when at age sixteen, he joined his uncle, Dr. Asa Hoxie in Washington County, Texas. In 1848 he studied law in his brother James' office in Brenham.[237] In 1849, at age 20 and by special act of the Texas Legislature, Willie was admitted to the bar.[238] Willie practiced law with his brother, James for several years. From 1852-54 he served as district attorney for the Third Judicial District. In 1857 he moved to Austin to assist his brother, James when he became Texas attorney general. When the Civil War broke out, Willie joined the Confederate Army and served as a major in the Texas Infantry. During the war, Willie was captured and spent nine months as a prisoner of war. In 1866 Willie was elected associate justice of the Supreme Court of Texas but was removed by military authority in 1867. Willie was elected to the U.S. Congress in 1872 and served one term in the House of Representatives. He did not seek reelection. Willie was elected as Chief Justice of the Texas Supreme Court, and took office in 1882.[239] Willie's election to Chief Justice was notable in that he received the largest majority of votes ever received by a political candidate in Texas.[240] Willie served as chief justice until he retired in 1888. He died in 1899 at age sixty-nine.[241] Several of Willie's contracts opinions are cited in this Article.

3. Morrill. Amos Morrill was born in Massachusetts in 1809. He received his law license in Tennessee. He moved to Clarksville, Texas in 1838. When the Civil War broke out, he fled to Mexico then Massachusetts and spent the final year of the war working at a customs

house in New Orleans. After the Justices who made up Texas' first Reconstruction court were removed by Major General Sheridan, Morrill was appointed Chief Justice of the "Military Court" and served from 1867 until Governor E. J. Davis appointed a new court under the Constitution of 1869. Morrill became the Federal District Judge in Galveston in 1872, where he served for eleven years. Among other cases, Chief Justice Morrill wrote the opinion in *Thompson v. Houston*, 31 Tex 610 (1869) (Morrill, C.J.), holding that a promissory note due twelve months after a treaty of peace between the Confederate States and the United States, was not enforceable because it had not come due, since there was no such peace treaty. This decision was overruled in *Atcheson v. Scott*, 51 Tex. 213 (1879) (Gould, A.J.), which held that a similarly-worded promissory note came due "after the close of the war."

4. Lindsay. Livingston Lindsay was born in Virginia in 1806. He was admitted to the Kentucky bar. In 1860 he moved to LaGrange, Texas. He was appointed by Major General Sheridan as to the Military Court in 1867. Lindsay served on the Court until it was reorganized under the Constitution of 1869 and the number of justices was reduced from five to three.[242] Lindsay authored the opinion in *Schreck v. Schreck*, 32 Tex 578 (1870), which held that the choice-of-law rule of lex loci contractu did not apply to the marriage contract. Lindsay also wrote *Roundtree v. Thomas*, 32 Tex. 286, 1869 WL 4819 (Tex. 1869) (Lindsay, J.), on the collectability of a note out of a wife's separate property. Chief Justice Moore later refused to afford *Roundtree* stare decisis effect because "the court by which that case was decided did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment." *Taylor v. Murphy*, 50 Tex. 291, 1878 WL 9260, *3 (Tex. 1878) (Moore, C.J.).

5. Hamilton. Andrew J. Hamilton was born in Alabama. He was admitted to the Alabama Bar in 1841. In 1846 he moved to LaGrange, Texas to practice law. In 1849 he was appointed attorney general by Governor Bell and settled permanently in Austin. In 1859 he was elected to Congress. He strongly and vocally opposed secession and upon his return to Austin in 1861, was elected to the state senate. Texas was now a Confederate state and being a Unionist, Hamilton declined to take the oath of office. He fled to Mexico and then to Washington, D.C. where he was appointed brigadier general for the Texas troops fighting on the Union side. In 1865 President Johnson appointed Hamilton as Provisional Governor of Texas. In 1867 Hamilton was appointed by Brevet Major General Griffin as an associate justice of the Military Court. Hamilton participated in the Reconstruction Convention of 1868. Hamilton did not attend the Court's sessions in Galveston and Tyler in 1868 or in Austin and Galveston in 1869.[243] He left the Court on October 1, 1869 to run (unsuccessfully) for governor in 1870. Hamilton authored *Luter v. Hunter*, 30 Tex. 690 (1868), holding a statute that stayed the payment of debt unconstitutional as violating the Contract Clause of the U.S. Constitution.

6. Latimer. Albert Hamilton Latimer was born circa 1800 in Tennessee. He was admitted to the Tennessee Bar in 1830, migrated to Texas in 1831, and settled in Red River County. He signed the Texas Declaration of Independence, attended the 1836 Constitutional Convention, and fought in the Texas revolutionary war. He served in two Texas Congresses, and one term as a state senator. He supported the Union cause during the Civil War, but was unmolested due to his advanced age. In 1865 he was appointed state comptroller by Provisional Governor A. J. Hamilton. He held various federal jobs, worked for the Freedmans' Bureau, and was appointed by Major General Sheridan to the Military Court in September of 1867. Latimer resigned his bench in 1869, to make an unsuccessful run for Lieutenant Governor.[244]

7. Caldwell. Colbert Caldwell was born in Tennessee in 1822. In 1846 he was admitted to the Bar in Arkansas, where he practiced until he moved to Texas in 1859. He owned a plantation and eleven slaves. In 1865, Provisional Governor A.J. Hamilton appointed Caldwell as judge of the Seventh Judicial District Court. In 1867, Major General Sheridan appointed Caldwell as associate justice of the Texas Supreme Court. Caldwell was removed from the bench after radical Republicans took control of the government.[245]

8. Evans. Lemuel Dale Evans was born in Tennessee in 1810. He was admitted to the Bar in Tennessee, came to Texas via Arkansas, and settled in East Texas. He was elected to one term in the U.S. Congress. Evans was a Unionist, and left Texas after the secession. He returned after the war, and was appointed by Major General Sheridan to be Chief Justice of the Military Court. Evans was also Chief Justice of the "Semicolon Court." Evans resigned from the Court in September 1871.[246]

9. Walker. Moses B. Walker was born in Ohio in 1819. After attending Augusta College in Kentucky, Yale College (now Yale University) and Cincinnati Law School, he read law in Springfield, Ohio. He fought for the Union in the Ohio Infantry, and was wounded three times at the Battle of Chickamauga.[247] He participated in the federal military occupation of Texas in 1868. After adoption of the Constitution of 1869, in July 1870, Walker was appointed associate justice by Governor Edmund J. Davis to replace Justice Latimer. Walker remained on the Court until 1874. His most notable opinion was in the Semicolon case, *Ex Parte Rodriguez*, 39 Tex. 705 (1873), invalidating the election of 1873. The decision was effectively nullified when President Grant refused to send federal troops to support the defeated Governor Davis, allowing Governor-Elect Coke to take the reins of state government. Justice Walker harbored strong feelings about Texas's secession and the brutality of the Civil War, as exemplified his Opinion in *Bender v. Crawford*, 33 Tex. 745 (1870) (Walker, J.), involving the reinstatement of a new statute of limitations on all claims that expired during secession and military occupation:

> It might be foreign to the object and duty of the court to enter into any detailed history of the times within which the statute of limitations has been suspended by the forty-third section of the twelfth article of the constitution. But they who talk about vested rights in the bar of limitations should at least remember the times in which we have been living; and those who think our constitution is not republican, nor in accordance with the great republican conception of our institutions, should remember that from the second of March, 1861, to the twenty-ninth of March, 1870, we had no republican government in Texas. Four years of that period were one of bloody and unrelenting war. From 1865 to 1870 we were a military government; he who gained a vested right in the statute of limitations during at least a portion of that period, gained it only because inter arma leges silent. Vultures and wolves gain vested rights when armies are slaughtered, if these be vested rights.

10. Ogden. Wesley B. Ogden was appointed by Governor Edmund J. Davis to be associate justice of the Texas Supreme Court in 1870, taking the spot of Lemuel D. Evans. Ogden was Chief Justice when the Court decided *Ex parte Rodriguez*, 39 Tex. 705 (1873), which held that the election of 1873 was invalid. Ogden wrote the Opinion in *Hollis v. Chapman*, 36 Tex. 1, 1872 WL 7486, *3-4 (Tex. 1871), saying that some contracts are "apportionable," and permitting a carpenter to recover for wood-work he had done in a brick building before the building was destroyed by fire.

11. McAdoo. John David McAdoo was born in Tennessee. He attended the University of Tennessee from 1846 to 1848, and then entered University of Tenneessee. He was admitted to the Bar in 1852. In 1873, Governor Edmund J. Davis appointed McAdoo to be an associate justice of the Supreme Court. McAdoo was on the Semicolon Court. McAdoo was the attorney for the plaintiff/appellee in the contract case of *Hall v. Morrison's Adm'r,*, 20 Tex. 179 (Tex. 1857) (Roberts, J.), in which the Court upheld a jury verdict based on testimony from a witness who packed goods for shipping that they were so well-packed that they could only have been injured by negligence in transport. McAdoo was the trial judge in *Stone v. Edwards*, 35 Tex. 556, 1872 WL 7441 (1871) (Walker, J.), in which the Supreme Court affirmed his ruling that Texas courts did not have the jurisdiction to enforce U.S. patent laws. The Supreme Court mandamused McAdoo, as district judge, to set aside an order granting a new trial and to enter a judgment on the verdict, in *Lloyd v. Brinck*, 35 Tex. 1 (1871) (Ogden, J.).

X. IMPORTANT WRITINGS ON CONTRACT LAW.

Legal advocates and appellate court justices have long relied on commentaries and treatises on the law as sources of authority. Early writings on American law were usually the product of law professors translating their lecture notes and classroom teaching experiences into full-scale publications. Many of these treatises, in their prefaces, indicate a primary intention of instructing students, and only secondarily assisting the bench and the bar. Nonetheless, treatises on the law were a convenient way for lawyers and judges in early Texas to have access to established legal principles and to a variety of appellate decisions. In the days when justices traveled circuits and law libraries were incomplete, it may be that some case citations in some appellate opinions were lifted from treatises without the benefit of the full text of the court's opinion. In early Texas, some of the available treatises relied heavily on decisions of English courts. These treatises contributed much to the dissemination of English Common Law into the American states, including Texas.

A. CONTINENTAL LAW. While most English and American writers about Contract Law tend to focus entirely on the laws of England and the American states, some writers over the years have referred to the Roman law respecting contracts, and to the French law especially as related through the writings of Robert Joseph Pothier (1699-1772). Pothier published seven treatises on contracts during the period from 1761 to 1767, the first being on general Contract Law principles, followed by special applications of the general principles to areas such as sales, bailment, partnership, gift, etc. An English translation of Pothier's Treatise on the Law of Obligations, or Contracts, was published in London in 1806 by William David Evans. The first American edition was published in 1839. Pothier's work was first cited in Texas in *Hall v. Phelps*, Dallam 435, 440 (1841) (Hutchinson, J.), for the proposition that a person who is paid not to do something that the law doesn't allow him to do must return the money paid.

B. ENGLISH TREATISES ON CONTRACT LAW. As noted in Section II.D.1 above, William Blackstone was the first person to teach the Common Law of England in a University setting, and he did so by identifying principles that he thought were more coherent than the jumble of court decisions suggested.[248] But a robust intellectual framework for Contract Law expounded by treatise writers did not develop until the second half of the 1800s.

1. Blackstone. William Blackstone was born in Cheapside, London, on July 10, 1723, into a mercantile family. Blackstone was a student at Pembroke College, Oxford, where he graduated with a Bachelor of Civil Law degree. He was admitted to All Souls College of Oxford University, a research institution. He undertook the study of law by reading the work of Littleton on The Tenures. Blackstone was admitted to the Bar in 1746. Blackstone's four-volume treatise, named Commentaries on the Laws of England,[249] was published from 1765 to 1769. Through his Treatise on the Common Law of England, Blackstone achieved lasting fame. He died in 1780.

As the American frontier pushed westward, Blackstone's Commentaries moved with it, serving as a substitute for large, private law libraries.[250] Because the Commentaries were comprehensive, and could be

read and understood by persons with no background in the law, they became a popular vehicle for self-study by many Americans aspiring to become lawyers without a lengthy apprenticeship, ranging from Patrick Henry to Abraham Lincoln.[251] The view, that the Common Law is a body of principles that can be discerned with careful analysis of precedents, was espoused not only by Blackstone but also by many that followed him. It was the approach used in the late 1800s to develop a new American doctrine of Contract Law. While Blackstone's treatise was never cited to or by the early Supreme Courts of Texas on contract issues, the Contract Law principles Blackstone outlined in his treatise are worth noting because they reflect the status of English Contract Law at the time.

a. Elements of a Contract. In keeping with the practical reality that English Common Law grew out of the feudal law of land tenures, and then expanded to ownership of personal property, Blackstone's Commentaries discuss contracts in the context of transferring ownership of personal property.[252] He defines a contract "an agreement, upon sufficient consideration, to do or not to do a particular thing. From which definition there arise three points to be contemplated in all contract; 1. The agreement: 2. The consideration: and 3. The thing to be done or omitted, or the different species of contracts."[253] Blackstone goes on to describe a contract as "an agreement, a mutual bargain or convention," which must involve at least two contracting parties who have sufficient ability to make a contract.[254]

b. What Constitutes Agreement? As to the first element of a contract, an agreement, Blackstone says that a contract or agreement may be either *express* or *implied*.[255] An express contract has terms that are "openly uttered and avowed" at the time of contracting.[256] Implied contracts are "such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform."[257] Examples of an implied contract occur when (i) someone hires another to perform a service without expressly-agreed-upon compensation, and the law requires him to pay "as much as his labour deserves," or (ii) when one takes wares from a vendor without a stated price, so that the law requires the purchaser to pay "their real value."[258] Blackstone also describes an implied contractual obligation, when a contracting party fails to perform the agreement, to "pay the other party such damages as he has sustained by such my neglect or refusal."[259]

Blackstone differentiates *executed* from *executory* contracts, the former having been fully performed when created (such a simultaneous exchange of horses) and the latter being a contract to perform in the future (such as an agreement to exchange horses next week).[260]

c. Consideration. As to the second element of a contract, Blackstone describes the requirement that a contract be founded "upon sufficient consideration." This is the "price or motive of the contract, which itself must be legal or else the contract is void." Blackstone divides consideration into four categories: (i) when money or goods are furnished upon an express or implied agreement to pay for them; (ii) an exchange of promises to perform an act or not perform an act; (iii) when a person agrees to perform work for a price, either stated or what the law considers reasonable; and (iv) where a person agrees to pay another to perform work (the counterpart of (iii). Blackstone reiterates that consideration is "absolutely necessary to the forming of a contract." Otherwise, the purported contract is a "nudem pactum" or "naked contract," that is not enforceable. However, "any degree of reciprocity will prevent the pact from being nude."[261] Blackstone identifies the requirement of consideration as a safeguard to avoid "the inconvenience that would arise from setting up mere verbal promises," so that consideration is not required "where such promise is authentically proved by written document." Examples are a voluntary bond or promissory note, which carry with them "an internal evidence of good consideration"–in the case of the bond it is the "solemnity of the instrument" and in the case of the promissory note it is "the subscription of the drawer."[262]

d. The Thing Agreed Upon. The third element of a contract is the thing agreed upon to be done or omitted. Blackstone identifies four things that can be agreed upon: (i) sale or exchange of personal property; (ii) bailment; (iii) hiring and borrowing (including interest on money loaned); and (iv) debt; all of which he discusses in detail.[263] Blackstone discusses usury at some length, and attributes a proper rate of interest both to a return on the money loaned and to reward the risk of loss. His discussion of risk leads to a discussion of insurance contracts. As to debt, Blackstone says debt arises from a sale of goods or lending of money. He calls the debt a "chose in action," and a right to a certain sum of money. A "debt of record" is a debt validated by the judgment of a court of record. A "debt by special contract" is where the obligation to pay a sum of money is reflected by deed or instrument under seal. A "debt by simple contract" is not a debt of record, or signified by deed or special instrument, but rests instead upon an oral promise or an unsealed note. Blackstone discusses in some detail two debts on simple contract, bills of exchange (a letter directing payment to a third person) and promissory notes ("a plain and direct engagement in writing, to pay a sum specified" at a specified time to a specified person, or to his order or to the bearer of the note).[264]

e. Other Contract Principles. Blackstone covers remedies for breach of various contractual obligations in Book III, chapter 9 of his Commentaries. Blackstone discusses the "form of the writ of debt" and the "writ of covenant." See Sections V.A&B above.[265] Blackstone speaks of accord and satisfaction in Book III, chapter 1, where says that " if a man contract to build a houfe or deliver a horfe, and fail in it; this is an injury, for which the fufferer may have his remedy by action," but if the injured party accepts something of value as satisfaction, the later agreement extinguishes the former claim.[266]

2. Chitty. Joseph Chitty was born at Dagenham, England in 1775. He was admitted to the Middle

Temple in 1794, and admitted to the Bar in 1816. Chitty wrote a large number of treatises, including Chitty on Commercial Contracts, published in 1828, and Chitty on Contracts (1826). Chitty's treatise on Contract Law was cited by the Texas Supreme Court numerous times.

3. Benjamin. Judah P. Benjamin was born into a Sephardi Jewish family in Saint Croix (now the U.S. Virgin Islands) in 1811, as a British subject. At age two, his family immigrated to North Carolina. In 1822 the family moved to Charleston, South Carolina. Benjamin attended a secondary school in North Carolina, and at age 14 entered Yale College in New Haven, Connecticut. Benjamin left school without graduating, and moved to New Orleans, Louisiana and began clerking for a law firm. In New Orleans Benjamin studied law and the French language. He was licensed as a Louisiana lawyer in 1833, at age 21. Benjamin married a Roman Catholic Creole girl, and bought a sugar cane plantation and slaves. In 1842 Benjamin affiliated with the Whig party, and was elected as a state legislator in Louisiana. In 1845 Benjamin was a delegate to the Louisiana state constitutional convention. Benjamin sold his plantation and 150 slaves in 1850. In 1852, the Louisiana Legislature elected Benjamin to be a U.S. Senator from Louisiana. While in Washington, D.C., Benjamin challenged Mississippi Senator Jefferson Davis to a duel, but Davis's affront was rectified with an apology and the two became friends. In 1854, U.S. President Franklin Pierce offered Benjamin a seat on the U.S. Supreme Court. Had Benjamin accepted, he would have been the first person of Jewish descent on that court. However, he declined, leaving to Louis Brandeis, in 1916, the honor of being the first person of Jewish descent to sit on the U.S. Supreme Court. Benjamin became a Democrat, and was reelected to the U.S. Senate, where he remained until he was expelled on February 4, 1861, as a result of Louisiana's secession from the United States. Benjamin was appointed by the President of the Confederate States of America, Jefferson Davis, as the first Attorney General of the Confederacy. Benjamin later became Secretary of War, but resigned that position in a controversy about his failure to reinforce the Confederate garrison at Roanoke Island, North Carolina, which as a consequence fell into Federal hands. Benjamin was then appointed Secretary of State of the Confederacy. Benjamin fled Richmond when Lee surrendered the Army of Northern Virginia at Appomattox Court House in April of 1865, and disguised as a poor farmer he made his way to Florida, where he narrowly escaped capture, ran the Union blockade to the Bahamas, and after several mishaps finally made his way by steamship to Liverpool, England, landing on August 30, 1865. There began Benjamin's meteoric rise as a barrister and commentator on the English law of sales. Once in England, Benjamin discovered that, out of 700 bales of cotton he had shipped on behalf of the Confederacy, 100 had arrived in England and $20,000 in sales proceeds were waiting in his name.[267] Benjamin lost much of his money in a bank failure, and he took to writing popular weekly articles on international events for income. On January 13, 1866, Benjamin entered as a student in the Lincoln Inns of Court, and was admitted to read law under Charles Pollack.[268] Later that same year, Benjamin was admitted to the Bar in England, as a barrister with a corporate law practice. In 1868, Benjamin published his Treatise on the Law of Sale of Personal Property, which achieved recognition in England and America, and which was cited in Opinions issued by the Supreme Court of the State of Texas. In 1872, Benjamin was honored with a designation as Queen's Counsel. Benjamin died in Paris in 1884.

4. Pollock. Sir Frederick Pollock was born in London on December 10, 1845. Pollock was educated at Trinity College, Cambridge, and admitted to the bar in 1871. Pollock published The Principles of Contract at Law and in Equity in 1876, which emphasized underlying principles as opposed to specific applications of the law in particular cases. Pollock began teaching at Oxford University as a professor of Jurisprudence in 1883. In 1895, Pollock co-authored with Frederic W. Maitland a History of English Law Before the Time of Edward I. In 1895, Pollock was appointed as editor of the Law Reports, overseeing the production of law reports on judicial opinions, a position he held for forty years. For sixty years Pollock exchanged correspondence with American jurist Oliver Wendell Holmes, Jr.[269] Pollock also edited the Law Quarterly Review, an academic journal that covered the common law across the world.

The first American edition of Pollock's second English edition was published in 1881, with Gustavus H. Wald as editor.[270] Wald did not alter the text, but added American cases to the footnotes. In 1885, the second American edition was released, also edited by Wald. The third American edition appeared in 1906, containing American cases gathered by Wald, prior to his death, and by Harvard Law Professor Samuel Williston. The footnotes also contains much analysis contributed by Williston, and Williston added a chapter on discharge of contracts, and added to Pollock's chapters on third party beneficiaries and repudiation of contracts.

Pollock's treatise on contracts was first cited in a Texas appellate opinion in *Williams v. Rogan*, 59 Tex. 438, 1883 WL 9194 (Tex. 1883), for his listing of the "stages and essentials of a contract":

> (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

> (c) The person making the proposal is called the 'promisor;' the person accepting the proposal is called the 'promisee.'
>
> (d) When, at the desire of the promisor, the promisee, or any other person, has done or abstains from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.
>
> (e) Every promise, and every set of promises forming the consideration for each other, is an agreement.

Id. at *2. The passage was actually taken from Section 2 of the Indian Contract Act of 1872,[271] which was essentially a codification of the basic principles of the English Common Law of Contracts, to be applied in India.

5. Maitland. Frederic W. Maitland was born in London on May 28, 1850. Maitland was educated at Trinity College, Cambridge and Eton college. He was called to the bar at Lincoln Inn in 1876. He was known as the "modern Father of English legal history."[272] Maitland suffered from poor health (thought to be tuberculosis and diabetes) and following doctor's orders, in 1898 began wintering in the Canary Islands. He died in Las Palmas, Canary Island, on December 19, 1906 at the age of 56 of pneumonia after contracting influenza on board ship.[273] Maitland published a treatise on The Forms of Action at Common Law in 1909. This treatise was actually constructed after Maitland's death, by certain of his students who blended his lecture notes with their classroom notes to produce the treatise. Maitland to this day is a popular authority on the history of English Common Law.

6. Anson. Sir William Reynell Anson was born at Walberton, Sussex, England on November 14, 1843. Anson attended Eton College, Balliol College, Oxford and then was elected to a fellowship at All Souls College in 1867. Anson was called to the bar at the Inner Temple, London in 1869 and became a bencher in 1900. He was appointed Vinerian reader in English law at Oxford in 1874. In 1879 Anson published Principles of the English Law of Contract.[274] Victor Tunkel wrote that "it largely shaped the modern law itself."[275] The first American edition was edited by J.C. Knowlton, Assistant Professor of Law at Michigan University, in 1877.[276] A second American edition was edited by Cornell University School of Law Professors Ernest W. Huffcut and Edwin H. Woodruff, in 1895.[277] Anson wrote that the term "agreement" has a wider meaning than the term "contract," a concept that was expressed in the Uniform Commercial Code Section 1.201(b)(3) & (12). He defined the elements of contract to include "proposal and acceptance," "form or consideration"[278] necessary to make the agreement binding, capacity to contract, "Genuineness of the consent expressed in Proposal and Acceptance," legality of the objects of the contract.[279] Anson noted that an acceptance must be communicated to be effective.[280] Anson lists as reference books two treatises by Savigny, Pollock on the Principles of the English Law of Contract (1878), Benjamin on Sales (2nd ed. 1873), Leake's Elementary Digest of the Law of Contract (1878), and C.C. Langdell's Selection of Cases on the Law of Contract.[281]

In 1881 he became Warden of All Souls College and remained Warden until his death on June 4, 1914. In 1912 he began tutoring the Prince of Wales who would later become Edward VIII.[282]

C. AMERICAN TREATISES ON CONTRACT LAW. American legal treatises of the mid-Nineteenth Century reflect a transition away from a procedure-based presentation of the law toward a presentation that grouped cases together based on subject matter. In the 1870s, treatise writers moved from aggregating cases based on factual similarities to an exposition of underlying principles of substantive law inductively gleaned exclusively from a study of appellate court opinions.[283] The idea rose to prominence that law was a science that operated on scientific-like principles.[284] This change in perspective was profound, and affected many branches of the law, particularly Contract Law. Many appellate opinions of the Supreme Court of Texas cited to then-contemporary treatises[285] on the law of contracts, equity, and evidence, which in turn cited as authority appellate court opinions, many of which were English court decisions or American court decisions that echoed earlier English court decisions.

1. Kent. James Kent lived from 1763 to 1847. He was born in Putnam County, New York. Kent is reported to have said that "he had but one book, Blackstone's Commentaries, but that one book he mastered." He was the first Professor of Law at Columbia College in New York City, beginning in 1793. Kent was appointed to the New York Supreme Court in 1798. In 1814, Kent was appointed chancellor of the New York Court of Chancery.[286] Kent insisted upon having a written opinion in every case that came before the full court.[287] Kent published a four-volume treatise, Commentaries on American Law, between 1826 and 1830, that grew out of his lecture notes for Columbia College.[288] Kent was cited many times by the Texas Supreme Court.

2. Story. Joseph Story was a U.S. Supreme Court Justice, Harvard Law Professor, and author of numerous treatises on American law. Story's treatises were often cited in American contract cases, including Texas contract cases. Story was born in Marblehead, Massachusetts, in 1779, the son of a medical doctor who had fought at Concord, Lexington, and Bunker Hill.[289] He entered Harvard College in 1795, at age 15.[290] He graduated second in his class[291] in 1789.[292] He read law in Marblehead under Samuel Sewall, then a congressman and later chief justice of Massachusetts. He later read law under Samuel Putnam in Salem.[293] He was admitted to the Massachusetts Bar in 1801.[294] Story rapidly built his reputation as a lawyer, and served in both State and Federal legislatures. He edited Chitty's

treatise on Bills and Notes in 1809.[295] He was one of the lawyers representing John Peck in the celebrated Contract Clause case of *Fletcher v. Peck*, 10 U.S. 87 (1810), in which the U.S. Supreme Court held that the U.S. Constitution's Contract Clause prohibited states from abrogating previously-granted land titles.[296] See Section XIII.A.5.a of this Article. In 1811, Story was President James Madison's fourth choice to fill an opening on the U.S. Supreme Court.[297] Story accepted the appointment, was confirmed by the Senate, and at the young age of 32 became a U.S. Supreme Court Justice. Story was the first Dane Professor of Law at Harvard College, where he taught from 1828 until he died in 1845.[298] Beginning in 1832, Story wrote nine Commentaries on the law, on bailments, constitutional law, conflict of laws, equity, pleadings, agency, partnership, bills of exchange, and promissory notes.[299] Story's never wrote a treatise on the law of contracts. However, his son William W. Story did. Joseph Story's treatises were often cited by Texas courts on contract issues. Story died in 1845, serving 33-1/2 years on the U. S. Supreme Court.

3. Parsons. Theophilus Parsons, Jr. was the son of a preeminent Massachusetts lawyer who was Chief Justice of the Supreme Court of Massachusetts from 1806 to 1813. Parsons Jr. was born in 1797 in Newburyport, Massachusetts. At age three he moved with his parents to Boston. In 1811, at age 14, Parsons entered Harvard University, graduating in 1815. Parsons entered into the study of law in the office of William Hickling Prescott. Prescott, a native of Salem, Massachusetts, was a Phi Beta Kappa graduate of Harvard University who traveled widely and then studied law in his father's Boston law office. Prescott became a practicing lawyer and, more notably, an historian of worldwide stature regarding Spain and her colonies. Parsons dedicated the first edition of his treatise on Contract Law to Prescott.[300]

In 1848, Parsons succeeded Simon Greenleaf as the Dane Professor of Law at Harvard Law School.[301] In 1853, Professor Parsons published a two-volume treatise on Contract Law, called The Law of Contracts, the first American Treatise devoted solely to Contract Law. Parsons wrote in his Preface that his Contract Law treatise differed from previous treatises since it did not just list cases and their holdings like earlier writers had done. Instead, Professor Parsons expounded his view of the principles of Contract Law, and supported these views by notes discussing individual cases. Parsons did not write the supporting notes. Instead, Parsons employed Harvard law students to read and digest the underlying cases, and they submitted their summaries to the student librarian, Christopher Columbus Langdell (1826-1906), who wrote the explanatory notes. These students read, and Langdell synthesized, some 6,000 cases, primarily from England but some from Massachusetts, New York, and a few other U.S. states. Parsons categorized contract cases according the types of persons or relationships involved. From 1853 to 1904 Parson's Contract Law treatise went through a number of editions and "was the standard American textbook used by lawyers and courts for two generations."[302] Parsons taught at Harvard Law School until 1870, when he retired. Parsons died in 1882. Professor Parsons' Treatise on the Law of Contracts was cited numerous times by Texas courts.

4. Other 19th Century Writers. There are other treatise writers of the Nineteenth Century whose writing were cited in Texas contract decisions. These include Greenleaf on Evidence and Sedgwick on Damages.

5. Langdell. Christopher Columbus Langdell was born to a farm family in New Boston, New Hampshire, in 1826. He grew up in humble circumstances. With financial assistance from his sister and a scholarship, Langdell entered Phillips Exeter Academy in 1845, then in 1848 he entered the sophomore class of Harvard College. Langdell dropped out of college in his third semester due to lack of funds. Langdell worked in a New Hampshire law office, then entered Harvard Law School, where he worked as a student librarian and assisted Professor Parsons in composing the latter's 1853 treatise on The Law of Contracts. While in school, Langdell met and spoke with another student at Harvard, William Eliot. In 1854, Langdell was awarded an honorary B.A. degree from Harvard College, effective 1851. Beginning in 1854, Langdell practiced commercial law with success in New York City, where he was valued for providing extensive written briefs for other lawyers.[303] On January 6, 1870, Langdell was selected by Harvard University President Charles William Eliot, to replace Professor Theophilus Parsons, Jr. as Dane Professor of Law at Harvard Law School. On September 27, 1870, Langdell became the first Dean of Harvard Law School. He held that position until 1895, when he retired as Dean. In 1900, he became Dane Professor of Law Emeritus until he died in 1906.[304]

President Eliot's selection of Langdell was a surprise to the Harvard Law School faculty and alumni, as Langdell had few ties to Harvard during his sixteen years in New York. However, hiring Langdell was one of many steps taken by President Eliot that--to use Oliver Wendell Holmes, Jr.'s words--"turned the whole University over like a flapjack."[305] Eliot worked with Langell to radically reform the operation of the law school. Before Langdell, entrance to Harvard Law School was based on family ties or social connections.[306] Langdell implemented merits-based criteria for the selection of law students. He required an undergraduate degree as a condition to admission to Harvard Law School. Langdell instituted a three-year, sequenced curriculum of study, and progression required students to pass a written examination based on complex hypothetical problems.[307] Langdell upgraded the law school library from a repository of text books to a facility for legal research. And he formed a national alumni association.[308] Langdell who valued intellect more than experience, also introduced a policy of hiring recent law school honor graduates to teach at the law school.[309]

In the spring of 1870, when Langdell took over Theophilus Parsons' Dane Professorship of Law, he

implemented a new teaching paradigm, that moved away from professorial lectures based on treatises and moved toward student study of appellate court opinions. Up to that time, law students developed their advocacy skills by participating in mock trials. Professor Langdell called upon his students to recite in class the facts and holdings of the cases, and had class members debate the principles underlying the court's decision.[310] To facilitate this case study approach, Langdell undertook to prepare a casebook of contract cases (the first casebook ever), the first volume of which he swiftly completed by October 1870.[311] Prior to Langdell, American authors of legal treatises on, for example, Contract Law used the "manual method," which grouped cases around particular factual components of situations, such as contracts with innkeepers, as distinguished from contracts with "drunkards, spend thrifts, seamen, aliens, slaves, infants, married women, outlaws," each of which was differentiated from the others.[312] Langdell conceived of an ordered intellectual framework for Contract Law consisting of rules that reflected principles like offer, acceptance, consideration, etc. Langell's preface to the first edition of his case book reflects his intent:

> Law, considered as a science, consists of certain principles and doctrines … [T]he number of fundamental legal doctrines is much less than is commonly supposed … It seems to me, therefore, to be possible to take a branch of the law such as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.[313]

Langdell's casebook begins with a case and ends with a case, with no commentary in between to guide the student. Langdell's approach to teaching forced law students to use inductive reasoning to discern the legal principles underlying the cases he had selected for them to read. Although the casebook method was controversial, and took decades to gain wide acceptance, the casebook method eventually supplanted the previous lecture-based teaching paradigm, and is universally reflected in present-day first year law classes that proceed based on casebooks and Socratic dialogue. Because Langdell's casebook was bereft of overt analysis, Langdell produced an outline of contract law principles to guide his students. This outline was published in 1880 as Langdell's Summary of the Law of Contracts.[314] Despite its seminal importance, Langdell's Outline on contract law was not frequently cited by appellate courts, and Langdell was never cited by a Texas appellate court.

Langdell's influence on shaping American Contract Law during its formative period, through his influence on the students he taught at Harvard Law School who themselves had significant impact on Contract Law, makes him a person to remember. Langdell's approach to Contract Law is now called "classical," even though it represented a modernization of the theory of Contract Law as it had existed up to that time. The task of developing underlying principles and rules expanded beyond Contract Law and became a movement in the law generally that came to be called "formalism." Formalism has been in ill repute in academia for more than a century, but many of the appellate decisions in contract cases, to the present day, still reflect a formalistic approach to Contract Law doctrine.

6. Holmes. Oliver Wendell Holmes, Jr. was born in 1841. His father was a physician who taught medicine at Harvard College and became known for his essays, novels and poetry. Holmes attended Harvard College from which he graduation in 1861. The Civil War having started, Holmes volunteered for the Massachusetts militia. He fought for a year-and-a-half in the Twentieth Massachusetts Volunteer Infantry, and was wounded three times. Holmes entered Harvard Law School in 1864, passed an oral bar exam, and was admitted to the Bar in 1866. Holmes practiced law in Boston for fourteen years. In 1870, Holmes was appointed co-editor of the American Law Review, one of America's only publications of scholarly legal articles.[315] In 1881, at age 39, Holmes published a book, The Common Law, based on his articles written for the American Law Review and a series of lectures he had given at the Lowell Institute, and his subsequent study. Soon afterward he took a job teaching at Harvard Law School, but resigned in 1883, after one semester of teaching, to accept an appointment to the Supreme Court of Massachusetts. Holmes edited the twelfth edition of Kent's Commentaries.[316] On December 2, 1902, President Theodore Roosevelt nominated Holmes to the U.S. Supreme Court. Holmes was confirmed two days later. Holmes' meticulous study of the historical development of the Common Law, coupled with his lucid analysis of legal principles and his gift for coining memorable phrases, and his prodigious output of appellate opinions during a 33-year career as a jurist, have contributed to his becoming America's most celebrated jurist and legal theorist.

Holmes advocated several concepts, including the idea that the law reflected practical necessities and not theoretical truths, that the desire to achieve sensible outcomes was in tension with continued adherence to inherited legal principles,[317] and that liability in tort should be measured by an objective "reasonable man" standard, just as contract formation and contract interpretation[318] should be determined objectively, not based on the actual thinking of the parties.[319] Holmes also suggested that a contractual obligation should be viewed as an option for the promisor to either perform or pay damages.[320] Holmes thus moved away from moral judgments and toward a standard of behavior to be derived from what the community would expect and accept, something he called "the felt necessities of the time." Many people have analyzed the philosophical perspective of Holmes's writings, some sourcing his approach in positivism[321] and others in pragmatism.[322] Holmes's perspective was eclectic, and not internally consistent, so that characterizing his entire body of writings is difficult and probably impossible.

7. Pound. Roscoe Pound was born in Lincoln, Nebraska, in 1870. He was prepared for college by his mother and attended the University of Nebraska, where he studied botany and graduated in 1888. After a year at Harvard Law School, and without a law degree, he was admitted to the Nebraska bar in 1890. Pound received a Ph.D. in Botany in 1989. He taught at the University of Nebraska from 1903 to 1907. He became professor of law in Northwestern University until 1909 when he took a similar post in the law school at the University of Chicago. In 1910 he became the Story professor of law at Harvard Law School and in 1913 the Carter professor of jurisprudence. Like Holmes, and later Lon Fuller, Pound thought not just about the law–he thought beyond the law. Pound's article on *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908), attacked the view that the law consisted of coherent body of rules that could be applied mechanically to arrive at the right result. Pound advocated that the methods of social sciences be applied to the study of law, to develop an accurate description of how the law was created and applied. Pound's writings gave impetus to the Realist school of legal thought that developed in the 1920s and 1930s. However, Dean Pound's personal movement away from formalism did not make him a Legal Realist. He was a legal philosopher with practical as well as jurisprudential concerns, more identified with including in legal analysis insights from psychology and sociology, more interested in the study of the "legal process" than the study of the law.[323] Pound resigned as Dean of Harvard Law School in 1937, and beame a University Professor.

Pound wrote an article on Liberty of Contract, 18 Yale L. J. 1 (1909). It was written during the Progressive Era, when state legislatures were attempting to rectify the worst abuses of the laboring class by business organizations, and these statutes were being nullified by state and federal appellate courts on the ground that they unconstitutionally interfered with the worker's "liberty to contract" as they wished with employers, a right protected by the Fourteenth Amendment and so-called Substantive Due Process.[324] Pound's criticism of the repressive nature of the court decisions of that era was forceful, almost indignant. The debate was eventually silenced under the weight of New Deal legislation.

8. Elliott. Byron Kosciusko Elliott, born 1835 in Ohio, moved to Indianapolis, Indiana in 1850. He was admitted to the Indiana Bar in 1858.[325] He served as a volunteer in the Indiana militia during the Civil War.[326] After the war he served as city attorney for Indianapolis. He eventually served as a justice on the Indiana Supreme Court from 1881 until he was defeated for re-election in 1893.[327] After leaving the bench, Justice Elliott went into a law partnership with his son, William F. Elliott, representing a large Indiana railroad. Justice Elliott and his son authored a number of legal treatises, including texts on municipal law and railroad law. Byron Kosciusko Elliott died in 1913.[328] That same year his son, William F. Elliott, published a six volume treatise, Commentaries on the Law of Contracts, "assisted by the publisher's editorial staff." Elliott's treatise on the Law of Contracts was first cited by a Texas court in *Hancock v. Haile*, 171 S.W. 1053, 1055 (Tex. Civ. App.–Fort Worth 1914, no writ), for the proposition that an insane person or minor, who contracts for necessaries that are actually provided, is not bound to pay the contract amount, but is bound to pay the reasonable value of the necessaries provided.[329] Elliott's treatise was also cited in *E.H. Perry & Co. v. Langbehn*, 113 Tex. 72, 79, 252 S.W. 472, 472 (1923) (Cureton, C.J.), for the proposition that the bill of lading represents a contract between the shipper and the shipping company.

9. Williston. Samuel Williston (1861-1963) was a law student at Harvard Law School from 1885 to 1888, where he studied Contract Law under Dean Langdell. From 1888 to 1889, Williston clerked for U.S. Supreme Court Justice Horace Gray.[330] Williston was a professor at Harvard Law School from 1895 to 1938. Williston served as acting dean of Harvard Law School from 1909-1910.[331] Williston edited the eighth edition of Parson's The Law of Contracts (1893), and the third American edition of Pollock's treatise on The Principles of Contract at Law and in Equity (1906). From 1938 to 1956, Williston was a consultant for the Boston law firm of Hale & Dorr.[332] Williston co-authored with Langdell a case book of contract cases.[333] Williston's own case book, A Selection of Cases on the Law of Contracts, was published in 1903.[334] Williston served as the main author of the Uniform Sales Act and the Uniform Warehouse Receipts Act, both promulgated by the National Conference of Commissioners on Uniform State Laws in 1906. Williston authored a one-volume treatise on sales law in 1909,[335] which expanded to two volumes in 1924, and to four volumes in 1948. In 1915, Williston published a one volume treatise on Negotiable Instruments, for the American Institute of Banking. In 1918, he published a one volume treatise on Commercial and Banking Law, for the American Institute of Banking. In 1920, Williston published a 5-volume treatise on The Law of Contracts which became and remains preeminent in American Contract Law. Williston drafted the Uniform Written Obligations Act that was approved by the NCCUSL in 1925.[336] Williston served as the Reporter for the American Law Institute's Restatement (First) of the Law of Contracts (1932). See Section XII.D of the Article. Williston lived to the age of 101.[337] Williston embraced formalism in his teachings and writings, and the prevalence of formalism that is evident in contract law today is to a great degree attributable to Williston's Treatise on Contracts and his influence on the Restatement (First) of the Law of Contracts.

In his writings, Williston elevated predictability to a primary goal of Contract Law. He wrote: "A system of law cannot be regarded as successful unless rights and duties can, in a great majority of instances, be foretold without litigation."[338] Like Holmes, Williston adopted the "objective" view of contracts, which guided his approach to the formation and the interpretation of contracts.

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

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

10. Corbin. Arthur Linton Corbin was born on a family farm in Linn County, Kansas,[339] in 1874. Corbin's mother taught high school, and his sister obtained a Ph.D. from Yale University, then returned to Kansas to teach. Corbin graduated from high school in Lawrence, Kansas, and graduated from the University of Kansas, Phi Beta Kappa, in 1894. Corbin taught high school in Kansas at $50 per month,[340] then entered Yale Law School 1897. He obtained an L.L.B. from Yale 1899, graduating magna cum laude.[341] As a law student Corbin taught as a substitute teacher in New Haven public schools, played varsity baseball, did some typewriting for pay,[342] and received two academic prizes.[343] After graduating from law school, Corbin moved to Colorado, took the bar exam in Denver, and practiced law and served as assistant prosecutor for four years in the "mining camp" of Cripple Creek, Colorado. Corbin then accepted a job as an instructor in contracts and mining and irrigation law at Yale Law School, where he taught from 1903 to 1943. Corbin became a full professor in 1909. As a Yale law student, Corbin was disenchanted with professors who lectured on black letter law with little discussion of the facts and circumstances of the different cases.[344] Corbin followed the casebook method pioneered by C.C. Langdell at Harvard Law School, using Clark's casebook on contracts, which was based on Sir William Anson's treatise on Contracts.[345] In 1919, and again in 1924, and 1930, Corbin wrote the American notes that were added to Anson's Principles of the Law of Contract.[346] In 1921, Corbin published his own casebook, Cases on the Law of Contracts: Selected from Decisions of English and American Courts.[347] Although Corbin adopted Langdell's casebook method, Corbin did not ascribe to Langdell's view that law was a science founded on fixed principles. Corbin acknowledged that he studied John Stuart Mill's book, Inductive Logic,[348] and he took to heart Mills' view that inductive reasoning did not establish its conclusions with certainty. In reviewing thousands of appellate decisions in contract cases, Corbin became convinced of two "truths": that contract decisions are not uniform and instead vary with the facts and surrounding circumstances; and that Contract Law principles change as society changes. As a consequence, Corbin considered the principles of Contract Law, which all acknowledge that he mastered, to be no more than working hypotheses. Corbin's thinking is reflected in twelve letters he wrote at different periods of his life, unearthed by Professor Perillo.[349] Corbin wrote: "[There] will always be two large fields of legal uncertainty--the field of the obsolete and dying, and the field of the new born and growing." "I have read all the contract cases for the last 12 years; and I know that 'certainty' does not exist and the illusion perpetrates injustice."

During the 1930's, while Corbin was teaching at Yale Law School, Yale was the hot bed of the Realist School of legal theory. They claimed Corbin as a devotee, but he did not claim them. Corbin did not see himself as a member of any legal school, other than Yale Law School.[350] He had his own perspective, developed no doubt on the foundation of his practical, non-legal experience as a child and student and teacher of the Midwest. Corbin has been widely credited with the inclusion of Section 90 on promissory estoppel, but Corbin's correspondence reflects that Williston crafted the section on his own. Although "differences arose, in both theory and expression," between Corbin and Williston, Corbin nonetheless considered Williston to be his teacher on Contract Law, and Corbin collaborated closely with Williston in preparing the Restatement (First) of Contracts, for which Corbin had the primary responsibility for drafting the chapters on remedies.[351] Corbin also greatly respected Samuel Williston.[352] Corbin had a close relationship with Legal Realist Karl Llewellyn, who called him "Dad."[353] Corbin's personal papers appeared to have been destroyed in a fire in 1959, so much of the "back story" of the way his thoughts developed has been lost. We do have some correspondence from the personal papers of others, and Corbin left a record of law review articles, a casebook, and a treatise, that reveal the depth of his thinking on various points of Contract Law. Corbin remained active in writing about the law of contracts up to the time his eyesight failed. Corbin died in 1967 at age 93.

Although Corbin published a casebook in 1921, Corbin is most noted for his treatise, Contracts: A Comprehensive Treatise on the Working Rules of Contract Law (1950),[354] which Professor Grant Gilmore called "the greatest lawbook ever written."[355] It was first published in eight volumes, and later expanded to fifteen. Corbin's treatise has endured, garnering more than 10,000 citations nationwide on Westlaw, and being cited recently in Justice Paul Green's Opinion in *Tawes v. Barnes*, 340 S.W.3d 419, 430 (Tex. 2011) (Green, J.). Professor Corbin was highly regarded by his students and by his contemporaries, and Corbin contributed significantly to Yale Law School's rise to prominence.

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

> [T]he law does not consist of a series of unchangeable rules or principles engraved upon an indestructible brass plate or, like the code of Hammurabi, upon a stone column. Every system

> of justice and of right is of human development, and the necessary corollary is that no known system is eternal. In the long history of the law can be observed the birth and death of legal principles. They move first with the uncertain steps of childhood, then enjoy a season of confident maturity, and finally pass tottering to the grave. . . . The law is merely a part of our changing civilization. The history of law is the history of . . . society. Legal principles represent the prevailing mores of the time, and with the mores they must necessarily be born, survive for the appointed season, and perish.

Arthur L. Corbin, Anson on Contracts v-vi (3d Am. ed. 1919). Corbin drew inspiration from the writing and opinions of Benjamin Cardozo.[356]

Corbin had strongly-stated views. Corbin championed the view that consideration was not always required to create an enforceable contract, and that reliance often served as a substitute. In his article *Offer and Acceptance and Some of the Resulting Legal Remedies*, 26 Yale L. J. 204 (1917), Corbin argued that the state's enforcement of contracts involved a choice of how, when, and for whom the weight of the state would be brought to bear.[357] Corbin disliked the Parol Evidence Rule, and wrote two weighty law review article on its deficiencies. Corbin, *The Parol Evidence Rule*, 53 Yale L. J. 603 (1944), and Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L. Q. 161 (1965).

11. Llewellyn. Karl Llewellyn was born in Seattle in 1893. Llewellyn entered Yale College in 1911 and remained there until 1914 when he attended the Sorbonne. In 1915 he returned to the United States and attended Yale Law School, from which he graduated in 1918.[358] In 1925 Llewellyn became a professor at Columbia Law School. Llewellyn argued that judges should become familiar with the facts of a case, so they could acquire a "situation sense" that would lead to the right result.[359] Llewellyn published a case book on contract law that broke with Langell's black letter law approach by discussing economic considerations, business practices, and other factors influencing the expectations and behaviors of commercial buyers.[360] Llewellen served as Reporter for the Uniform Commercial Code ("U.C.C."), a project that was started in 1940 and came to fruition in 1951. See Section XII.E. Llewellyn was the principal draftsman of Article 2, on sales, which contained provisions relating to the formation, interpretation, and enforcement of contracts. Professor Llewellyn influenced the U.C.C. to be more in accord with prevailing business practices, and to focus more on general standards and less on mechanical rules. Instead of merely enacting the existing body of contract law, the U.C.C. in many instances deviated from the Common Law of contract that had developed for the sale of goods. Llewellyn drafted the Uniform Trust Receipts Act in 1957.

Professor Llewellyn was a leading light in the Legal Realist school of thought, and the original 1952 version, and even the 1962 version, of the Uniform Commercial Code reflected Llewellyn's Legal Realist view of the law. In his 1962 book entitled Jurisprudence: Realism in Theory and Practice, Professor Llewellyn suggested that American law has moved between two poles, one being a flexible approach to interpreting and applying the law and the other being a formalistic, rule-bound approach.[361] In the 1830s and 1840s, judges followed the flexible approach, but from 1885 to 1910 a formulaic approach prevailed, only to shift back to the flexible approach beginning in the 1920s and 1930s, leading to the Uniform Commercial Code of the 1950s and 1960s, which was flexible in its terms.[362] Llewellyn was an adherent of the flexible approach to law, and this characterized his approach to drafting the Uniform Commercial Code. See Section XII.E below.

12. Fuller. Lon Luvois Fuller was born in Hereford, Texas in 1902.[363] In 1906, his family moved to California. Fuller attended the University of California at Berkley in 1919-1920, then transferred to Stanford University from which he graduated in 1924 with a degree in economics. Fuller obtained a law degree from Stanford Law School in 1926. His first job was teaching at the University of Oregon. In 1928, Fuller moved to the University of Illinois, where he taught until 1931. He then moved to Duke University where he taught until 1939. From 1939 to 1940, Fuller was a visiting professor at Harvard Law School, where he officed next door to Professor Samuel Williston.[364] Fuller accepted a professorship at Harvard in 1940. During World War II, from 1942-1945, Fuller taught only two days a week and practiced law the rest of the time.[365] In 1945, Fuller returned to teaching, but also served for the next twenty years as a labor arbitrator.[366] From 1940 to 1972, Fuller was a professor at Harvard Law School. In 1947, Fuller published his own case book, Basic Contract Law, which contained the innovation of starting with cases on remedies and not cases on contract formation.[367] In 1948, Fuller took Dean Roscoe Pound's Chair in General Jurisprudence at Harvard University. Fuller died in 1978.

Professor Fuller's article, co-authored with his student research assistant William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52 (1936), written when Fuller was 35 years old, appears 49th on Fred R. Shapiro's June 2012 list of the most-cited law review articles of all time.[368] The article was enormously influential in contract theory. In the article, Professor Fuller posited that there were three interests that should be protected in contract law: the expectation interest, the restitution interest, and the reliance interest. See Section XXVII.A of this Article. Fuller's other significant article on Contract Law was Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

13. Gilmore. Grant Gilmore was born in Ohio in 1910. He graduated from Yale undergraduate in 1931, and obtained a Ph.D. in French Literature from Yale in 1936, and taught French at Yale. Gilmore obtained his law degree from Yale Law School in 1942. Gilmore was a student of Corbin, and Gilmore later wrote that he

"benefited greatly from his wise counsel."[369] Gilmore taught at Yale Law School and later at the University of Chicago School of Law and then back to Yale. Gilmore was the Reporter for Article 9 of the Uniform Commercial Code. In 1974, Gilmore published a book of lectures he had delivered in 1970 at Ohio State University Law School, with explanations, qualifications, and documentation added. The book, entitled The Death of Contract, laid out Gilmore's view that American Contract Law was not a product of the slow development of the Common Law, but instead sprang from the mind of C.C. Langdell when he created his first case book, and was carried forward by Oliver Wendell Holmes, Jr. and Samuel Williston.[370] Gilmore suggested that the cases chosen to be included in case books caused the underlying theories to seem warranted, but that was the result of selecting cases that supported the author's view and omitting those that did not (i.e., sampling bias). Gilmore noted that Contract Law absorbed preexisting areas of specialty, like sales and negotiable instruments. Gilmore saw a trend away from the objective approach typified by the Restatement (First) of Contracts to a more generous approach to liability reflected in the Restatement (Second) of Contracts. Gilmore suggested that Contract Law was in a trend away from a bargain theory toward a reliance theory, and would eventually be reabsorbed into tort law, from whence it came (i.e., the "death" of contract). Gilmore published law review articles from 1949 to 1979, in which he stated his views on Contract Law and Admiralty.[371] Gilmore's analysis was always trenchant, and he was not afraid to share unkind comments about other legal writers.[372]

14. Farnsworth. E. Allen Farnsworth was born in Providence, Rhode Island, in 1928. Farnsworth obtained a B.S. in Applied Mathematics from the University of Michigan in 1948, an M.A. in Physics from Yale University in 1949, and a J.D. from Columbia University in 1952. Farnsworth taught at Columbia University School of Law from 1954 to 2005. Farnsworth served as the Reporter for the Restatement (Second) of the Law of Contracts, published in 1981. Farnsworth died in New Jersey at age 76.

15. Posner. Richard Posner was born in New York City in 1939. He graduated summa cum laude from Yale University in 1959. He attended Harvard Law School, where he was president of the Harvard Law Review and graduated first in his class, magna cum laude, in 1963.[373] Posner clerked for Supreme Court Justice William J. Brennan Jr. Posner worked for the Federal Trade Commission and the U.S. Solicitor General, and worked for ten years as a researcher at the National Bureau of Economic Research. Posner joined the Seventh Circuit Court of Appeals in 1981 and began teaching at the University of Chicago School of Law that same year. Posner has advocated an economic perspective on the law, particularly Contract Law, and suggests as a goal that court decisions be made in such a way not to vindicate a moral commitment to keeping a promise but rather to maximize overall value or reduce overall cost. This perspective is evident in Justice Posner's Opinion in *Zapata Hermanus Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002), where he says that "a breach of contract is not considered wrongful activity in the sense that a tort or crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is just to perform or pay damages . . . ." Posner cited to Holmes's book on the Common Law (1881) and Holmes's 1897 Harvard Law Review article *The Path of the Law*.[374] Posner, like Story and later Holmes, has been able to present his perspective on Contract Law both in publications and, when the opportunity was presented, through the opinions he wrote on behalf of a prominent appellate court. But Posner has not had the advantage of writing a treatise or Restatement or uniform law of contracts that would have fostered the replication of his contract theories in court decisions throughout the land. However, the final chapter is not yet written, and Posner has succeeded in seeing his noteworthy contract law decisions come to outnumber those of Holmes and Cardozo in contract case books used in American law schools.[375]

16. Perillo. Joseph M. Perillo was born in 1933. He attended Cornell University for both undergraduate and law school studies and was admitted to the bar in 1955. He taught at Fordham from 1963 to present and is Distinguished Professor of Law, Emeritus. He was a Fulbright Scholar at the University of Florence, 1960 to 1962. Perillo co-authored Calamari and Perillo on Contracts in 1987.

D. TEXAS TREATISES ON CONTRACT LAW. There are not many publications we could call treatises on Texas law, per se. While Texas has had no law professors that achieved national stature in the area of Contract Law, there have been commentaries on Texas Contract Law.

1. Simpkins. William Stewart Simpkins was born in Edgefield, South Carolina, in 1842. He attended the Citadel Military College in South Carolina. In 1856 he entered service in the Confederate Army where he is said to have relayed the order to fire on Fort Sumpter, starting the Civil War. Simpkins attained the rank of Colonel. After the war ended, "Colonel" Simpkins moved to Florida. He was admitted to the Bar in 1870, then moved to Texas in 1873. Simpkins joined the University of Texas School of Law faculty in 1899, and taught there until he retired in 1923, but continued to lecture until his death in 1929. [376] Simpkins published a number of treatises, including a treatise on Contracts and Sales in 1905, which was updated in later editions. The treatise has occasionally been cited by Texas appellate courts. Simpkins gained notoriety in 2010, when an earlier address he had given at the Law School[377] was brought to light, that extolled his role in establishing the Ku Klux Klan in Florida.

2. Hildebrand. Ira Polk Hildrebrand was born in La Grange, Texas in 1876. He acquired a college degree from Texas Christian University in Fort Worth, Texas, in 1897, and a B.A. and L.L.B. from the University of

Texas in 1899. Hildebrand then attended Harvard Law School, where he studied contracts law under Professor Samuel Williston and acquired another L.L.B. in 1902. Hildebrand started as a member of the faculty of the University of Texas School of Law in 1907, where he helped to popularize the casebook method of teaching. Hildebrand served as Dean of the Law School from 1924 through 1940. Hildebrand attended some of the annual meetings of the American Law Institute. Dean Hildebrand participated in and argued with Williston in the American Law Institute meetings on the Restatement (First) of Contracts, and wrote a book review on the Restatement of the Law of Contracts, 13 Tex. L. Rev. 156 (1934). Hildebrand wrote *Contracts for the Benefit of Third Parties in Texas*, 9 Tex. L. Rev. 125 (1931), which was cited a few times by Texas appellate courts. In 1933, Dean Hildebrand authored a book of Texas case annotations to the Restatement (First) of Contracts, but he is better known for a 4-volume treatise on Texas corporations. Hildebrand died in 1944.[378]

3. Anderson. Professor Roy Ryden Anderson, currently a Professor and Dean at Southern Methodist University School of Law in Dallas, has co-authored a Texas Uniform Commercial Code Annotated (Thomsen West 2003). He also authored a two-volume Treatise on Damages Under the Uniform Commercial Code (2d ed. 2003), and has written law review articles on the U.C.C.

4. Krahmer. John Krahmer, currently a Professor of Law at Texas Tech University School of Law, authors for the Southwestern Law Journal an annual review of legal developments in Texas involving commercial transactions. Professor Krahmer's reviews include commentary on the Law of Contracts in the commercial context.

5. West's Texas Practice Series. Thomson Reuters publishes a treatise on Texas Contract Law, Volume 49 of the Texas Practice Series. The authors are David R. Dow and Craig Smyser. Dow is a law professor at the University of Houston Law Center, who earned a B.A. in History from Rice University, an M.A. in History from Yale University, and a J.D. from Yale Law School. He has been teaching since 1988, with an emphasis on criminal law. Dow co-authored Volume 49 with Craig Smyser. Smyser graduated from the University of Texas in 1973 (Phi Beta Kappa) and from the University of Texas School of Law in 1980. He practices with the firm of Smyser Kaplan & Veselka in Houston.

XI. FEDERAL COMMON LAW. Early Texas Supreme Court decisions sometimes cited to U.S. Supreme Court opinions as authority in contract cases. The U.S. Supreme Court was the ultimate authority regarding the interface between Contract Law and the U.S. Constitution. However, in many appeals in the early 1800s the U.S. Supreme Court was sometimes called upon to rule on non-constitutional contract issues, and its opinions wound up being cited by state courts for contract law principles. The U. S. Supreme Court found justification for its non-constitutional contract decisions in English case law, cases decided by courts of American states, legal treatises, accepted practices, and in some instances the personal experiences of Chief Justice John Marshall as a lawyer in Richmond, Virginia.

In *Swift v. Tyson*, 41 U.S. 1 (1842) (Story, J.), Justice Story wrote that the U.S. Supreme Court was bound to follow state statutes, and their interpretations by courts of the state, and state law as to real estate, but not state court opnions regarding the interpretation of contracts or general commercial law. Story wrote that the law of negotiable instruments belonged not to just one county, but to the commercial world. In saying that, Story quoted Lord Mansfield who had quoted Cicero. *Id.* at 18-19. This decision permitted Federal courts to develop their own Common Law of sales and contract. *Swift v. Tyson* was overturned 90 years later in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (Brandeis, J.), which asserted that federal judges hearing cases that were removed to federal court based on diversity of citizenship must apply the law of the state from which the case was removed. *Erie* had the practical effect of eliminating a federal Common Law that might have co-existed with, or even co-opted, state Common Law on matters governed by state law. One consequence of *Erie* was that Contract Law remains the domain of state law, except when the U.S. Constitution or a Federal statute comes into play, or where the United States is a contracting party.

However, a Federal Common Law of contracts exists in ERISA and admiralty, and may develop further in connection with intellectual property.

XII. UNIFORM LAWS, RESTATEMENTS AND TREATIES.

A. UNIFORM LAWS PERTAINING TO CONTRACTS. The desirability of a uniform Law of Contracts has long been noted. Sir Frederick Pollock wrote about it in 1885 in The Law Quarterly Review:

> The law of contracts, in particular, is in most of its departments admirably rational and equitable, though it exists in a form in which no one can understand it without the labour of years, which bears upon it in every direction traces of the gradual expansion of view and extension of old formulas to meet new facts which are so interesting to the historical student, and so troublesome, not only to the legal practitioner, but also to his clients. I believe that it would be quite as possible to codify the law relating to contracts as to codify the criminal law, and I think that the advantages of such a code would be felt by every man of business in the country. In order to do so, however, it would be necessary in the first place to digest the existing law into one compact body, and it would be a great convenience, in carrying out such an undertaking, if certain parts of the law which are at once most intricate and open to all sorts of objections could be repealed.[379]

The American movement toward uniform state laws began in 1882, when a committee of the American Bar Association recommended uniform state laws on the acknowledgment of deeds and to prevent fraudulent divorces. In 1889, the ABA created a committee on uniform state laws. In 1892, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") was formed.[380] The NCCUSL consists of unpaid commissioners appointed by state governors.[381] Over time, states enacted legislation for the appointment of commissioners to the NCCUSL. In 1896, the NCCUSL recommended the Uniform Negotiable Instrument Act,[382] governing checks, notes, and bills of exchange.[383] By 1916, the UNIA had been adopted in 46 states and Alaska.[384] The uniform state law movement gained momentum that spawned many failed efforts but some significant triumphs.

Underlying all uniform acts is an unstated preference for achieving uniformity through concerted state action as opposed to achieving uniformity through the power of the United States Congress to preempt state laws. Since the U.S. Constitution's Interstate Commerce Clause has been the basis for so much Federal legislation, it is both remarkable and fortunate that American Contract Law, a core element of interstate commerce to this day, is largely still a creature of state Common Law and state statutes, and not Federal law.[385] Remarkable in the sense that in the Twentieth Century the forces for uniformity tended to achieve uniformity by using Federal preemption to take law-making power away from the states. Fortunate in the sense that a Congressional law of contracts would be a target of lobbyists and special interests that would create anomalies and preferences like we have in the Internal Revenue Code, whereas uniform state laws are more the product of thought and not politics, and thus are more balanced and coherent.[386] It should be remembered, however, that the Commissioners to the NCCUSL are political appointees, and that the ultimate decision to adopt a uniform law rests with elected state legislatures. The fact that the uniform acts have been thoroughly vetted during the drafting process, that the drafters are seeking balance in order to facilitate nationwide adoption, and the ethic that, to remain uniform, the laws must not be amended locally, serves to dampen the partisan inclination to embed competitive advantage in the law at the local level.[387]

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

B. RESTATEMENTS OF THE LAW OF CONTRACTS. Restatements of the law are published by the American Law Institute (ALI), a non-profit corporation founded in 1923 and headquartered in Philadelphia, Pennsylvania. The ALI consists of 4,000 lawyers, judges, and law professors[388] who work together to generate Restatements, model statutes, and statements of principles of the law.[389] The ALI's Restatements are lengthy compilations of appellate court decisions that distill the legal principles underpinning the decisions and state them as rules or standards of law. The Restatements also give explanatory comments, illustrative hypothetical examples, and citations to state and Federal appellate opinions. Primary responsibility for drafting a Restatement is assigned to one or more law professors. The written product is subjected to comment and criticism by editorial committees and by members of the American Law Institute in public meetings, and the text is rewritten and rewritten again until a final product is achieved. University of Texas School of Law Professors Robert W. Hamilton, Alan Scott Rau, and Russell J. Weintraub wrote in their textbook: "Restatement provisions are usually drawn from case precedent, though they do not always reflect the 'majority' view. Sometimes a Restatement provision sets forth what the Reporter and Advisers think the rule should be even though there is little precedent for it."[390] Restatements have been criticized for presenting legal rules bereft of any consideration of social or economic consequences.[391]

The American Law Institute's two Restatements on the Law of Contracts tacitly suggest that the best way to organize and understand Contract Law is through a structuring of underlying legal principles, as opposed to presenting the law in the context of Theophilus Parsons' identifiably distinct fact patterns, or Lon Fuller's interests being protected, or in some other way. The Restatement's Sections are presented as legal rules or standards. The Comments to the Sections discuss the purpose or intent of the rule or standard, and give examples of how the rule or standard should be applied to simple hypothetical situations stripped bare of factual context. The Comments also include case citations that either support or contradict the Section. The Restatements contain little discussion of the deep history of Contract Law principles, and little indication that for the last 110 years writers have made insightful suggestions on how Contract Law might be better explained, or better justified, or improved.

The Restatements of the Law of Contracts reflect the same combination of analogical, inductive, and deductive reasoning that we saw in the writings of

Frances Bacon and the publications of Parsons, Langdell, and Williston. That is, a group of investigators (i) collects "specimens" or records observations (i.e., they read appellate court decisions), (ii) compares them analogically to aggregate the similar and segregate the dissimilar, and finally (iii) arranges the categories into a mental framework that we call the Law of Contracts.

C. THE UNIFORM SALES ACT (1906). The Uniform Sales Act, drafted by Harvard Law Professor Samuel Williston, was a project of the NCCUSL. The Uniform Sales Act was largely modeled on the English Sale of Goods Act of 1893, with variations to reflect American case law. The Uniform Sales Act applied to the sale of goods. Section 1. The Uniform Sales Act was conceptually based on title (called "the property in the goods"). That is, many of the parties' rights and duties were determined by when title transferred from the seller to the buyer, and consequently by who owned title to the goods at the critical juncture (such the moment when the goods were destroyed). The Uniform Sales Act did not free the law of sales from its roots in property law.[392] Nonetheless, it did standardize practices around a norm, and between 1906 and 1947, the Uniform Sales Act was adopted in 34 states, not including Texas. The failure of the Uniform Sales Act to achieve nationwide acceptance, its over-dependence on the property concept of title,[393] and its obselescence due to the passage of time, resulted in its replacement by Article 2 of the Uniform Commercial Code. While the Uniform Sales Act was the precursor to Article 2 of the U.C.C., the principles used in drafting Article 2 of the U.C.C. were very different, as explained below. See Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 Yale L. J. 1341 (1948) (written after an early working draft of Title 2 of the Uniform Commercial Code had been disseminated).

D. THE RESTATEMENT (FIRST) OF THE LAW OF CONTRACTS (1932). The creation of the Restatement (First) of the Law of Contracts (1932) was a ten-year effort, spearheaded by Harvard Law Professor Williston. His collaborator Arthur L. Corbin wrote that Williston, Corbin and Professor George J. Thompson had about four conferences a year from 1922 to 1932, some a week in length, in the summer on the coast of Maine and in winter near Pinehurst, N.C., during which the Restatement was written. [394] The Restatement (First) of Contracts (1932) contains 609 sections, each containing a tersely-stated rule of law, followed by a comment that often contains hypothetical fact situations in which the rule in the section is applied. While the Restatement (First) of Contracts was not designed to make new law, it did have to choose between conflicting decisions from different states, and the Restatement would sometimes identify a majority rule and minority rules or even the "better" rule. What the Restatement (First) of Contracts lacked by way of commentary and case citations could be gotten from the Reporter's treatise, Williston on Contracts. The Restatement (First) of the Law of Contracts has been cited many times by the Texas Supreme Court.

Additional reading:

- Arthur L. Corbin, *Some Problems in the Restatement of the Law of Contracts*, 14 A.B.A. J. 652 (1928).

E. THE UNIFORM COMMERCIAL CODE (1952).

1. The Idea of Creating a Uniform Code. Prior to the U.C.C., the NCCUSL had issued seven commercial statutes[395] that had been adopted by various states.[396] These acts were prepared one-by-one, by different writers at different times, and thus were not always consistent.[397] Nor was coverage of the many facets of commercial law complete. Also, court decisions under the uniform acts were not all in agreement on the meaning and application of the acts. And by the 1940s, some of the uniform acts were outdated,[398] and did not reflect contemporary commercial practices.[399] A uniform code for commercial practices in America was first suggested by the president of the NCCUSL in 1940.[400] His suggestion was a new code that would revise existing acts and expand coverage into other areas of commercial law.[401] In 1942, the American Law Institute agreed to join in with the NCCUSL to prepare a Uniform Commercial Code.[402]

2. The Creation of the Code. The drafting of the U.C.C. began in 1945, under the supervision of an Editorial Board chaired by a Justice from the Third Circuit U.S. Court of Appeals.[403] Professor Karl N. Llewellyn of Columbia Law School was Chief Reporter, and Llewellyn's wife Professor Soia Mentschikoff of Harvard Law School was Associate Chief Reporter.[404] Philadelphia lawyer William A. Schnader is credited with the idea of the U.C.C. and lobbied along with Karl Llewellyn for the U.C.C. Schnader is known as the "Father of the Uniform Commercial Code."[405] Final editorial responsibility rested with Professor Robert Braucher of the University of Wisconsin Law School.[406] Professor Braucher was chair of the subcommittee that handled Article 2 governing sales.[407] The only Texans named as contributors were Harvard Law-educated Baker and Botts lawyer Dillon Anderson, and U.S. Fifth Circuit Justice Joseph C. Hutcheson, Jr.[408] The NCCUSL and ALI approved a definitive text in 1951, which that same year was endorsed by the House of Delegates of the American Bar Association.[409] The text with edits was completed in 1952, whereupon the U.C.C. was released to the public. The U.C.C. was introduced in eight state legislatures, but Pennsylvania was the only state to adopt the 1952 version of the Code,[410] which it did in 1953.[411] Further adoption of the 1952 version of the U.C.C. was derailed in New York, which sent the proposed Code to a commission for review.[412] Criticism of the 1952 version of the U.C.C. came from many quarters.[413] The Editorial Board for the Uniform Commercial Code accommodated the criticisms engendered by their initial effort, and issued new text in 1958.[414] The revision process finally culminated in the release of a revised U.C.C. in 1962.[415]

The 1962 version of the U.C.C. was adopted by the Texas Legislature effective July 1, 1966,[416] and is now set out in the Texas Business and Commerce Code.

3. Legal Realism's Affect on the U.C.C. While the drafting of the U.C.C. involved many persons, Professor Karl N. Llewellyn was the principal intellectual force that shaped the U.C.C.[417] Llewellyn was a Legal Realist, and his approach to the problem of drafting a uniform law for commercial transactions is reflective of that philosophy. To begin with, Llewellyn envisioned a code, not an act. Implicit in the idea of a code was an enactment of law that is selective, comprehensive, and unified[418]: selective in that *only* leading rules are included; comprehensive in that *all* the leading rules are included;[419] unified in that all provisions of the code are consistent with each other. However, uniformity requires more than just uniform statutory language. It also requires uniformity in interpretation by courts applying those statutes to individual cases. Stated differently, a uniform law should have reliability, meaning consistency in application, where different courts applying the law to the same set of facts will arrive at the same result.[420]

In Llewellyn's view, the standard Common Law approach to business transactions was undesirable because it focused exclusively, or at least excessively, on preconceived legal doctrine and abstract ideas.[421] Llewellyn believed that lawyers and businessmen had fundamentally different ideas about the creation and enforcement of contracts.[422] The existing law envisioned contracts as calling for a single, fixed performance exactly as described in the contract.[423] Businessmen, Llewellyn believed, viewed contracts as flexible, and as having a range of satisfactory performances.[424] In Llewellyn's view, requiring that the outcome of commercial disputes be determined by fixed rules, perhaps centuries old, instead of current commercial practices, made the existing commercial law irrelevant and useless.[425]

Llewellyn also rejected the Uniform Sales Act's idea that title to the goods should determine the parties' rights and duties. He thought that the use of the single concept of title was too blunt an instrument to achieve the goals of a modern law of business transactions.[426] Instead, the law needed to focus on particular kinds of transactions, and develop rules that were suited to that kind of transaction.[427]

In constructing the U.C.C., Llewellyn attempted to create a statute that would give judges the flexibility to arrive at a just result without having to distort the law or mischaracterize the facts.[428] Llewellyn did this in four ways: (i) by adopting open-ended standards instead of bright-line[429] rules; (ii) by avoiding formalities as a way of determining contractual rights and duties; (iii) by encouraging courts to engage in "purposive interpretation" of the U.C.C. instead of a textualist approach; and (iv) by making the U.C.C. non-exclusive by allowing the Common Law of Contracts to continue to operate as the background for the U.C.C.[430]

As to standards, Article 2 on sales uses the reasonableness standard in connection with good faith, the requirement of a writing, firm offer, contract formation, battle of the forms,[431] contract interpretation, modification of terms, and in many other instances.[432] This use of standards was an effort to allow the business community to develop commercial norms, and to change them over time, and to have the parties' legal rights and duties judged by these evolving norms.[433]

The U.C.C.'s avoidance of formalities is exemplified by the rejection of the traditional requirement of offer-and-acceptance in the creation of a contract in Section 2-204(1), which says: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[434] The U.C.C. also created exceptions to the statute of frauds (U.C.C. § 2-201(2)-(3)), the parol evidence rule (U.C.C. § 2-202(a)-(b)), and it made seals inoperative (U.C.C. § 2-203).[435] The de-emphasis on formalities also was manifested in Article 9, which combined the previously-distinct liens, collateral, and pledges into one category called "security interests," which were then treated in a uniform way.[436]

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

> (2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
> (c) to make uniform the law among the various jurisdictions.

To assist in this purposive interpretation, the drafters included "official comments" for every section of the U.C.C.[437] In a few instances, the purpose of a provision was embedded in the statutory language itself, as in Section 4-107, which allows banks to close before the end of the business day "[f]or the purpose of allowing time to process items, prove balances, and make the necessary entries . . . ."[438] By this approach, judges were invited to apply the U.C.C. in a way that best accomplished its purposes, rather than in a formalistic manner. Llewellyn felt that cases falling on the borderline between categories were inevitable, as were cases that were not contemplated by the Code's drafters,[439] and that the best way to resolve these problem cases was to inform the judges of the goals to be achieved so that they could adapt the rules and standards to achieve the result that would have been

intended had the case been contemplated when the statute was drafted.

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

> § 1-103. Supplementary General Principles of Law Applicable.
>
> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, Bankruptcy, or other validating or invalidating cause shall supplement its provisions.

This provision has been called "the most important single provision in the Code."[440] Professor Grant Gilmore, the Reporter for Article 9, said that the U.C.C. "assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to least possible extent, and without which it could not survive."[441] Assistant Professor Gregory E. Maggs pointed out that Article 2, which governs sales of merchandise, says very little about basic contract doctrines, does not define consideration, does not address mistake, and does not address conditions.[442] Article 3 says when holders of negotiable instruments take them subject to defenses, but the defenses are not defined, and issues of infancy, lack of consideration, and mistake are left to the Common Law.[443]

In substance, then, the U.C.C. generally, and Article 2 in particular, can be seen as effort to get the best of both worlds: securing the benefit of a uniform law that standardizes commercial practices, while allowing courts the flexibility to achieve justice in the individual cases.[444]

A separate observation is necessary with regard to remedies for breach of contract under the U.C.C. Throughout the Code the remedies are designed to make the injured party "whole."[445] However, Section 1-106(1) provides:

> § 1-106. Remedies to Be Liberally Administered.
>
> (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

By awarding damages based on the benefit of the bargain while ruling out consequential damages, the U.C.C. afforded as much compensation as it could while still avoiding the uncertainties of proving causation of consequential damages and measuring lost profits, tasks that would be difficult to assess before entering into a contract, and tasks that would expand the damage phase of a contract suit far beyond the face of the contract. Since the promisor under the UCC does not automatically undertake the risk of consequential damages, that risk does need to be included in the contract price–unless the parties expressly contract for that risk to be assumed by the promisor. In this way, the contract price includes only the economic value of the contractual benefit given, and insuring against consequential damages remains with the promisee unless it is bargained for separately, or is covered by an agreement with a third party. The U.C.C.'s approach to assessing damages is also distinguished from an approach that would set damages with an eye toward its effect on the behavior of others, in the way that exemplary damages do in tort law. The drafters of the U.C.C. were sensitive to the effect the scope of damages might have on the availability and the cost of transactions.[446]

4. Texas' Adoption of the U.C.C. The version of the U.C.C. adopted into Texas law in 1966 was the 1962 version of the Code.[447] In adopting the Code, the Texas Legislature made certain elections offered in the uniform act, and in some instances deviated from the uniform act. These elections and deviations are detailed in University of Texas School of Law Professor Millard H. Ruud's *The Texas Legislative History of the Uniform Commercial Code*, 55 Tex. L. Rev. 597 (1966).[448] The only deviation in Article II, relating to sales, is the deletion of proposed Section 2.318, which would have extended the seller's warranties to guests in the buyer's home and members of his family or household. An implied warranty for food and beverages, extending to manufacturers, had already been introduced into Texas law in the case of *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 620, 164 S.W.2d 828 (1942) (Alexander, C.J.). See Section XX.B.2.h of this Article. So the Supreme Court had already engaged in expanding the Commercial Law of Warranty. The Board of Directors of the State Bar of Texas recommended against adopting Section 2.318, out of concern that the section might imperil the adoption of the U.C.C.[449] A comment included in Business and Commerce Code Section 2-318 clarified that the Legislature intended to leave the scope of seller's warranties to common law development.[450] The remainder of the elections and deviations do not touch directly on the basic Contract Law and are not covered in this discussion.

5. Uniform Commercial Code Amendments. The 1962 version of the U.C.C. has undergone a significant number of alterations since it was initially released. Article 9 was revised in 1972.[451] Article 8 was revised in 1977.[452] Articles 3, 4, 5, 6, and 8 have also been revised.[453] Assistant Professor Gregory E. Maggs covered, in his article called Karl Llewellyn's *Fading Impact on the Jurisprudence of the Uniform Commercial Code*,[454] the degree to which the amendments and additions to the 1962 version of the U.C.C. have drifted away from Karl Llewellyn's Legal Realist vision. The trend has been to move away from

standards and toward rules,[455] and to introduce formalities in the creation of duties.[456] The drift toward rules also shrinks the role of purposive interpretation under the 1962 version of the Code, and new Articles 2A and 4A, as well as revised Articles 3, 4, 5, 6, and 8 have few provisions that expressly set out the purpose of the provision.[457] In particular, the official comment to Article 4A-102 states that the rules regarding electronic funds transfers were based on the need to predict risk with certainty, in order to make adjustments to operational and security procedures, and to price funds transfers appropriately.[458] The policy of excluding consequential damages, except where they have been specifically contracted for, continues.[459] Professor Maggs also notes that courts appear to be taking a "textualist approach in commercial cases."[460]

The NCCUSL approved amendments to Article 2 the U.C.C. in 2003. The historical details, and the difficulties in the process of drafting these amendments, is described in George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 Texas Tech L. Rev. 235 (2009). One area of disagreement was whether Article 2 should be expanded beyond "goods" to include "information," and particularly licenses for software. Id. at 260-286.

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

F. THE RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981). The ALI began the task of preparing a second Restatement on the Law of Contracts in 1962. Robert Braucher served as the Reporter on the Restatement (Second) of Contracts until 1971, when he was appointed to the Massachusetts Supreme Judicial Court, at which point Law Professor E. Allen Farnsworth became the Reporter.[461] The project was completed in 1979. The Restatement (Second) was like the U.C.C. in adopting many standards in lieu of rules. The Restatement (Second) of Contracts contains 385 sections, making it shorter than the Restatement (First). Each section of the Restatement (Second) contains official Reporter's Notes, listing cases, to augment the official comments and illustrations. Professor Gregory E. Maggs, of George Washington University Law School, published an analysis of the two restatements. Gregory E. Maggs, *Ipse Dixit*: *The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508 (1998). Maggs characterized the Restatement (First) as trying to clarify the law without changing it.[462] Maggs characterized the Restatement (Second) as frequently ignoring prevailing rules and instead setting out rules that the draftsmen and the ALI thought were preferable, supported by citation to scholarly writing.[463] Maggs noted several sections where the Restatement (Second) varied from traditional contract law doctrine. As an example, Section 86 deals with the ability to revoke an offer. Traditional Contract Law treats an offer as revocable unless consideration is given to make the offer non-revocable. Section 87(2) permits the court to bind the offeror to his offer to the extent necessary to avoid injustice, if the offeror should reasonably expect the offer to induce reliance and the offeree does rely on the offer, This extends the use of reliance as a substitute for consideration, not only for promises covered in Section 90, but for mere offers.[464]

G. THE U.N. CONVENTION ON INTERNATIONAL SALE OF GOODS (1980). The United Nations Convention on the International Sale of Goods ("CISG")[465] became effective in the United States on January 1, 1988.[466] Like U.C.C. Article 2, it applies to the sale of goods, only on an international scale. Unlike the U.C.C., the CISG does not apply to consumer transactions.[467] The CISG also does not apply to auctions, sale by execution, investment securities, negotiable instruments, ships and aircraft, and electricity.[468] The CISG is a treaty with more than sixty signatories. The U.S. has subscribed to it, so it is part of the supreme law of the land and preempts state law to the contrary.

The CISG says that it governs only the formation of contracts, not the validity or effect of them.[469] CISG Article 8 says that statements or conduct are to be interpreted according to the party's actual intent, if that is known to the other party, or if the other party could not have been unaware of the intent. If that principle does not apply, then according to Article 8(1) & (2), statements and conduct are to be interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Under Article 8(3), in determining what a reasonable person would understand, due consideration must be given to "all relevant circumstances" including negotiations, past practices, usages, and subsequent conduct.

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

Article 14 of the CISG defines an offer as a "proposal for concluding a contract addressed to one or more specific persons . . . if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Under Article 15, the offer becomes effective

"when it reaches the offeree." Under Article 16, an offer can be revoked until the offeree has dispatched an acceptance. However, an offer cannot be revoked during any time fixed by the offer for acceptance, or where the offeree reasonably relied on the offer being irrevocable. Under Article 17, an offer is terminated when a rejection reaches the offeror. Under Article 18, an acceptance is a statement or other conduct by the offeree "indicating assent to an offer." An acceptance becomes effective upon receipt by the offeror, provided the offer has not expired. Thus, the CISG reverses the ordinary "mailbox rule." See Section XV.C.6 of this Article. Past practices can vary how assent may be accomplished. Under Article 19, a reply to an offer that contains "additions, limitations or other modifications" is a rejection and constitutes a counteroffer. However, that rule applies only to changes that materially alter the terms of the offer. For changes that do not materially alter the offer, the changes become part of the agreement unless the offeror rejects them without undue delay. See discussion of the "battle of the forms" in Section XV.C.8 of this Article.

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

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

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

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

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

> 1. The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.
>
> 2. In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.
>
> 3. A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.
>
> However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.[470]

In one case, the Fifth Circuit Court of Appeals held that Texas' parol evidence rule applied despite the CISG, while in another case the Eleventh Circuit Court of Appeals held that the CISG preempted state law, and thus declined to apply the parol evidence rule. See McQuillen, at 521-23; Note, The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods, 28 Hofstra L. Rev. 799 (2000). Several federal district courts have recognized preemption of the parol evidence rule by the CISG. McQuillen, at 521-23.

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

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

XIII. CONSTITUTIONAL PROTECTION OF CONTRACTS. Both the United States Constitution and the Texas Constitution contain restraints on the government's power to affect contracts. However, the explicit restraints are on the state legislatures, not the United States Congress. In considering these issues it is important to distinguish between a party's freedom to enter into a contract, which is not explicitly protected, and a party's right to enforce an existing contract, which is explicitly protected against state action.

A. THE U.S. CONSTITUTION'S PROTECTION OF CONTRACTS. The U.S. Constitution's protection of contracts developed from the specific concerns of the country's founders into a broad-based principle used by state and federal courts to declare state legislation invalid. Early cases on the subject were fairly intolerant of state laws impairing the obligation of contracts, but over time the U.S. Supreme Court has given the states greater latitude to legislate in ways that impair contractual rights to a degree, or for important reasons. Today, the U.S. Constitution's Contract Clause is rarely invoked to invalidate state statutes.

1. The Northwest Ordinance of 1787. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio ("the Northwest Ordinance") was adopted by the Second Confederation Congress on July 13, 1787.[471] The Ordinance declared certain rights for settlers who lived in or moved to the Northwest Territory (present day Ohio, Indiana, Illinois, Michigan, and Minnesota) and set up an administrative framework to govern the area until the area could be admitted to the Union. In Section 14, Article 2, the Ordinance proclaimed:

> . . . it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.[472]

It is noteworthy that protection was afforded only to contracts that were (i) private, (ii) previously formed, and (iii) formed bona fide and without fraud.

The Northwest Ordinance was enacted while the Constitutional Convention was meeting in Philadelphia. Vanderbilt University Law School Professor James W. Ely, Jr. has studied the question and suggests that the impetus for the prohibition against impairing contracts was a spate of state-adopted debt-relief laws that stayed the collection of debts, allowed payments in installments, and allowed the repayment of debts in commodities or inflated paper money instead of coin.

2. The Constitutional Convention. Delegates from 12 of the 13 states (Rhode Island did not send representatives) of the Confederacy of the United States of America met in Philadelphia, Pennsylvania, from May 25, 1787, to September 17, 1787, and drafted what became the Constitution of the United States of America. Virginia delegate James Madison took notes of the proceedings. The United States government purchased these notes from Dolly Madison, after James Madison's death, for $30,000.00, and the notes, published in 1840, four years after Madison's death, represent the most complete day-by-day record we have of the proceedings.

a. Prohibition on the Federal Congress. The freedom to enter into contracts received no attention, and the impairment of the obligation of contracts received scant attention, from the Constitutional Convention in Philadelphia. According to Madison's report of the Convention, on August 22, 1787, Massachusetts delegate Elbridge Gerry and Maryland delegate James McHenry moved to include in the Constitution a clause providing that "The Legislature shall pass no bill of attainder nor any ex post facto law." The proposed restraint was to apply to the Federal Congress, not state legislatures. Gerry argued that such a constraint was needed more on the Federal Congress than the state legislatures, "because the number of members in the former being fewer were on that account the more to be feared."[473] Gouverneur Morris of Pennsylvania argued that the precaution against ex post facto laws was unnecessary, but the bar against bills of attainder[474] was essential.[475] Oliver Ellsworth[476] of Connecticut argued that no prohibition against ex post facto law was needed because "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves."[477] James Wilson of Pennsylvania argued against including a provision on ex post facto laws since it would suggest that the delegates "are ignorant of the first principles of Legislation."[478] A vote was taken and the bar against bills of attainder passed with no opposition ("nem. contradicente").[479] The debate continued as to ex post facto laws. Daniel Carroll of Maryland noted that state legislatures had in fact passed ex post facto laws.[480] James Wilson of Pennsylvania argued that a federal ban would be no more effective than state constitutional bans had been, and that disagreements would arise in its application.[481] Hugh Williamson of North Carolina said that such a prohibitory clause in the South Carolina constitution had had beneficial effect and "may do good here, because Judges can take hold of it."[482] William Johnson of Connecticut argued that the clause was unnecessary and implied "an improper suspicion of the National Legislature."[483] John Rutledge of South Carolina spoke in favor of the clause.[484] A vote was taken, and the ban on ex post facto laws was supported by New Hampshire, Massachusetts, Delaware, Maryland, Virginia, South Carolina, and Georgia.[485] It was opposed by Connecticut, New Jersey, and Pennsylvania, and the North Carolina delegation was

divided.[486] Thus, on August 22, 1787, the Convention voted to prohibit the Federal Congress from passing bills of attainder and ex post facto laws.

b. Prohibitions on State Legislatures. Prohibitions on state legislatures were discussed on August 28, 1787, when Rufus King of Massachusetts moved the addition of "a prohibition on the States to interfere in private contracts," based on the words used in the Ordinance of Congress [Northwest Ordinance of 1787] establishing new states.[487] Gouverneur Morris of Pennsylvania objected that this was going too far. He said that "[t]here are a thousand laws, relating to bringing actions–limitations of action etc. which affect contracts." He continued: "The Judicial power of the U.S. will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves."[488] Roger Sherman of Connecticut retorted: "Why then prohibit bills of credit?"[489]James Wilson of Pennsylvania supported King's motion.[490] James Madison, of Virginia, said that "inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it."[491] George Mason of Virginia argued that "[t]his is carrying restraint too far. Cases will happen that can not be forseen, where some kind of interference will be proper & essential." According to Madison's notes, "He mentioned the case of limiting the period for bringing actions on open account–that of bonds after a certain lapse of time–asking whether it was proper to tie the hands of the States from making provision in such cases?"[492] James Wilson, of Pennsylvania, responded: "The answer to these objections is that *retrospective* interferences only are to be prohibited," meaning that the states would be free to change the law on a prospective basis.[493] Madison asked if that was not already prohibited by the ex post facto bar.[494] Rutledge moved as an alternative to King's motion to insert "nor pass bills of attainder nor restrospective laws."[495] A vote was taken in which Rutledge's amendment was supported by New Hampshire, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia, but opposed by Connecticut, Maryland, and Virginia.[496] The next day, August 29, 1787, Dickinson of Delaware announced that "on examining Blackstone's Commentaries, he found that the term 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite."[497] No one mentioned prohibiting the Federal Congress from passing retrospective laws, even though the vote favoring a ban on ex post facto laws taken August 22, 1787 may well have been intended as such, given the delegates' apparent misconception that a prohibition of ex post facto laws extended to both criminal and civil matters.

c. The Final Draft of the Constitution. The Convention's Committee on Style produced a final draft of the Constitution that was presented for consideration on September 12, 1787.[498] True to the vote on August 22, 1787, the committee's draft constitution, in Article I, Section 9, clause 3, barred the Federal Congress from passing bills of attainder and ex post facto laws, with no mention of retrospective laws or laws impairing contracts. Article I, Section 10, clause 1, contained a prohibition against states passing bills of attainder, ex post facto laws, and "laws altering or impairing the obligation of contracts."[499] Note that the Committee on Style substituted the phrase "laws altering or impairing the obligation of contracts" for the prohibition against "retrospective laws" that had been approved on August 28, 1787. On September 14, 1787, clean up of specific language continued, and George Mason moved to strike the bar against ex post facto laws, saying that the language was not sufficiently clear that the phrase was limited to criminal matters, and that such laws cannot be avoided in civil matters.[500] Elbridge Gerry seconded the motion, but argued the ban should be extended to civil cases.[501] The matter was put to a vote and was unanimously rejected.[502]

Later writers have noted that the Committee on Style introduced a version of the prohibition on state legislatures that was not what had been discussed or previously voted on. Professor Ely cites one author that attributes the final wording to Alexander Hamilton, and another author that attributes the final wording to James Wilson.[503] In any case, the Committee on Style's version became the law of the land.

3. During the Ratification Process. James Wilson, who supported the Contract Clause during the Constitutional Convention, told the Pennsylvania ratification convention that the Article I, Section 10, Clause 1 limitations on state power were sufficient, standing alone, to justify adoption of the Constitution. He made specific reference to Delaware's "tender law" that permitted the payment of debt in depreciated paper currency.[504] Charles Pinckney told the South Carolina ratification convention that Article I, Section 10, Clause 1, was "the soul of the Constitution."[505] In the North Carolina ratification provision, William R. Davie, a delegate to the Philadelphia convention, said: "The clause refers merely to contracts between individuals. That section is the best in the Constitution. It is founded on the strongest principles of justice. It is a section, in short, which I thought would have endeared the Constitution to this country."[506] In the Virginia ratifying convention, anti-federalist Patrick Henry argued: "The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts."[507] Antifederalist Luther Martin, also a delegate to the Philadelphia convention, at the Maryland ratifying convention attacked the restraint on state legislative power, arguing that the people are oppressed with debt and cash is scarce and they are threatened with destruction unless they can be offered relief by the state.[508] In *The Federalist*, No. 44, Madison wrote that "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some."[509] [Emphasis in the original.] Thus, to the extent

the subject was discussed at all in the ratification proceedings, the focus was on the restrictions on state power contained in Article I, Section 10, Clause 1, and not the *absence* of a restraint on the U.S. Congress to enact statues impairing the obligation of contracts.

4. Restraints on Congress vs. Restraints on States. As noted, the U.S. Constitution's explicit restraint on Congressional legislation varies significantly from the corresponding restraint on State legislation.

Article I, Section 9, Clause 3 of the United States Constitution, which applies to the U.S. Congress, says:

> No Bill of Attainder or ex post facto Law shall be passed.

A bill of attainder is a legislative declaration of guilt and a legislative imposition of criminal penalties on an individual without a trial.[510] An ex post facto law is a statute criminalizing noncriminal behavior after it has occurred.[511]

Article I, Section 10, Clause 1 of the United States Constitution says:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility. [Italics added.]

Note that the limitation on state power prohibits a "Law impairing the Obligation of Contracts." The italicized provision in Section 10 is known as the Contract Clause. Again, the United States Constitution's Contract Clause is a restraint only on state governments, not the Federal government.

5. U.S. Court Decisions. The jurisprudence on the Contract Clause began to develop soon after the U. S. Constitution was adopted, and it grew into a powerful tool for Courts to restrain state legislatures.

a. Early Contract Clause Cases. Professor Ely notes, in his article *Origins and Development of the Contract Clause*, a Federal court case called *Champion and Dickason v. Casey* (U.S. 1792). The case was not reported but, according to newspaper accounts, a two-judge federal panel invoked the Contract Clause to overturn a Rhode Island law that preferentially gave Silas Casey a three-year extension on the payment of his debts and immunity from arrest and attachment.[512] Professor Ely also notes that James Wilson, who was a Pennsylvania delegate to the Philadelphia convention and was appointed to the U.S. Supreme Court in 1789, issued an opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793), a case involving a claim for goods supplied to Georgia during the Revolutionary War, where he stated that the Supreme Court's jurisdiction to question the constitutionality of state laws was implicit in the Contract Clause prohibition against states passing laws impairing the obligation of contracts.[513] Professor Ely discusses federal Justice William Paterson's extended trial court-level directed verdict in *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dallas) 304 (1795) (Paterson, J.), given historical significance by its verbatim inclusion in the Dallas Reporter, which found a Pennsylvania statute revoking a land grant to violate the Ex Post Facto Clause and the Contract Clause of the U.S. Constitution. Paterson was a Pennsylvania delegate to the Philadelphia convention.

Fletcher v. Peck. In 1810, Chief Justice John Marshall wrote the Supreme Court's opinion in *Fletcher v. Peck*, 10 U.S. 87 (1810), the first case in which the Supreme Court declared a state statute invalid under the Contract Clause. The Court applied the Contract Clause to a state's grant of ownership interests in land. The case arose out of the Yazoo Land Scandal, where the legislature of Georgia conveyed to four land companies much of what is now Alabama and Mississippi for below-market prices. It became known that the land grants were procured by bribery, and the legislators were turned out in the next election, whereupon the land grants were revoked by the subsequent legislature. Meanwhile the land companies sold the land to speculators, who resold the land, etc. One of the speculators, John Peck, sold the land to Robert Fletcher. When the original grant was rescinded, Fletcher sued Peck for damages, claiming that the title was invalid. There are many indications that the suit was pretextual, including: the fact that suit was brought in Massachusetts and not Georgia, the state which made the original grant; the fact that the suit was not between opposing claimants to the same land but rather was brought by the buyer against his seller such that both adversaries wanted the same result (i.e., a declaration that title was good); the fact that the U.S. Supreme Court first disposed of the case on pleading deficiencies, but the parties agreed to amend their pleadings and the case was then decided on the merits; and Justice Johnson's belief that the cause bore "strong evidence, upon the face of it, of being a mere feigned case." *Id.* at 147-48.

Chief Justice Marshall, one might argue, stepped briskly through the pleading infirmities and the possible lack of a true controversy, too-easily dispatched the rights of Native Americans (who were not parties to the case) to the land under their control, and considered a completed land transfer as an executory contract, all to allow the Court to invalidate a state statute under the Contract Clause. In doing so, the Court realized Patrick Henry's fear that the Contract Clause applied not just to private contracts (between persons) but also to public contracts (between a state and a person). But the application of the Contract Clause to public contracts is not the only significant aspect of the case. *Fletcher v. Peck* also elevated protecting the contract rights acquired by a bona fide purchaser for value (BFP) over the principle that fraud in the original transaction vitiates its validity. In other words, the case indicates that the assignee of contract rights can enforce the contract even if his assignor could not. This was

decided in a case where the bona fides of the assignor and assignee were never tested, because the case was decided on the pleadings not the facts proven, and where the bona fides of the original transaction was never contested because the suit was between an assignor and an assignee, both of whom wanted the contract to be enforced. The BFP rule is discussed in Section XXXIII.E below.

As an historical note, a Georgia senator who headed one of the four land companies secured a legal opinion from Alexander Hamilton, a New York delegate to the Philadelphia Convention, as to the validity of their title. In his legal opinion, Hamilton invoked natural law to protect the rights of third parties who were innocent of the fraud that tainted the original grant, and went on to suggest that the Contract Clause applied to the original land grants, under the theory that the conveyances by the State of Georgia constituted "virtual" contracts that the grantees would have secure title as against the grantor and persons claiming through the grantor.[514] Chief Justice Marshall's opinion seems to reflect some of Hamilton's perspectives. Another historical note: in the Supreme Court, Robert Fletcher was represented by Luther Martin, and John Peck was represented by John Quincy Adams and Joseph Story.

New Jersey v. Wilson. In *New Jersey v. Wilson*, 11 U.S. 164 7 Cranch 164 (1812) (Marshall, C.J.). The court considered a claim that certain land in New Jersey was not subject to tax, on account of the fact that the colony of New Jersey had entered a pact with the Delaware Indians that they could live on that land, tax free, and the colony would receive the rest of the land claimed by the Indians. The Indians lived on the tract until 1801, when they secured the permission of the state of New Jersey to sell the land and move to New York. The Indian land was sold, and assignees of that land claimed immunity from New Jersey tax. The Court held that the Contract Clause prohibits New Jersey from imposing a tax on the land, since the agreement between the Indians and the Colony was a contract, and a state law imposing a tax would violate the U.S. Constitution's Contract Clause. Chief Justice Marshall said: "It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it." 11 U.S. at 167.

Sturges v. Crowninshield. In *Sturges v. Crowninshield*, (4 Wheat) 17 U.S. 122 (1819) (Marshall, C.J.), the Supreme Court held that a New York bankruptcy law discharging debtors from paying their debts was an unconstitutional impairment of a contractual obligation.

The Dartmouth College Case. In *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) (Marshall, C.J.), the Supreme Court held that the Contract Clause prohibited the State of New Hampshire from stripping the College's board of trustees of management authority in derogation of a charter granted to the College by King George III of Great Britain. The case was argued on behalf of Dartmouth College by celebrated lawyer and statesman Daniel Webster, himself a graduate of Dartmouth College.[515] In his Opinion, Chief Justice Marshall applied the Contract Clause to public contracts (i.e., contracts with a state). Some later writers have asserted that there was no basis for applying the Contract Clause to public contracts.[516] Professor Ely has developed the opposite view. [517]

Ogden v. Saunders. The case of *Ogden v. Saunders*, 25 U.S. 213 (1827), was decided in two stages. In the first stage, the Supreme Court, with Chief Justice Marshall and Justice Story dissenting, held that the Contract Clause did not apply to a contract not yet formed as of the date the statute became effective. In the view of the Majority of the first stage of the case, parties who enter into a contract do so in the context of the laws then in place. Chief Justice Marshall took the position that the Contract Clause prohibited states from interfering in advance with future contract, and that states are free to affect the remedies for breach of contract, but not free to limit the substance of contracts, even future contracts. In a second phase of the case, Chief Justice Marshall and Justice Story were in a majority that held that a discharge of a debtor in state bankruptcy in one state did not affect the enforceability in another state of a contract signed by the debtor.

The Charles River Bridge Case. In *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 1837 WL 3561 (1837) (Taney, C.J.), Chief Justice Taney, in his first opinion for the Court on a constitutional issue, omitted any reference to natural law[518] and instead reduced the question to whether the state of Massachusetts, when it granted a corporate charter for the construction of a toll bridge, with the right to collect tolls for a period eventually extended to seventy years, impliedly promised not to authorize a competing bridge. Forty-three years later, the State in fact authorized a second bridge, to be built next to the first, with the proviso that it would become toll-free in six years. Taney's Opinion invoked a principle that public grants should be construed in favor of the public, and that, since no express right to exclusivity was stated in the grant, the State was free to do what it did. Taney thus applied a purely contractual analysis to the question.

b. Eminent Domain. In *West River Bridge Co. v. Dix,* 47 U.S. 507 (1848) (Daniel, J.), the Supreme Court ruled that a state could use its power of eminent domain to condemn a toll bridge operated by a corporation in order to make the bridge toll-free. Several Opinions were written by members of the Court. Justice Daniel rested his Opinion on the view that all contracts are subordinate to "the laws of nature, of nations, or of the community to which the parties belong," which include the power of eminent domain. *Id*. at 532-33. Justice McLean rested his Opinion on the view that the property condemned was the bridge, and not the

corporate franchise, which was the contract right protected by the Contract Clause. *Id*. at 536. Justice Woodbury rested his Opinion on sovereignty, necessity, and implied compact. *Id*. at 539-40. He noted, however, that governments could specifically agree to exempt a corporation or other property from a sovereign power, such as taxation, in which event they would be bound to their agreement. *Id*. at 544.

c. The Exercise of Police Power. In *Stone v. Mississippi*, 101 U.S. 814 (1880) (Waite, C.J.), the Court held that the Contract Clause did not prohibit states from legislating to protect public health, safety, and morality. In *United States Trust v. New Jersey*, 431 U.S. 1 (1977) (Blackmun, J.), the Supreme Court held that state laws would not violate the Contract Clause if they were "reasonable and necessary to serve an important public purpose." *Id.* at 25-26. However, when a state is abrogating its own contractual obligation, special scrutiny by the courts is required. *Id*. at 26-32.

d. Altering Remedies. In *Bronson v. Kinzie*, 42 U.S. 311 (1843) (Taney, C.J.), the Court recognized that states may change remedies as to past contracts as well as future ones, including altering limitation periods or specifying items exempt from creditors' claims. *Id.* at 315-16. But a state may not eliminate all remedy, or seriously impair available remedies. *Id*. at 316-17. In *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (Hughes, C.J.), decided in the dark days of the Great Depression, the Supreme Court ruled that a Minnesota law temporarily extending the time for paying farm and home mortgages did not violate the Contract Clause because it altered only the remedy without impairing the underlying contractual obligation.

In *McCraken v. Hayward*, 43 U.S. 608 (1844) (Baldwin, J.), the Court invalidated an Illinois statute, adopted after a judgment was taken against a debtor, that prohibited foreclosure sales for less than two-thirds of a value set by three householders of the same county. The statute was held to be a violation of the Contract Clause.

6. The Ebb and Flow of Contract Clause Decisions. At the time of the Constitutional Convention and during the ratification process, the focus of the debate was whether it would be good or bad to restrain state legislatures from enacting debtor-relief laws that affect creditor's ability to collect debts. However, both before and during Chief Justice Marshall's tenure, the Contract Clause was applied to legislative land grants, tax exemptions, corporate charters, agreements between states, and state bankruptcy laws.[519] Thus, the Marshall Court's activities in broadening the scope of the Contract Clause to include many "rights" that were not traditionally conceived as contract rights, had a profound effect in strengthening Contract Law as against the political power of state legislatures, and thus providing a more stable base for long-term contractual relationships. Professor Ely and others have observed that the Contract Clause was the primary means by which the U.S. Supreme Court invalidated state laws in the Nineteenth Century.[520] Ely quotes Chief Justice Salmon P. Chase as saying, in 1870, that the Contract Clause was "that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice . . . ."[521] Ely also quotes Justice William Strong, in *Murray v. City of Charleston*, 96 U.S. 432, 448 (1877), as saying: "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away."[522] The Contract Clause has since faded in significance. The current law on the Contract Clause was stated in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983) (Blackmun, J.), where the Supreme Court announced a three-prong test for compliance with the Contract Clause: first, the state law or regulation cannot substantially impair a contractual relationship; second, the state must have "a significant and legitimate purpose" behind the law or regulation, such as "the remedying of a broad and general social or economic problem;" third, the law must be reasonable and appropriate for its intended purpose. *Id*. at 411-13. A higher level of scrutiny is applied when the state modifies its own contractual relations. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (Blackmun, J.). In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (Stephens, J.) the Supreme Court said: "It is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."

Additional Reading:

- James W. Ely, James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904>

B. SUBSTANTIVE DUE PROCESS AS A RESTRAINT ON THE STATES. The Fourteenth Amendment's due process and equal protection clauses are more expansive and flexible vehicles for declaring state laws unenforceable compared to the Contract Clause. The use of the Fourteenth Amendment's due process clause to invalidate state legislation affecting contracts reached its zenith in *Lochner v. New York,* 198 U.S. 45 (1905) (Peckham, J.). In *Lochner*, the Supreme Court declared unconstitutional a New York state law that limited bakers' work days to eight hours. The basis for the Court's decision was the Fourteenth Amendment guarantee of due process of law, in this case "substantive" due process of law. The substantive due process cases striking down Progressive Era legislation were vilified by many, exemplified Harvard Law School Dean Roscoe Pound, who virulently attacked these cases in Pound, *Liberty of Contract*, 18 Yale L. J. 454 (1909). The Court retreated from the *Lochner* line of thinking in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-93 (1937) (Hughes, C.J.), where the Court said:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.
>
> This essential limitation of liberty in general governs freedom of contract in particular.

Substantive due process of law is not dead. *See Troxel v. Granville*, 530 U.S. 57 (2000) (the Court's lead opinion relied on substantive due process of law to invalidate a state statute relating to child visitation rights).

8. Contracts with the Federal Government.[1] In *Cooke v. United States*, 91 U.S. 389 (1875) (Waite, C.J.), the Supreme Court held that the Federal government was contractually bound, like private persons, to the terms of commercial paper issued by the government. In *United States v. Bostwick*, 94 U.S. 65, 66 (1877) (Waite, C.J.), the Supreme Court held, in connection with a lease, that "[t]he United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them." *Id.* at 66. In *Lynch v. United States*, 292 U.S. 571, 579 (1934) (Brandeis, J.), the Supreme Court said: "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Accord*, *Franconia Associates v. United States*, 536 U.S. 129, at 141 (2002) (Ginsberg, J.); (quoting *Mobile Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000). However, the Federal government is free to rescind its contracts; but when it does, it must pay just compensation. *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923) (Sutherland, J.); *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 72-3 (1931) (Sutherland, J.). The Federal government, acting directly or through a corporation, is free to cancel its own contracts, but in doing so the government must pay the other contracting party "'the value of the contract at the time of its cancellation, not what it would have produced by way of profits ... if it had been fully performed").

[1]Richard - what do you want to do with 8? We changed "7" to "B" and "9" to "C" leaving "8" out of place. - d

The U.S. government is a large purchaser of goods and services, and those procurements are subject to a web of federal statutes, regulations and executive orders.[523] In *Federal Crop Ins. Corp v. Merrill*, 332 U.S. 380 (1947) (Frankfurter, J.), the Supreme Court held that an Idaho farmer, who bought insurance from a government-owned corporation, was held to knowledge of applicable Federal regulations even if the government's agent in the transaction misinformed the farmer about the insurance coverage.[524]

C. FEDERAL PREEMPTION. Federal statutes and regulations have preempted state law in some areas of interstate commerce and in other domains (e.g., admiralty and patent law) that are within the scope of Federal power. In those instances, Federal law has supplanted state Contract Law to the extent of a conflict.

D. THE TEXAS CONSTITUTION'S CONTRACT CLAUSES. Texas's current 1876 Constitution, Article I, Section 16, provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made." The provision originated in the 1845 Texas Constitution and has been repeated in the succession of constitutions. *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 138 (Tex. 2010) (Hecht, J.). For purposes of analyzing Texas contract law then, the important parts of Article I, Section 16 are the contract impairment clause and the retroactive law clause.

1. Impairing the Obligation of Contracts. In *Luter v. Hunter*, 30 Tex. 690 (1868) (Hamilton, J.), the Court held that a statute that prohibited a foreclosure sale unless two-thirds of the amount at which the property is appraised is bid, impaired the obligation of the contract. In *Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025 (Tex. 1934) (Cureton, C.J.), the Court held that a 1933 statute was unconstitutional for violating the contract impairment clause of the Texas Constitution, where it purported to reduce a deficiency judgment on a foreclosure by the difference between the true value of the property and the price bid at the sale. The Court quoted from *Von Hoffman v. City of Quincy*, 4 Wall. 535, 5552, 18 L.Ed. 403 (1866), and *Walker v. Whitehead*, 83 U.S. 314 (1872).

2. Retroactive Laws. In *Sutherland v. De Leon*, 1 Tex. 250, 1846 WL 3617, *34 (1846), Justice Lipscomb gave the following description of a retroactive law:

> [R]etrospection, within the meaning of the constitution, would be to give a right where none before existed, and by relation back, to give the party the benefit of it; if, however, the right already existed, it would be in the power of the legislature to devise and provide a remedy. This seems to be a fair construction of that part of the constitution that prohibits the passage of retrospective laws, if applicable to civil cases.

In *Mills v. Waller*, Dallam 416, 419 (1841) (Hemphill, C.J.), the Court wrote: "[T]he rights of the parties arose under the laws in forces at the time of the execution of this instrument; that they are controlled and established by these laws, and not by subsequent acts of legislation." In *Scott v. Maynard*, Dallam 548 (1843) (Hemphill, C.J.), the Court held that contracts antedating the adoption of the Common Law are governed by Spanish law at the time of contracting.

In *DeCordova v. City of Galveston*, 4 Tex. 470, 475–476 (1849) (Hemphill, C.J.), the Court considered notes signed during a period of time when no statute of limitations was in force. The Court held that a statute of limitations changing the limitation period to enforce a contract did not impair the obligation of contracts because the change affected only procedure. The Court also held that retroactive application of the statute of limitations to a contract signed before its effective date did not violate the retroactive law provision of the Texas Constitution.

In *Hamilton v. Avery*, 20 Tex. 612 (1857) (Roberts, J.), the Court inferred that a statute relating to land patents was not intended by the Legislature to adversely affect certificates for surveyed land that had not yet been recognized by a land patent.

In *Bender v. Crawford*, 33 Tex. 745, (1870) (Walker, J.), the Court held that Art. 12, Section 43, of Texas' 1869 Constitution, which established a new statute of limitations for all claims that expired during the Civil War, was within the rights of the people of Texas, and further did not violate the U.S. Constitution's Contract Clause because it only affected the remedy and not the obligation of contracts

In *Wilson v. Work*, 122 Tex. 545, 62 S.W.2d 490, 490 (1933) (per curiam), the Court held that where limitations has expired, the defendant has a vested right in the defense, and it cannot be taken away by a subsequent statute. The Supreme Court reiterated in *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1 (Tex. 1999) (Hecht, J.), that, "after a cause has become barred by the statute of limitation, the defendant has a vested right to rely on such statute as a defense."

The use of vesting as the standard for rights that are protected may no longer be viable from the property right perspetive. In *Cearley v. Cearley*, 544 S.W2d 661 (Tex. 1976) (Daniel, J.), the Supreme Court held that one spouse's community property interest in the other spouse's pension is a recognized property right even before the pension is vested. Thus, persons in Texas can have property rights in claims that are not vested, and it would seem that these unvested rights would be protected against retroactive laws.

In *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 633-34 (Tex. 1996) (Abbott, J.), the Court held that even vested rights could be divested based on police power. In *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 145-46 (Tex. 2010) (Hecht, J.), the Court moved away from its old vesting test, and substituted a three-prong test for when police power could justify a retroactive law that removed vested rights: " the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." The Court said that allowing such an impairment would require a compelling state interest.

In *Beck v. Beck*, 814 S.W.2d 745, 747 (Tex. 1991) (Cornyn, J.), the Court held that a constitutional amendment can impliedly validate a statute that was previously unconstitutional, thereby validating actions taken in reliance on the statute.

3. Remedies for Breach of Contract Can Be Changed. In *Austin v. W.C. White & Co.*, Dallam 434, 435 (1841) (Hutchinson, J.), the Court said:

> It was competent for congress to alter the remedy, as was done by the act of 1840, prescribing 20 instead of 30 days' notice for an execution sale. The clause in the constitution referred to in the bill is in no degree invaded or violated. The laws of the land, existing at the date of a contract, do not enter into the contract, so as to form portion and essence of it, but will be the criterion to define its scope and obligation. Its obligation is to do or forbear according to the engagement or stipulation. The remedy to redress a breach of it in force at its date may be altered or modified according to the will of the legislature; so that a full remedy of some sort be provided. This doctrine is so well established as to render a reference to authority superfluous.

In *DeCordova v. The City of Galveston*, 4 Tex. 470, 1849 WL 4050, *3 (1849) (Hemphill, C.J.), the Court wrote:

> A distinction has always been taken between the obligation of a contract and the remedy for its enforcement; and it has never been doubted but that the Legislature may vary "the nature and extent of the remedy, so that some substantial remedy be in fact left." A State may at pleasure regulate the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations, or exempt the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, from execution. "Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity," and as not impairing the obligation of the contract.

In *Worsham v. Stevens*, 66 Tex. 89, 90-91, 17 S.W. 404, 404 (Tex. 1886) (Robertson, J.), the Court held that a statute, which prohibited a pre-suit waiver of service of process or pre-suit confession of judgment, did not impermissibly impair the contract rights of a lender with a contract permitting such actions. The Court held that the rights constitutionally protected are property rights, not legal procedures, and that the state is free to alter its legal procedures.

4. Statute of Frauds. The enactment, and later expansions, of the statute of frauds present constitutional issues when applied to existing contracts, because the statute deprives certain oral contracts of enforceability. Texas' current statute of frauds is set out in Tex. Bus. & Com. Code §§ 26.01 and 26.02. In *Hodges v. Johnson*, 15 Tex. 570 (1855) (Hemphill, C. J.), the Court held that the statute of frauds adopted in 1840 had no application to contracts made before it became effective. *Hutchings v. Slemons*, 141 Tex. 448, 453. 174 S.W. 487, 490 (Tex. 1943) (Slatton, Commisioner), held that a Statute of Frauds barring enforcement of an oral promise to pay a real estate commission could not constitutionally be applied to an oral agreement made before the statute became effective. To apply the law retroactively would violate Tex. Const. art. I, § 16 and U.S. Const. art I, § 10. The Court quoted from *Von Hoffman v. City of Quincy*, 4 Wall. 535 (1866) (Swayne, J.); *Walker v. Whitehead*, 16 Wall. 314, 317, 83 U.S. 314, 317 (1872) (Swayne, J.); and *Chew Heong v. U.S.*, 112 U.S. 536 (1884) (Harlan, J.). *Walker v. Whitehead* said that a state could change a remedy if it did not impair a substantial right secured by the contract. Here, the Legislature eliminated any judicial remedy, which transgressed the constitutional protection. *Hutchings*, at 454, 490.

5. Further reading.

- Bryant Smith, *Retroactive Laws and Vested Rights*, 6 Tex. L. Rev. 231 (1927).

,

XIV. WHAT IS A CONTRACT? Over the years, the essence of a contract has been described in many ways. The same is true when listing the elements considered essential to creation of a contract.

A. VARIOUS DEFINITIONS. Here are some examples of definitions of contracts:

Powell. John Joseph Powell, author of a treatise on the English law of contracts p. 9 (1790)--

> We have already fuggefted, that it is of the *effence* of every contract or agreement, that the parties to be bound thereby fhould confent to whatever is ftipulated; for, otherwise, no obligation can be contracted, or concomitant right created.

Blackstone. William Blackstone, in his Commentaries on the Laws of England (1765-1769), describes a contract as follows--

> "[A]n agreement, upon fufficient confideration, to do or not to do a particular thing. From which definition there arife three points to be contemplated in all contract; 1. The agreement: 2. The confideration: and 3. The thing to be done or omitted, or the different fpecies of contracts."[525]

Napoleon. The Napoleonic Code § 101 (1804), gave this definition of a contract–

> A contract is an agreement which binds one or more persons, toward another or several others, to give, to do, or not to do something.[526]

Webster. Daniel Webster, in his oral argument in the Webster College case (1818)--

> There are, in this case, all the essential constituent parts of a contract. There is something to be contracted about, there are parties, and there are plain terms in which the agreement of the parties on the subject of the contract is expressed. There are mutual considerations and inducements.[527]

Sturges v. Crowninshield. In *Sturges v. Crowninshield*, 4 Wheat. 122, 17 U.S. 122, 197 (1819), Chief Justice Marshall gave this definition for a contract–

> A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.

Williston. Samuel Williston, in his Treatise on the Law of Contracts § 1 (1936), gave this definition of a contract--

> A contract is a promise, or set of promises, to which the law attaches legal obligation.

Corbin. Professor Arthur Corbin in, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 Yale L. J. 169, 170 (1917), defined "contract" as--

> . . . the legal relations between persons arising from a voluntary expression of intention, and including at least one primary right in personam, actual or potential, with its corresponding duty . . .

Restatement (First). The Restatement (First) of the Law of Contracts § 1 (1932) defined contract in this way--

> A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Uniform Commercial Code. The Uniform Commercial Code distinguishes an "agreement" from a "contract" in the following terms–

> §1.201(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1.303.
>
> § 1.201(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws.

Restatement Second. The Restatement Second of the Law of Contracts § 1 (1981), defines Contracts in this way--

> A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

The Restatement (Second)'s definition of contract was cited by Justice Guzman in *½ Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, (Tex. 2011) (Guzman, J.).

Texas Cases.

Smith v. Thornhill, 25 S.W.2d 597, 600 (Tex. Com. App. 1930, judgm't adopted) --

> A contract is a deliberate engagement between competent parties to do or abstain from doing some act for a sufficient consideration.

B. ISSUES RAISED BY THESE DEFINITIONS.

1. Consent. The definitions emphasize the central importance of consent in the formation of a contract. Without consent, there is no contract. There are many duties that arise by operation of law, and there are non-contractual legal duties that can be voluntarily assumed. So consenting to create a duty is not exclusive to contracts, but it is essential to contracts. However, with some contracts, implied duties arise that may not be known to a party. In many consumer transactions and loan transactions actual consent to many pages of terms written in legalistic language is no more than a fiction especially for persons who have English as a second language. And in many industries, a contracting party has no real freedom to reject contract terms, because the terms of the agreement are non-negotiable and no competitors are willing to offer different terms. Many times patients seeking admission to a hospital emergency room must first sign "consent forms." Given that most people go to the emergency room only to address a pressing need, and that the refusal to sign a consent form may lead to a denial of admission, can the contractual waivers truly be said to be consensual? Consent, like consideration, may be a method by which we differentiate contracts we will enforce from those we will not.

2. Thing vs. Relationship. Some of the foregoing definitions view a contract as thing that comes into existence. However, a contract could instead be seen as a relationship between contracting parties. Businessmen often see a contract in terms of an ongoing relationship, and the desire to keep ongoing relationships harmonious can affect the parties' views of the contract and how to handle a breach. However, when a contract right or duty is assigned to a third party, the contractual relationship involves new parties, even though the contract is the same. So a contractual relationship may originally be a personal relationship, but the rights and duties arising under a contract become, in many instances, a property right or obligation that can be assigned. An assignable contract right or duty can be an item of personal property, that has a value in exchange. The rights and duties that arise between an assignor and assignee of a contract right or duty can be governed by legal principles that are external to the underlying contractual rights and duties, complicating the contract issues.

3. Circular. Several of these definitions say that a contract is an agreement that the law will enforce. That definition is not helpful because we must look elsewhere to determine what makes an agreement enforceable.

4. Confusing the Existence of a Contract with Its Enforceability. Some of the definitions of a contract blend the question of what constitutes a contract with what constitutes an *enforceable* contract. The distinction was recognized in the old German legal distinction between an unenforceable legal duty (schuld) and an enforceable liability (haftung).[528] The distinction between a contract as an enforceable contract is also reflected in the Medieval English distinction between promises that were enforceable in law and promise that were enforceable only by religious sanction. The legal and policy issues surrounding the enforceability of contracts are so varied that they are better addressed separately. So, whether a contract is enforceable is a question of remedy, not the essence of the contract. Historically, and even today, a contract not enforceable in law might be enforceable in equity (i.e., damages versus specific enforcement). And a contract that was enforceable at one time can become unenforceable, if the statute of limitations expires. And in today's multi-state and multi-national economy, the same agreement may be enforceable in one appellate district, or state, or country, but not another, so that defining a contract based on its enforceability can lead to a situation where the same agreement is both a contract and not a contract at the same time, depending on where the question is asked. Also, contrasted to earlier times, today's contracts can contain many operative provisions, most of which are enforceable but some of which might not enforceable. If some provisions of a contract are not enforceable while the other provisions are enforceable, the contract can still remain in effect despite losing one or more provisions. And in multi-jurisdictional disputes, conflict of laws principles might call for the law of the place of contracting to be applied to contract formation, but the

law of the forum to be applied in determining available remedies. Finally, American constitutional strictures against legislative impairment of the obligation of contracts does not prohibit later changes in remedies, as long as some remedy is provided. In sorting through the many issues of Contract Law, it makes things simpler to disconnect the question of what makes a contract from the question of how the contract, once made, can be enforced.

The variable nature of the enforceability of agreements is not only interstate and international. Right here in Texas there is a difference of opinion about the enforceability of arbitration clauses in an attorney's employment agreement. In *Henry v. Gonzalez*, 18 S.W.3d 684 (Tex. App.--San Antonio 2000, pet. dism'd by agr.), the San Antonio Court of Appeals held that an arbitration clause in an attorney-client employment agreement was enforceable, against claims of public policy and fraudulent inducement. But in *In re Godt*, 28 S.W.3d 732, 738-39 (Tex. App.--Corpus Christi 2000, no pet.), the Corpus Christi Court of Appeals held that an arbitration clause in the same attorney's employment agreement was not binding on the client bringing a legal malpractice claim, because it was not signed by an independent attorney advising the client, as required by Tex. Civ. Prac. & Rem. Code § 171.002(a)(3). Both courts agree that a contract was created. They differ on the enforceability of one provision of the contract.

5. Not All Contract Rights and Obligations are Specified by the Parties. The definitions do not limit the contractual rights and obligations to those explicitly stated in the contract. In today's world, many terms of contractual rights and duties are supplied by law, such as the U.C.C. or the CISG, and thus need not be explicitly stated in the contract. And modern Contract Law has increasingly recognized implied duties arising from contracts.

6. Third Parties and Assignees. Contractual obligations may originate between the contracting parties, but some contracts provide for benefits to flow to others. The definitions of contract do not restrict the definition of the contract to the original parties.

XV. PRINCIPLES OF CONTRACT FORMATION. "No particular words are required to create a contract." *City of Houston v. Williams*, 353 S.W.3d 128, 137 (Tex. 2011) (Guzman, J.) (holding that a city ordinance constituted a contract.)

A. THE SUBJECTIVE VIEW OF CONTRACT FORMATION. It is sometimes said that, in order for there to be a contract, there must be a "meeting of the minds." Originally that meant that both parties in fact shared the same understanding. The most famous example of that perspective was the Peerless case, *Raffles v Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). In *Raffles*, the plaintiff entered into a contract to sell 125 bales of Indian cotton to the defendant. The contract specified that the cotton would be arriving in Liverpool on the ship Peerless from Bombay ("to arrive ex Peerless from Bombay"). Unbeknownst to the parties, there were two ships named Peerless arriving from Bombay, one departing in October and another in December. The defendant claimed that he understood the contract to mean cotton on the October ship while the plaintiff claimed that contract was for the arrival of the December ship. In December, when the later ship arrived in England, the plaintiff tried to deliver the cotton but the defendant refused to accept it. The plaintiff sued for breach of contract. The court ruled that, although courts will strive to find a reasonable interpretation in order to preserve the agreement whenever possible, the court was unable to determine which ship named Peerless was intended in the contract. As a result, there was no "consensus ad idem," and the two parties did not agree to the same thing, so there was no binding contract. The defendant won. The court essentially found that there was no "meeting of the minds." Stated another way, the plaintiff's subjective intent was not the same as the defendant's subjective intent, so no contract arose.

The Restatement (Second) of Contracts § 201 (1981) endorses a form of subjective view of contract formation, in that it considers whether the parties had the same intent in entering into a contract, and if they did not, the Section suggests binding both parties to the intent of party A when party A does not know that party B has a different intent but party B knowns or should have known of party A's intent. If the disagreement about intent cannot be resolved by this rule, then under Section 201 the agreement fails.

The earliest Texas case to discuss a "meeting of the minds" was *Roberts v. Heffner,* 19 Tex. 129, 1857 WL 5062 (1857) (Hemphill, C.J.), where the Chief Justice found the contract to be a "complete act of sale." In his words: "The proposal for the sale on the one hand, and the purchase on the other at a stipulated price, received the reciprocal assent of the parties. There was the *aggregatio mentium*, the meeting of the minds, or the mutual assent of the parties to the same thing in the same sense." *Id*. at *2. In *Summers v. Mills*, 21 Tex. 77, 1858 WL 5419, *7 (1858) (Wheeler, J.), the Court said: "there is no contract unless the parties thereto assent: and they must assent to the same thing in the same sense." In *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (Tex. 1867) (Coke, J.), the Court wrote: "A proposal by one party, and an acceptance of that proposal according to the terms of it by the other, constituted a contract. It is not only necessary that the minds of the contracting parties should meet on the subject-matter of the contract, but they must communicate that fact to each other, so that both may know that their minds do meet, and it is then only that the mutual assent necessary to a valid contract exists, and not until then that the contract is concluded." In *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S.W. 1111, 1111 (Tex. 1907) (Williams, J.), the Court wrote: "A mere offer or promise to pay does not give rise to a contract. That requires the assent or meeting of two minds, and therefore is not complete until the offer is accepted." In *Fordtran v. Stowers*, 113 S.W. 631, 634 (Tex. Civ. App. 1908, writ denied), the Court identified "meeting of the minds" with an offer and an

acceptance: "One of the essential elements of a contract is an agreement or meeting of the minds of the parties, by an offer on the one hand, and an acceptance on the other."

As noted in the next Section of this Article, Texas courts now hold an objective view on contract formation. *See Paciwest, Inc. v. Warner Alan Properties, LLC*, 266 S.W.3d 559, 568 (Tex. App.–Fort Worth 2008, pet. denied) ("A determination of whether a meeting of the minds has occurred is based on an objective standard; thus, evidence of Nguyen's subjective belief about what the contract says or about whether an amendment occurred is not relevant to whether there was a meeting of the minds sufficient to amend the contract"). Thus the inquiry of whether minds truly "meet" is not longer pertinent. But the concept of a "meeting of the minds" still lurks in Texas Contract Law. In *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam), the Court said that "[a] meeting of the minds is necessary to form a binding contract." The Court cited *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986) (Spears, J.), where the Court said "[a] modification must satisfy the elements of a contract: a meeting of the minds supported by consideration." It appears that the concept of "meeting of the minds" ultimately has become the requirement of an offer and an acceptance and that, since objective standards are now applied to offers and acceptances, the term "meeting of the minds" is an objective determination and not a subjective one.

However, the subjective roots of the "meeting of the minds" doctrine periodically reappear. In *Milner v. Milner*, 360 S.W.3d 519, 524 (Tex. App.–Fort Worth 2010), *aff'd on other grounds*, *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012) (Medina, J.), the court of appeals found that a signed mediated settlement agreement was not enforceable because the husband and the wife intended different things when they signed the agreement so that there was no meeting of the minds. *Id.* at 524. The decision has shades of *Raffles v Wichelhaus*. The Supreme Court, in contrast, took an objective approach treating the issue as a dispute in interpreting the language of the mediated settlement agreement, found an ambiguity, and remanded the matter to the mediator-turned-arbitrator to resolve.

B. THE OBJECTIVE VIEW OF CONTRACT FORMATION. The objective view of contract formation approaches the question of whether a contract was formed based on the observable actions of the parties participating in the contracting process, including words or writings exchanged. Under the objective approach, it does not matter what the parties actually thought during the contract formation process. It only matters what they did and didn't say, or did and didn't do. The test for whether a contract was formed is whether a third party, seeing the behavior of the parties, would reasonably conclude that an agreement had been reached. The matter was put this way in *Merritt v. Merritt*, 1 WLR 1211, 1970 (Denning, J.): "In all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard this agreement as intended to be legally binding?"[529]

1. Holmes's Objective View of Offer and Acceptance. Oliver Wendell Holmes, Jr. advocated an objective approach toward resolving contract questions, meaning that questions, like whether a contract was formed, should be determined with reference to external standards and not the actual mental processes of the individual."[530] In *O'Donnell v. Town of Clinton*, 145 Mass. 461, 463, 14 N.E. 747, 751 (1888) (Holmes, J.), Holmes wrote that "[t]o lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words."

2. Williston's Objective View of Contract Formation. Williston was a proponent of the objective theory of contract. Here is a passage from his Treatise on Contract Law § 3.5, Intent to Contract (4th ed.):

> Closely related to the question of genuineness of assent is the question of whether the parties must actually intend to contract. It is often said by the courts that in order to create an enforceable contract, the parties must agree to the material terms of their bargain and have a present intention to be bound by their agreement, sometimes referred to as present serious contractual intent.[FN1] Here, too, however, the law of contracts is concerned with the parties' objective intent, rather than their hidden, secret or subjective intent.[FN2] The courts examine the parties' objective manifestations of intent to determine whether they intended to enter into a contractual obligation, and it is the parties' objective manifestations of intent that will determine whether a contract has in fact been formed.[FN3] Thus, when the courts speak of the contractual intent of the parties, they are referring to an intent that is determined objectively, by considering what a reasonable person in the parties' position would conclude given the surrounding circumstances.[FN4]
>
> Under this "reasonable person" standard, the law accords to individuals an intention that corresponds with the reasonable meaning of their words and conduct, and if their words and conduct manifest an intention to enter into a contract, their real but unexpressed intention is irrelevant.[FN5] The courts' inquiry, therefore, is not into the parties' actual, subjective intention, but rather into how the parties manifested their intention; not on whether there has been a subjective "meeting of the minds," but rather on whether the parties' outward expression of assent is sufficient to show an apparent intention to enter into a contract.[FN6] When making this determination, a court must consider the totality of the circumstances surrounding the parties at the time

> they manifest an intention to contract; all of the parties' words, phrases, expressions and acts should be viewed in light of the circumstances that existed at that time, including the situation of the parties, both individually and relative to one another, and the objectives they sought to attain.[FN7] [Footnotes not included.]

3. Restatement (First). The Restatement (First) of Contracts § 20 (1932), adopts an objective standard for contract formation:

> § 20. Requirement Of Manifestation Of Mutual Assent
>
> A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by §§ 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

"Mental assent" is meeting of the minds. Under Section 20, mental assent is not essential.

4. Restatement (Second). The Restatement (Second) of Contracts § 2, cmt. b, (1981), endorses and objective view of offers and acceptances. The Comment says: "Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase "manifestation of intention" adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct. Rules governing cases where the promisee could reasonably draw more than one inference as to the promisor's intention are stated in connection with the acceptance of offers (see §§ 19 and 20), and the scope of contractual obligations (see §§ 201, 219). While the Restatement (Second) may adopt an objective standard for interpreting offers and acceptances, the Restatement (Second) adopts a subjective view of contract formation in Section 20, which provides in subsection (1) that "[t]here is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; or (b) each party knows or each party has reason to know the meaning attached by the other." Section 20(2) provides that party A's view of the "manifestations" of intent will prevail if party A neither knew nor had reason to know that party B had a different view, and party B knew or had reason to know of party A's view. Thus, if neither party knew or should have known about the other party's view, then no contract was formed.

C. OFFER AND ACCEPTANCE. It is fundamental Contract Law doctrine that, to create a contract, there must be an offer by one party and the acceptance of that offer by the other party. It has long been the law of Texas, if not always so, that "[a] proposal by one party, and an acceptance of that proposal according to the terms of it by the other, constituted a contract." *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (Tex. 1867) (Coke, J.). This principle derives from the view that a contract restricts a party's freedom and that parties should not be held to a contractual obligation until they both agree to be bound. See Restatement (First) of Contracts § 22 (1932).

1. What Constitutes an Offer? An "offer" is "the manifestation of a willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981). Article 14 of the CISG defines an "offer" as a "proposal for concluding a contract addressed to one or more specific persons," provided that "it is sufficiently definite and indicates the intent of the offeror to be bound in case of acceptance." Under the CISG, a proposal that is not addressed to specific persons is an invitation to make an offer.

2. Interpreting the Offer. In *Faulk v. Dashiell*, 62 Tex. 642, 1884 WL 8979 (Tex. 1844), the Court espoused the view that ". . . where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he knew or had reason to suppose it was understood by the promisee." The court cited to Coke's Commentaries on Littleton and Bacon's Law Maxims, along with older New York cases. Under the objective view of contract formation, whether an act or statement constitutes an offer, and if so then the terms of the offer, are determined from the perspective of a third party observer, not the actual mental intent of the offerer.

3. How Long is the Offer Effective? An offer remains "open" until it expires by its own terms, or until it is accepted, rejected, or withdrawn. Under Restatement (Second) of Contracts § 41 (1981), an offer expires at the time specified in the offer, or, if no time is specified, at the end of a reasonable time. What is reasonable depends on the facts and circumstances. A "time demand" offer is one which, by its very terms, expires "at a certain time and can no longer be accepted after the expiration of such time." *Lacquement v. Handy*, 876 S.W.2d 932, 935 (Tex. App .--Fort Worth 1994, no pet.).

The CISG says that an offer becomes effective when it reaches the offeree (Art. 15), and can be revoked as long as the revocation is received by the offeree before the offeree has sent an acceptance (Art. 16). However, an offer cannot be revoked during the fixed time given for acceptance or if the offeree has reasonably relied on the offer being irrevocable (Art. 16).

4. What Constitutes An Acceptance? Restatement (First) of Contracts § 52 (1932) says that an "acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror." Restatement

(Second) of Contract § 50(1) (1981) provides that "[a]cceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Article 14 of the CISG assumes that an "offer" is made to one or more *specific* persons. Article 18 defines an acceptance as a "statement made by or other conduct of the offeree indicating assent to an offer."

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

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

6. The Acceptance Must be Communicated. The acceptance must be communicated to the other party to be effective. In *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (Tex. 1867) (Coke, J.), the Court wrote:

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

In *Brauer v. Shaw*, 168 Mass. 198, 200, 46 N.E. 617 (1897) (Holmes, J.), Oliver Wendell Holmes, Jr. considered the question of whether a contract had been formed when a steamship company telegraphed an offer to a shipping company to transport cattle at a certain price, and the shipping company telegraphed back an acceptance in different terms. The steamship company then telegraphed another offer at a higher price, and the shipper sent a telegram accepting the new offer. But before the acceptance was received the steamship company revoked its second offer. The court ruled that the revocation was to no avail. Holmes wrote that a contract had been formed, since the notice that the offer had been revoked was not received before the acceptance of the offer was sent. Holmes supported this decision with the explanation that the course of dealing indicated that the shipper had the power to turn the offer into a contract, which it did before it received notice that the offer had been revoked. This case presents the problem know to Contract Law as the "mailbox rule." The idea is that the acceptance is effective as soon as the acceptance is mailed. The mailbox rule has been recognized in Texas. *Blake v. Homburg-Breman Fire Insurance Co.*, 67 Tex. 160, 2 S.W. 368, 370 (1886) (Gaines, J.) (with the added complication that the offer was mailed with without postage); *Scottish-American Mortg. Co. v. Davis*, 96 Tex. 504, 508, 74 S.W. 17, 18 (Tex. 1903) (Brown, J.).

Professor Langdell criticized the mail box rule in his 1880 Summary of of the Law of Contracts 5-11 (1870). The Restatement (First) of Contracts (1932) adopts the mailbox rule in Section 66, illustration 1. The Restatement (Second) of Contracts § 56 (1981) requires that the offeree use due diligence to advise the offeror that the offer has been accepted or that notice of acceptance be received by the offeror "seasonably." The Restatement (Second) of Contracts § 63 (1981) adopts the mailbox rule, "unless the offer provides otherwise." However, Section 63 treats option contracts differently; acceptance of an option contract is not effective until it has been received by the offeror. CISG Articles 17 and 18 reverse the mailbox rule, because neither the rejection nor the acceptance of an offer become effective until the rejection or "the indication of assent" "reaches the offeror." Restatement (Second) of Contracts Section 30 (1981) provides that an offer may specify the form that the acceptance may take; otherwise, an acceptance may be indicated in any manner and by any medium reasonable in the circumstances.

7. When the Acceptance Varies From the Offer. When terms of the acceptance varies from the terms of the offer, courts traditionally found that no contract was formed.

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

Eliason v. Henshaw, 17 U.S. 225, 228, 1819 WL 1971, *2 (1819) (Washington, J.). Early Texas cases took a strict view of the "mirror image" rule. In *Summers v. Mills*, 21 Tex. 70, 1858 WL 5419, * 7 (1888) (Wheeler, J.), the court relied upon Parsons' treatise for the proposition that the acceptance must correspond exactly to the offer or else no contract arises. A similar view was expressed by the Texas Supreme Court in *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *6 (Tex. 1867) (Coke, J.):

> An acceptance of a proposal to sell, in order to bind the maker of the proposition and conclude

> the contract, must be unconditional and unqualified. The exact terms of the proposition, without addition or variation, must be acceded to before the proposition is withdrawn; otherwise, the maker of the proposition is not bound by the acceptance.

In *Allis-Chalmers Mfg. Co. v. Curtis Elec. Co.*, 153 Tex. 118, 121, 264 S.W.2d 700, 702 (1954) (Wilson, J.), the Court said that "a substantial meeting of the minds" was sufficient and that one day difference in the maturity date did not defeat the creation of a contract. Nonetheless, modern courts continue to require the that the acceptance be identical to the offer. *Kingwood Home Health Care, L.L.C. v. Amedisys, Inc.*, 375 S.W.3d 397, 400 (Tex. App.–Houston [14th Dist.] 2012, no pet.)

U.C.C. Section 2.207 gives the offeree the flexibility to bring a contract into being, by issuing an acceptance that contains additional or different terms from those in the offer, as long as the offer didn't preclude variations in the acceptance, and the variations from the offer are not material, and the offeror does not object within a reasonable time after receiving the acceptance.

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

8. The Battle of the Forms. Under the Common Law "mirror image" rule, if the acceptance did not exactly match the offer, no contract was created.[531] Thus, the contract, if any, had the terms of the last offer or counter-offer that was accepted without modification by the other contracting party. The Restatement (Second) of Contracts § 59 (1981) adopted the Common Law rule: "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." Sales transactions have increasingly been conducted based on the seller's and the buyer's forms. The "battle of the forms" describes the situation where an acceptance of an offer contains additional or different terms from the offer. U.C.C. Section 2.207 addressed this problem, by saying that if the acceptance contains additional or different terms from the offer, they are binding on the offeror unless the offer limits acceptance to the terms of the offer, or the acceptance materially alters the offer, or the offeror gives notice of an objection to the variations within a reasonable time. This provision has been heavily criticized.[532] Article 19 of the CISG sets out the "mirror image" rule, but if the deviations in the acceptance are not material, they become part of the contract, unless the offeror objects. Examples of changes that are material, and therefore are governed by the "mirror image" rule, are "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes . . . ."[533] See Section XII.G of this Article.

9. Revoking the Offer. An offer may be revoked at any time before it is accepted, unless the offer is non-revocable. Non-revocable offers are options, discussed in Section XV.E.2 of this Article. For the revocation of the offer to be effective, it must be communicated to the offeree before the offer is accepted. *Antwine v. Reed*, 145 Tex. 521, 525, 199 S.W.2d 482, 485 (Tex. 1947) (Slatton, J.). See Restatement (First) of Contracts § 41 (1932).

D. THE ROLE OF CONSIDERATION. One of the signal features of Anglo/American contract law is the requirement that, to be enforceable, a promise must be supported by consideration. The source of the Anglo/American requirement of "consideration" has an obscure origin. The necessity and legitimacy of this requirement has been questioned many times, but as Justice Oliver Wendell Holmes, Jr. wrote: "A common law judge could not say: 'I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court.'"[534] Whatever its source, the requirement of consideration is used in Anglo/American law to separate enforceable from unenforceable contracts.

In *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burrows 1663, 1669 (1765), Lord Mansfield wrote: "I take it that the ancient notion about the want of Consideration was for the sake of *Evidence* only: for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no obligation to the want of consideration." This was Mansfield's valiant attempt to treat consideration–not as the sine qua non of contracts but instead–as just one method of proving the contract. He reasoned that consideration was not required of some contracts, such as contracts under seal. The affixing of a seal to the contract proved the contract. To Mansfield this suggested that consideration was not *always* required to make a contract enforceable. If consideration was not required of all contracts, then its more likely role was as proof that the promisor intended to be legally bound to perform the contract, and consideration was therefore merely one way to prove the promisor's intent to be bound. The accepted view is that Mansfield's effort was discredited by the House of Lords in *Rann v. Hughes,* (1778) 7 Term. Rep. 346 n.a. 101 Eng. Rep. 1014 n.a. (K.B). Since *Pillans & Rose*, the doctrine of consideration has suffered encroachments, but no successful frontal assaults. However, Chief Justice Jefferson boldly advocated the elimination of the requirement of consideration to support an option contract in *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 111 (Tex. 2004) (Jefferson, C.J.) (concurring).

Regardless of its origin, the requirement of consideration is a primary divider between contracts

that are enforceable and those that are not. Contracts excluded from enforcement include "option contracts, promises to give a gift, and open-ended agreements that bind one party but not the other."[535]

1. Consideration is Required for an Agreement to be Enforceable. In *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 659 (Tex. 2006) (Willett, J.), the Supreme Court reconfirmed that in Texas a promise must be supported by consideration to be enforceable. This rule had long been recognized in Texas law, dating back to *Jones v. Holliday*, 11 Tex. 412, 1854 WL 4298 (Tex. 1854) (Wheeler, J.), which said: "A consideration is essential to the validity of a simple contract, whether it be verbal or in writing." Justice Wheeler cited 2 Kent, 464 (5th Ed. 1827). Exceptions to the requirement of consideration were recognized for contracts under seal, and bills of exchange and negotiable instruments that had "passed into the hands of an innocent endorsee." *Id.* Justice Wheeler wrote that a recital in the contract, that consideration was given, is prima facie evidence of consideration. He continued that the plaintiff in a contract action must plead that consideration was paid. *Id.* The requirement of consideration for specific enforcement of a contract was recognized in *Short v. Price*, 17 Tex. 397, 1856 WL 5028 (Tex. 1856) (Hemphill, C.J.), where the Court said: ". . . it is believed to be a rule without exception, that equity will not interfere to enforce an executory contract, unless it be founded on a valuable consideration." Chief Justice Hemphill cited *Boze v. Davis' Adm'rs*, 14 Tex. 331, 1855 WL 4894 (Tex. 1855) (Hemphill, C.J.).

2. How Did This Requirement Arise? There is much speculation in Contract Law writings as to how the requirement of consideration arose. Despite the best efforts of many legal writers, the answer is lost in the sands of time. The failure may be attributable to the futility of retrospectively imposing the modern view that contract doctrines must reflect consistent underlying principles, when in fact they may be the by-product of lawyers and judges adapting old forms of action to meet the changing needs of their time.

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

To constitute consideration to support a contract, the consideration must be bargained for. Restatement (Second) of Contracts § 71 (1981) ("To constitute consideration, a performance or promise must be bargained for").

4. Benefit/Detriment. Not too long ago the Texas Supreme Court defined "consideration" as "'either a benefit to the promisor or a loss or detriment to the promisee.'" *Northern Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998) (Hecht, J.). In giving this definition, Justice Hecht quoted a 1993 court of appeals opinion.[536] That case cited a 1984 court of appeals opinion,[537] which cited a 1962 court of civil appeals opinion,[538] which cited to Tex. Jur.2d.[539] This principle of law was first settled in Texas in *Bason v. Hughart*, 2 Tex. 476, 479 (Tex. 1847) (Lipscomb, J.), where the Court wrote: "We believe the doctrine to be well settled, that to constitute a consideration valid in law, it is not essential that it should be mutually beneficial to the promisor and the promisee; that it is sufficient if one or the other is to receive a benefit, or to be injured by it." As authority, Justice Lipscomb cited two U.S. Supreme Court decisions, one being *Townsley v. Sumrall*, 2 Pet. 182, 1829 WL 3178, *9 (U.S. Sup. Ct. 1829), where Justice Story wrote without citation to authority that "[d]amage to the promissee, constitutes as good a consideration as benefit to the promissor." The other decision was an earlier one, *Violett v. Patton*, 5 Cranch 142, 150, 1809 WL 1659, *5 (U.S. Sup. Ct. 1809), in which Chief Justice Marshall asserted, without citation to authority: "To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction." *Accord*, *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915 (Tex. 1851) (Hemphill, C. J.) ("A valuable consideration is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made"). These cases all tacitly assume an underlying requirement of consideration. Thus the ultimate cited source of authority for the rule in Texas, that contractual consideration may consist of either a benefit to the promisor or a loss or detriment to the promisee, is an unsupported assertion by Chief Justice Marshall.

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

5. Adequacy of Consideration? The rule at Common Law was that courts did not concern themselves with the sufficiency of consideration. Since contracts were a bargained-for exchange, the parties agreed to a fair price and their agreement was conclusive. Restatement (Second) of Contracts § 79, cmt. c (1981). However, a greatly disproportionate value in the bargain was considered to be evidence of exploiting an advantage with bargaining parties who

were comparatively weak. Restatement (Second) of Contracts § 79, cmt. c (1981).

6. Mutual Promises. In *James v. Fulcrod*, 5 Tex. 512, 1815 WL 3915, *6 (Tex. 1851) (Hemphill, C.J.), the Court wrote that "[a] mutual promise amounts to sufficient consideration, provided the mutual promises be concurrent in point of time." This remains the law of Texas. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997) (Baker, J.). See Restatement (Second) of Contracts § 75 (1981).

7. Recitals of Consideration. There was a time when courts considered a recital of "valuable consideration" in a contract to constitute prima facie evidence of consideration *Jones v. Holliday*, 11 Tex. 412, 1854 WL 4298 (Tex. 1854) (Wheeler, J.). In 1855, the Texas Legislature adopted a statute providing that all written contracts carried with them a presumption of consideration, which diminished the importance of rote recitals of consideration.

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

9. Proof of Consideration. In *Ellet v. Britton*, 10 Tex. 210 (1853) (Hemphill, C.J.), the Supreme Court addressed the question of whether parol evidence could be used to establish the payment of consideration when the contract contained no recital of consideration, and the contract fell within the statute of frauds. Chief Justice Hemphill noted the similarity between the English statute of frauds and the Texas statute of frauds, and noted that, for more than a century after enactment, English courts held that consideration could be prove by parol evidence for contracts within the scope of the statute. That law changed, however, in 1804, when it was held in the English case of *Wain v. Warlters*, 5 East 10, that consideration must be expressed in the contract. According to Hemphill, the English courts did not enforce the requirement strictly, finding "loose expressions" in the contract as implying consideration. *Id.* at 210. Hemphill noted that most American courts had rejected *Wain v. Warlters*, or had watered it down. In the end, Hemphill saw the Court as having to choose "between the two constructions which have been advanced, each upon the highest authority," and the Court decided that consideration could be proven by parol evidence even when the statute of frauds applied. *Id.* at 212.

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

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

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

11. Lack of Consideration as a Defense to a Contract Claim. "Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties." *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.--Tyler 2010, no pet.). Since a contract is not enforceable if not supported by consideration, it is a recognized defense to a contract claim that the contract was not supported by consideration. The defense must be pled and verified by affidavit. Tex. R. Civ. P. 93.9.

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

13. Reliance as a Substitute for Consideration. There has been a long-running dispute in American Contract Law over the use of reliance on a promise as a substitute for consideration. This was one of Arthur Corbin's "pet peeves" about traditional Contract Law theory. The dispute boiled over in the drafting of the Restatement (First) of Contracts (1932). Samuel Williston surprisingly sided with the proponents of reliance when he included Section 90 in the Restatement (First) of Contracts. The critics of formalist contract doctrine long attributed Section 90 to Arthur Corbin's influence on the first Restatement. Corbin's personal correspondence reveals that Williston himself wrote Section 90 and defended it against criticism in the American Law Institute's public meetings. The episode reflects that Williston may not have been as doctrinaire as he is sometimes painted to be.

14. Legislative Modifications of the Requirement of Consideration. The requirement of consideration is a Common Law rule, and it is subject to legislative override. As explained in Section XVIII.A of this Article, many American legislatures eliminated contracts under seal, which effectively eliminated contracts made without consideration. In 1987, the Texas Legislature adopted the Uniform Premarital Agreement Act, which provides that premarital agreements may be enforced without consideration.[540]

E. MUTUALITY OF ENGAGEMENT. American Contract Law recognizes an exchange of promises of future performance as sufficient consideration to create a binding contract. See Section XV.D.6. However, for this rule to apply, the promises must create a "mutuality of engagement." If there is not mutuality of engagement, there may be a unilateral contract (see Section XV.D.6); if not, there is no contract.

1. Mutuality of Engagement Under Texas Law. Mutuality of engagement was recognized as a requirement in early Texas law. *See Burleson's Heirs v. Burleson*, 11 Tex. 2 (1853) (Lipscomb, J.) (finding that mutuality of engagement was present in the case). In *Missouri, K. &T. Ry. Co. Of Texas v. Smith*, 98 Tex. 47, 81 S.W. 22, (1904) (Williams, J.), the Court found no mutuality of engagement to support a contract signed by an injured employee, releasing the railroad from liability for his injury in exchange for being allowed to come back to work. Since the employee's job could be terminated at will, the railroad undertook no obligation. Mutuality was absent, and the release was not enforceable. The *Smith* case revealed another aspect of mutuality. Since the re-employment agreement did not specify the length of time of the re-employment, it failed as a contract for lack of definiteness. *Id*. at 53, 24. In *Adams v. Abbott*, 151 Tex. 601, 606, 254 S.W.2d 78, 80 (Tex. 1952) (Hickman, C.J.), the Court said that mutuality of obligation does not have to exist at the outset. It is sufficient that mutuality of obligation exists at the time the contract is sought to be enforced. Mutuality can be established by tender of performance. *Id.*

2. Options. An "option" is an offer that is non-revocable for a period of time during which it may be accepted by the offeree. *Wall v. Trinity Sand & Gravel, Co.*, 369 S.W.2d 315, 317 (Tex. 1963) (Culver, J.). An option is a unilateral contract, but it is nonetheless binding if it is supported by consideration. *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 572, 222 S.W. 154, 155 (1920) (Phillips, C.J.). In *Kraft, Holmes & Co. v. Sims*, 1883 WL 8611 (Tex. Civ. App. 1883, no writ), the Court of Civil Appeals held that a sale that could be rescinded by the buyer for ten days was not binding on the seller, who was permitted to revoke the sale prior to the time it became unconditional. The Court of Civil Appeals noted the necessity of mutuality of engagement as a condition to creating a binding contract. The Court said:

> It is elementary that "a promise is a good consideration for a promise," but it is further settled that "a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement."

Id. at *1. The Court's supporting authority was three citations to Parson's Treatise on Contracts (5th ed.) and one Alabama Supreme Court case. The first citation was to Parsons, pp. 448-49, for the proposition that "a promise is a good consideration for a promise," provided that "there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." *Id.* at *1 [the quotations are quotes of Parsons' text set out in the Court's Opinion]. The second cite was to Parsons, p. 475, for the proposition that a contract requires mutual consent to mutual obligations. The third cite was to Parsons, p. 476, for the proposition that an incomplete contract, where one party has an option but not an obligation to agree to the contract, is subject to rescission by either party prior to the contract being ratified by the party with the option. The third citation also referred to an Alabama Supreme Court case so holding.

It is interesting to note that Story's treatise, not cited in the *Sims* opinion, held the opposite view, saying that the offer of an option, with a stated deadline for acceptance, should carry with it an implied duty not to revoke the option until it expires, absent consent from the optionee. Story, A Treatise on the Law of Contract § 496. Story had three rationales. As to the requirement of consideration, Story wrote that "[t]he consideration is the expectation or hope, that the offer will be accepted, and this is sufficient legally to support the promise." Story cites several supporting court decisions. The second rationale was to address the optionee's reliance in examining the goods, and perhaps giving up opportunities to buy similar items from another seller. Story cited French law in support. Story's third rationale was common sense:

> The only answer to this in the English law, appears to be, that no one is entitled to rely on a unilateral engagement gratuitously made and

> without consideration. But one cannot help feeling that a rule so different from what commonly happens in the intercourse of life raises that inconsistency between law and justice which is sometimes complained of. The subtleties of lawyers never ought to interfere with the common sense and understanding of mankind; and the law is on a better footing where an engagement, seriously made, is enforced by the law without regard to the motive from which it proceeds.

Story, A Treatise on the Law of Contracts § 496. Story also cited Chief Justice Marshall's Opinion in *Violett v. Patton*, 5 Cranch 142, 1809 WL 1659 (1809) (Marshall, C.J.).

In *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 105 (Tex. 2004) (Smith), the Court adopted Restatement (Second) of Contracts Section 88(a) (1981) in holding that an option contract was binding if it contained a recital of consideration, even if the recital was false.

3. Unilateral and Bilateral Contracts. Another perspective on mutuality of engagement is the distinction between unilateral and bilateral contracts. A unilateral contract occurs when the promisor promises a benefit if the promisee performs. A bilateral contract occurs when both parties make mutual promises. *Hutching v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489 (1943) (Slattern, Comm'r). With a unilateral contract, the promisee accepts the promisor's offer by actual performance. *Vanegas v. American Energy Service*, 302 S.W.3d at 303.

Houston & T.C. Ry. Co. v. Mitchell, 38 Tex. 85, 1873 WL 7366 (Tex. 1873) (Walker, J.), involved a written contract whereby Mitchell and the railroad company agreed in writing that the company would pay Mitchell to cut and stack up to 200-tons of hay in exchange for "$22.5 coin" per ton, to be paid as each 25-tons of hay was cut. After Mitchell cut 25-tons of hay, the company told him it did not want the hay. Mitchell continued to work until he had cut 200-tons of hay, and sued and recovered in the trial court the full contract price. Mitchell was in the trial court but the Supreme Court reversed.

Justice Walker wrote that the contract was not mutual, that Mitchell could cut up to 200-tons of hay, and that the company would pay Mitchell for whatever hay he cut, up to the point the company gave notice to stop. *Id.* at *7. The Court said that "the measure of damages in such a case is not the full contract price; but the damages must be measured by the actual injury sustained." *Id.* at *7. The contract was thus seen as an unilateral contract that was binding only to the extent that Mitchell performed up to the point that he received notice of the company's desire to terminate.

Texas law holds that unilateral contracts are not enforceable, absent certain exceptions. "A contract is unilateral when one party furnishes no consideration of value to the other party, and does not obligate himself to do anything which may result in injury to himself, or benefit to the opposite party." *Edwards v. Roberts*, 209 S.W. 247, 250-51 (Tex. Civ. App. 1918, no writ). The Court went on to state the general rule:

> Such a contract is not supported by a sufficient consideration, and therefore, unless there has been some performance, or other equitable reasons to prevent, either party may declare the contract null and void, and it will not thereafter be binding upon him; but when there has been partial or full performance, such performance operates as a sufficient consideration, and renders the contract binding upon the other party.

Id. at 251. The Court of Civil Appeals cited as authority two Georgia Supreme Court cases, and one apiece from the Supreme Courts of Michigan, West Virginia, and Minnesota. *Id.* at 251. One of the Georgia cases, quoted in *Edwards*, in turn cited contract law treatises by Bishop, Parsons, Clark, and Story. The Georgia court cited Hammonds on Contracts for the proposition that a promise that is unenforceable due to lack of mutuality can become enforceable if consideration is supplied prior to the promise being withdrawn.

The question of *when* a unilateral contract becomes a bilateral contract was considered in *Hutchings v. Slemons*, 141 Tex. 448, 453. 174 S.W. 487, 490 (Tex. 1943). There a landowner made an oral agreement with a broker to pay at 5% commission for selling the land. At the time of contracting, such oral promises were enforceable. The broker found the prospect who agreed to and then did purchase the property on terms consistent with the listing agreement. After the sale, the Statute of Frauds was amended to require such commission agreements to be in writing to be enforced. The seller refused to pay the commission. Under constitutional principles (see Section XIII.B.4), the amendment to the Statute of Frauds would impair the obligations of a contract if, and only if, the contract was legally enforceable prior to the amendment. The Supreme Court held that the contract was bilateral, not unilateral, prior to the date of the amended statute, and was therefore enforceable. The court imagined a conversation in which the landowner promised to pay a commission upon sale, and the broker promised to use reasonable diligence to sell the land in accordance with the listing agreement. *Id.* at 452, 489. Thus, each party "is both a promisor and a promisee." *Id.* The Court quoted the description, in Restatement (First) of Contracts § 12, of a bilateral contract: "A bilateral contract is one in which there are mutual promises between two parties to the contract, each party being both a promisor and a promisee." The Supreme Court cited two Texas court of civil appeals decisions for the proposition that "the test of mutuality is to be applied, not as of the time when the promises are made, but as of the time when one or the other is sought to be enforced." *Id.* The Supreme Court also cited a Texas court of civil appeals decision for the proposition that a contract is void for lack of mutuality when made and while it remains executory, but once there has been part performance by rendering services or incurring

contemplated expenses, which confers "even a remote benefit on the other party," the benefit constitutes "equitable consideration" that makes the contract enforceable. *Id.* 452, 489.

The doctrine of unilateral contracts was endorsed in the Restatement (First) of Contracts (1932), but was questioned in the Restatement (Second) of Contracts (1981).[541] The doctrine nonetheless was recently reaffirmed as Texas law in *City of Houston v. Williams*, 353 S.W.3d. 128, 136-37 (Tex. 2011) (Guzman, J.):

> Unlike a bilateral contract, in which both parties make mutual promises, *Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489 (1943), a unilateral contract is created when a promisor promises a benefit if a promisee performs, *Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 303 (Tex. 2009). The requirement of mutuality is not met by an exchange of promises; rather, the valuable consideration contemplated in "exchange for the promise is something other than a promise," i.e., performance. Restatement of Contracts § 12 cmt. a (1932). A unilateral contract becomes enforceable when the promisee performs. *Vanegas*, 302 S.W.3d at 303. We have explained that "'[a] unilateral contract occurs when there is only one promisor and the other accepts ... by actual performance,'" rather than by the usual mutual promises. *Id*. at 302 (quoting 1 Richard A. Lord, Williston on Contracts § 1.17 (4th ed. 2007)).

4. Is Mutuality Just Consideration in Disguise? In many cases the description of what makes a contract mutual is that both parties must give promises that constitute a benefit to the promisee or a detriment to the promisor. In *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) (Baker, J.), the Court said that "[a] contract must be based upon a valid consideration, in other words, mutuality of obligation"). The Restatement (Second) of Contracts § 79 (1981) suggests that "[i]f the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'" *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 857-58 (Tex. 2009) (Hecht, J.) (concurring).

F. SPECIFICITY. The parties' agreement must be sufficiently specific in order to be enforceable. The Restatement (First) of Contracts § 370, cmt. a (1932), says that exact certainty in the expression of the terms of a contract is not required to make the contract binding. The terms must have "a reasonably clear and definite meaning." *Id* cmt. a. Courts require a greater certainty to warrant specific performance than to award damages or restitution. *Id.* cmt. b. The Restatement (First) of Contracts encourages courts to use "courageous common sense" in resolving uncertainty of expression. *Id.* cmt. c. Under U.C.C. Section 2.204, "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Contracts that are incomplete due to missing terms are discussed in Section XVIII.F below.

G. EXECUTORY CONTRACTS. In *Roberts v. Heffner*, 19 Tex. 129, 1857 WL 5062, *2 (1857) (Hemphill, C.J.), the Chief Justice contrasted a completed transaction from an executory contract. With a completed contract, the obligations of the parties have all been met. With an executory contact, the performance of some further act by a party is required by the agreement.

H. CONTRACT FORMATION UNDER THE NAPOLEONIC CODE. Napoleon's codification of the civil law was promulgated in 1804. The Napoleonic Code had little impact on the Contract Law of Texas, except as it may have influenced the writings of the French commentator Pothier, to the extent he influenced English law and eventually Texas law. It is possible that the principles in the Code operated as unattributed influences on writers on Contract Law. At any rate, it is instructive to consider some of the concepts in Napoleon's Code relating to contract law.

> Four conditions are essential to the validity of an agreement:
>
> The consent of the party who binds himself;
> His capacity to contract;
> A certain object forming the matter of the contract;
> A lawful cause in the bond.

There is no requirement of consideration, and no express requirement of mutuality.

XVI. DEFINING THE AGREEMENT.

1. Fully Integrated, Partially Integrated, and Unintegrated Agreements. "An integrated agreement may be either fully integrated or only partially integrated. A fully integrated contract is one that is a final and complete expression of all the terms agreed upon between or among the parties. A contract is partially integrated if the written agreement is a final and complete expression of some or all of the terms therein, but not all of the terms agreed upon . . . are contained in the written agreement."[542] The Restatement (Second) of Contracts (1981) states the following regarding integration:

> § 209. Integrated Agreements
>
> (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
>
> (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

> (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

2. Multiple Contemporaneous Documents. "It is a generally accepted rule of contracts that 'Where several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other.'" *Board of Ins. Com'rs v. Great Southern Life Ins. Co.*, 150 Tex. 258, 239 S.W.2d 803, 809 (Tex. 1951) (Calvert, J.). *See City of Houston v. Williams*, 353 S.W.3d 128, 137 (Tex. 2011) (Guzman, J.) (instruments relating to the same transaction may be read together to determine the parties' intent). "[C]ourts are to give effect to all provisions of a contract, whether a contract is comprised of one, or more than one, document." *City of Galveston v. Galveston Mun. Police Ass'n*, 57 S.W.3d 532, 538 (Tex. App.--Houston [14th Dist.] 2001, no pet.). *See* Restatement (Second) of Contracts § 95 cmt. b (1981). *Accord*, *Dunlap v. Wright*, 11 Tex. 597 (1854) (Hemphill, C.J.).

3. The Parol Evidence Rule. Professor Williston wrote: "When parties reduce their contract to writing, the law presumes the instrument to be complete, to contain all their agreement, and it cannot be modified by parol evidence."[543] The parol evidence rule applies to fully integrated agreements, and limits the ability of the parties to provide sworn statements and other extrinsic evidence about the parties' intent, if that other evidence varies the terms of the integrated agreement. The parol evidence rule does not apply to agreements that are purely oral. In *Thomas v. Hammond*, 47 Tex. 42, 1877 WL 8582, *6 (Tex. 1877) (Gould, A.J), the Court said if the agreement is fully integrated, but is partially in writing and partially oral, the parol evidence rule does not apply to the oral portion so long as it is distinct and collateral to the written portion. An agreement is "collateral" if it is "one that the parties might naturally make separately, i.e., one not ordinarily expected to be embodied in, or integrated with, the written agreement and not so clearly connected with the principal transaction as to be part and parcel of it." *Transit Enters., Inc. v. Addicks Tire & Auto Supply, Inc.*, 725 S.W.2d 459, 461 (Tex. App.-Houston [1st Dist.] 1987, no writ).

The parol evidence rule is not a rule of evidence, *Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30, 30 (1958) (Calvert, J.), and the rule does not apply just to "parol" evidence. *Id.* at 170.

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

> [I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.[544]

b. The Rule in Texas Case Law. The parol evidence rule was recognized early in Texas jurisprudence. In *Rockmore v. Davenport*, 14 Tex. 602, 1855 WL 4944, *2 (Tex. 1855) (Wheeler, J.), Justice Wheeler wrote:

> The general rule, subject to a few exceptions not applicable to the present case, undoubtedly is that parol evidence cannot be received to contradict or vary a written agreement. (2 Phil. Ev., 357, 358, 6th Am. from 9th London ed.) And this rule operates to the exclusion of parol evidence of any prior or contemporaneous agreement to vary the terms or legal effect of the written contract. These cases which illustrate and enforce the rule are collected in the Notes to Phillips's Evidence, Id., part 2, p. 593, note 295, where it is said: "We find it either conceded or asserted in almost every case which speaks on this subject that all oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and that the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to or vary its terms. This general doctrine has been recognized almost universally."

Justice Wheeler cited the 8th American edition of Samuel March Phillipps' Treatise on the Law of Evidence (Cowen & Hill ed. Banks, Gould and Co. N.Y, 1849). The Treatise refers to Lord Coke's report of the Countess of Rutland case, discussed above. The rule was again recognized in *Bedwell v. Thompson*, 25 Tex. 245, 1860 WL 5825 (Tex. 1860) (Wheeler, C.J.), where the Court wrote that "[i]t is quite clear that the alleged parol contemporaneous agreement could not be set up to vary the terms of the written contract." *Self v. King*, 28 Tex 552, 553 (1866) (Smith, J.), is an early expression of the parol evidence rule applied in Texas. The Court said:

> When parties have reduced their contract to writing, which expresses the terms and character of it without uncertainty as to the subject or nature of the agreement, it is presumed that the writing is the repository, and contains the whole, of the agreement made between them, and hence the rule that no contemporaneous evidence is admissible to contradict or vary the terms of a valid written agreement. 12 Wend. 573. The court may read a written document in the light of surrounding circumstances, which can be proved, in order to arrive at the true meaning and intention of the parties as expressed in the words used, but will not hear parol evidence of language or words

> other than those used by the parties themselves in the writing. No other words are to be added to or subtracted from the written instrument.

The sole authority for the rule was one New York Supreme Court case. In *Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30, 31 (Tex. 1958) (Calvert, J.), the Court said this about the parol evidence rule:

> When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements.

However, the parol evidence rule does not preclude enforcement of "prior or contemporaneous agreements which are collateral to an integrated agreement and which are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof." *Id.* at 31.

c. The Deed-as-Mortgage Exception. Texas courts have long permitted parol evidence to show that a deed for land, absolute on its face, was in fact intended as a mortgage. *Stampers v. Johnson*, 3 Tex. 1, 1848 WL 3852, *3 (Tex. 1848) (Wheeler, J). Justice Wheeler cited cases from the Supreme Courts of New York and Massachusetts to support this exception. The rule was reaffirmed in *Carter v. Carter*, 5 Tex. 93, 1849 WL 4064, *6 (Tex. 1849) (Wheeler, J.) ("Their conduct and conversations upon the subject, both before and after the making of the bill of sale, were relied on to show what was their real purpose and intention at the time and in the act of its execution, and were circumstances from which the jury were to infer the real character of the transaction, and to determine whether the bill of sale was, in fact, executed and intended, as alleged, only as a security for the payment of money."). *Accord*, *Gibbs v. Penny*, 43 Tex. 560, 1875 WL 7600, *2 (Tex. 1875) (Gould, A. J.).

d. Parol Evidence Admissible to Explain Language. In *Epperson v. Young*, 8 Tex. 135, 1852 WL 3927, *2 (1852) (Wheeler, J.), the Court wrote that "parol evidence could be received to explain the language or terms used in a written contract so as to understand what the parties really meant, but never to permit it to be received for the purpose of varying or substituting another one to control and overrule the written contract." In *Franklin v. Mooney*, 2 Tex. 452 (1847) (Lipscomb, J.) the Supreme Court held that parol evidence may be received to explain an ambiguity, but not to vary or change the contract.

e. Proof of Fraud or Mistake Not Barred. "The parol evidence rule will not prevent proof of fraud or mutual mistake." *Santos v. Mid-Continent Refrigerator Co.*, 471 S.W.2d 568, 569 (Tex. 1971) (per curiam). In *Dallas Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 233 (Tex. 1957) (Calvert, J.), the Court held that parol evidence was admissible as to fraud in inducing the contract. *Accord*, *King v. Wise*, 282 S.W. 570, 573 (Tex. Com. App. 1926, judgm't adopted). However, in *Wooters v. I. & G. N. R. Railway Co.*, 54 Tex. 294 (1881) (Moore, C.J.), the Court ruled as inadmissible evidence of oral representations, contrary to the written agreement, that were alleged to have fraudulently induced the contract.

f. Parol Evidence of Transfer to Wife's Separate Estate Not Barred. In *Higgins v. Johnson's Heirs*, 20 Tex. 389, 1857 WL 5257, *5-6 (Tex. 1857) (Hemphill, C.J.), the Court held that the parol evidence rule did not bar extrinsic evidence that, where community property money was paid for land but the deed was to the wife alone, the transfer was to the wife as her separate property. Chief Justice Hemphill lamented: "We cannot be insensible to the fact that the admission of parol evidence to establish the intention of gift by the husband must offer facilities and temptations to fraud and perjury." However, the law of resulting trust was consistent with this approach, and the fact that a deed between spouses or to a spouse from a third party could be either separate or community property, favored allowing extrinsic evidence of the true circumstances.

g. Under the U.C.C. U.C.C. Section 2.202 sets out a parol evidence rule for the sale of goods:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (1) by course of performance, course of dealing, or usage of trade (Section 1.303); and
>
> (2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

h. Consistent Prior and Contemporaneous Agreements Are Not Excluded. The parol evidence rule does not exclude agreements that are collateral to the main agreement and are not inconsistent with it. *Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30, 32 (1958) (Calvert, J.); *accord*, *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 875 (Tex. 2010). This is the rule reflected in the Restatement (First) of Contracts § 240 (1932).

i. Subsequent Agreements Are Not Excluded. The parol evidence rule does not preclude evidence of subsequent agreements that modify or replace the earlier agreement. In *Mikeska v. Blum*, 63 Tex. 44, 47 (1885) (Willie, C.J.), the Court wrote:

> There is nothing to prevent parties to a contract from making such other agreements in writing, contemporary with its execution, as they may choose, although such agreement may vary the terms of the contract. The agreement will be

> binding between the parties, and may be enforced, although it make the paper referred to in it more or less onerous upon one of the parties than it would appear to be upon the face of the paper itself.

In *Hubacek v. Ennis State Bank*, 159 Tex. 166, 171-172, 317 S.W.2d 30, 32 (1958) (Norvell, J.), the Court endorsed Restatement (First) of Contracts § 240, that the parol-evidence rule does not preclude a collateral oral agreement that was natural to make and not inconsistent with the written agreement.

j. Criticisms of the Parol Evidence Rule. Speaking of the parol evidence rule, Professor James Thayer said: "Few things are darker than this, or fuller of subtle difficulties."[545] The Pennsylvania Supreme Court said: "There is scarcely any subject more perplexed than in what cases, and to what extent, parol evidence shall be admitted. Not only have different men viewed the subject differently, but the same man, at different times, has held opinions not easily reconciled. . . ."[546] Williston characterized the parol evidence rule as being "[p]hilosophically based on the objective theory of contracts."[547] Yale Law School Professor Arthur L. Corbin, especially in his article, *The Parol Evidence Rule*, 53 Yale L.J. 603 (1944), challenges the validity of the Parol Evidence Rule. The CISG does not include a Parol Evidence Rule. See Section XII.G of this Article.

XVII. CONTRACT INTERPRETATION. As with contract formation, there is a subjective view of contract interpretation and an objective view of contract interpretation.

A. THE SUBJECTIVE VIEW OF CONTRACT INTERPRETATION. The subjective view of contract interpretation seeks to determine the meaning of a contract based on what the parties actually intended, which may be different from what they said. Professor Joseph M. Perillo of Fordham University School of Law, in his article *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427 (2000), states his view and supporting evidence that an objective view of contract interpretation has dominated the Common Law "since time immemorial." In keeping with the objective view, Texas courts do not allow parties to testify to their intent in entering into a contract unless the contract is ambiguous.

B. THE OBJECTIVE VIEW OF CONTRACT INTERPRETATION. The objective view of contract interpretation disregards the actual intent of the contracting parties and instead looks to the language of the contract to determine what was agreed upon. Judge Learned Hand expressed it this way:

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

Hotchkiss v. National City Bank of New York, 200 F. 287, 293 (D.C.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913). Judge Learned Hand was a student of Williston at Harvard Law School.

The objective approach relies upon the judge's interpretation of the words of the contract, aided by rules of construction. This rule-based approach, to interpreting contracts on their face, has subsequently been disparaged as operating on axiomatic and deductive reasoning, where axioms are uncritically accepted as true, and are applied with a deductive logic (i.e., syllogistically) in a manner wholly independent from surrounding circumstances. In actuality, this strict version of the objective of contract interpretation theory is not always followed, and in many instances additional information is considered in interpreting a contract.

The objective approach to interpreting contracts does not mean that you must limit your analysis to the words on the page in the abstract. Justice Oliver Wendell Holmes Jr. noted:

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

Towne v. Eisner, 245 U.S. 418, 425 (1918). Back in 1899, Holmes had articulated an objective standard for interpreting contracts that looked beyond the words of the agreement:

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

O.W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899). In Holmes's view, objectivity in contract interpretation was not to be achieved by applying unchanging rules to the face of

the agreement. It was not a question of what one party meant, or even what the other party understood. To Holmes objectivity meant that the contract should be evaluated through the eyes of a disinterested third party, including in the mix that person's common knowledge. In practice, Holmes approached interpretation questions (statutory as well as contractual) by considering not only the words, but also the context in which the words were written, including not only the document as a whole but also the geographic, historical and societal context which might give meaning to the words. Thus Holmes did not confine himself to applying rules of construction to the four corners of the document, and he did look outside the contract, but he avoided an assessment of the actual understanding of either party to the contract and instead sought to determine what a reasonable person would take the words to mean.[548]

Arthur Corbin, too, believed in the importance of factors beyond the words themselves, in determining a contract's meaning. Corbin wrote: "Words, in any language have no meaning whatever apart from the persons by whom they are used and apart from the context and the circumstances of their use."[549] He also wrote that "[t]he final interpretation of a word or phrase should not be adjudged without giving consideration to all relevant word usages, to the entire context and the whole contract, and to all relevant surrounding circumstances." 3 Corbin on Contracts § 555, at 236 (1960).

C. AMBIGUITY. In *Weir v. McGee*, 25 Tex. 20, 1860 WL 5735, *7 (1860) (Wheeler, J.), the Court held that whether a deed is for a sale of a quantity of land or a specific tract of land is a question of law for the court, not the jury. In *Taliaferro v. Cundiff*, 33 Tex. 415, 1870 WL 5766, *3 (1870) (Walker, J.), the Court ruled that it was a question of fact for the jury whether a transaction was a sale or the creation of security for a debt, and the jury was properly allowed to consider the written instrument and surrounding circumstances in deciding that question. In *Berry v. Harnage*, 39 Tex. 638, 1873 WL 7610, *7 (1873) (McAdoo, J.), the Court held that it was error to let the jury determine the effect of serious documents and deeds, as they were to be construed by the court. The Supreme Court proceeded to interpret the effect of one of the documents. From this foundation, the current law is that, "if there is no ambiguity, the construction of the written instrument is a question of law for the court." *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex. 1962) (Smith J.). Whether a contract is ambiguous is a question of law for the court. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex. 1987) (Spears, J.).

A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (Baker, J.); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (Barrow, J.). "A contract is not ambiguous if it can be given a certain or definite legal meaning or interpretation." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 860 (Tex. 2000) (O'Neil, J.). "If a written instrument is so worded that a court may properly give it a certain or definite legal meaning or interpretation, it is not ambiguous. On the other hand, a contract is ambiguous only when the application of the applicable rules of interpretation to the instrument leave it genuinely uncertain which one of the two meanings is the proper meaning." *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980) (Denton, J.).

"An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract. . . . For an ambiguity to exist, both interpretations must be *reasonable*." *Columbia Gas Trans. Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996) (Abbott, J.).

In *National Union Fire Ins. Co. of Pittsburgh, PA v. CBI* , 907 S.W.2d 517, 520 (Tex. 1995) (per curiam), the Court distinguished between patent ambiguities and latent ambiguities:

> An ambiguity in a contract may be said to be "patent" or "latent." A patent ambiguity is evident on the face of the contract. . . . A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. [FN 4]
>
> FN4. For example, if a contract called for goods to be delivered to "the green house on Pecan Street," and there were in fact two green houses on the street, it would be latently ambiguous. [Citation omitted.]

D. CONTRACT INTERPRETATION UNDER THE RESTATEMENTS AND THE U.C.C. The Restatement (First) of Contracts (1932) adopted a reasonable person standard of interpretation, as reflected in Section 230:

> § 230. Standard Of Interpretation Where There Is Integration
>
> The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

Comment b to Section 230 notes:

> Where a contract has been integrated the parties have assented to the written words as the definite expression of their agreement. . . They have assented to the writing as the expression of the

> things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have.

The Restatement (First) of Contracts (1932) § 226, cmt b, said that "[t]he meaning that shall be given to manifestations of intention is not necessarily that which the party from whom the manifestation proceeds, expects or understands."

Section 1.201(b)(3) of the U.C.C. defines "agreement" as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade . . . ." While the U.C.C. permits the court to look beyond the four corners of the agreement to discern meaning, the meaning is determined from the language of the agreement or from their actual behaviors. U.C.C. Section 2.202 sets out a parol evidence rule that applies where the parties have reached a "final expression" of their agreement, banning evidence of a contrary prior agreement or contemporaneous oral agreement. However, Section 2.202 permits a final expression to be explained or supplemented by evidence of course of performance, course of dealing, or usage of trade, and evidence of consistent additional terms, unless the final expression was a "complete and exclusive statement of the terms of the agreement."

Restatement (Second) of Contracts § 201 (1981) exhibits a subjective approach to contract interpretation. Section 201 says that "[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." Where the parties have attached different meanings, the contract is to be interpreted in accordance with the meaning attached by party A if, at the time of contracting party B knew of party A's meaning and party A did not know or have reason to know that party B had a different meaning or had reason to know. If the foregoing rule does not resolve the meaning in favor of one party, then "neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent."

E. TEXAS' APPROACH TO CONTRACT INTERPRETATION. Disputes over the interpretation of contracts are some of the earliest Texas appellate cases, and they continue to be a problem today. Texas adheres to the objective view of contract interpretation. In the case of *El Paso Field Services, L.P. v. MasTec North America*, --- S.W.3d ----, 2012 WL 6634023, *6 (Tex. 2012) (Green, J.), still pending on rehearing at the time this Article was written, the Court divided 6-to-3 on the interpretation of a pipeline construction contract. The Court majority felt that a risk-allocation provision in the contract assigned the risk of undetected obstacles in the pipeline's path to the contractor, while the dissenting Justices felt that the more specific provision, which said that the pipeline company "will have exercised due diligence" to detect obstacles, prevailed over the more general risk-allocation provision and created a duty under the contract that a jury found had been breached. While there was testimony as to what constitutes due diligence in this industry, and there was evidence of industry standards in detecting obstacles, in the end the risk-allocation provision trumped the contractual duty of due diligence.

Many of the older Texas cases on contract interpretation involved land titles. In *Swisher v. Grumbles*, 18 Tex. 164, 1856 WL 5106 (Tex. 1856) (Wheeler, J.), the Supreme Court was required to construe the meaning of a deed for real property. Justice Wheeler wrote: "All the various rules of construction which have, from time to time, been adopted and acted upon, are designed for the purpose of arriving at, and carrying out, the intention of the contracting parties. Where that is manifest, all else must yield to, and be governed by it." *Id.* at *9. While the avowed role of the court was to determine the intent of the parties, the method the court used was to interpret the words of the contract. This remains the law of Texas today.

In the Twentieth Century, a movement arose to look beyond the language of the contract itself, in order to find the intent of the parties. This legal movement reflected the popularity of a legal philosophy that words don't have intrinsic meanin; that words have only the meaning that people attribute to them. Title 2 of the U.C.C., adopted into Texas as the Business and Commerce Code, specifically requires courts to look at the parties' course of conduct and industry practices in determining the meaning of a contract covered by that Code. This directive has had only slight impact on the interpretation of contracts outside of merchants' sales of goods.

The objective view of contract interpretation was stated in *Watrous' Heirs v. McKie*, 54 Tex. 65 (1880) (Gould, A.J.), where the court said:

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

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

It continues to be the law of Texas is that, "[w]hen construing a contract, the court's primary concern is to

give effect to the written expression of the parties' intent." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). Note the focus on the *written expression* of the parties' intent, rather than actual intent of the contracting parties that might be discerned by admitting evidence of subjective intent. "Even if the court could discern the actual intent, it is not the actual intent of the parties that governs, but the actual intent of the parties as expressed in the instrument as a whole, 'without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.'" *Luckel v. White*, 819 S.W.2d 459, 462, 463 (Tex. 1991).

The idea that the intent that counts is the intent reflected in the contractual writing is an expression of the objective theory of contracts, popularized by Holmes and later Williston but that existed long before they wrote. When coupled with the rule that the meaning of an unambiguous written agreement is a question of law for the court and not a question of fact for the jury, this approach to contract interpretation gives stare decisis more weight than the facts of the individual case, and thus favors predictability.

F. SPECIFIC RULES FOR INTERPRETING CONTRACTS. Many contracts are serviceably written, and their interpretation does not wind up in court. In some situations, however, a problem arises and the parties disagree on what a contract requires, so the matter is taken to court, and the court is called upon to resolve the dispute by determining the meaning of the contract.

1. Four Corners Rule. "The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the 'four corners' rule. . . . "*Luckel v. White*, 819 S.W.2d 459, 462, 463 (Tex. 1991) (Gammage, J.). However, multiple "instruments pertaining to the same treansaction may be read together to ascertain the parties' intent." *City of Houston v. Williams*, 353 S.W.3d 128, 137 (Tex. 2011) (Guzman, J.).

2. Clear Mistakes. "Where it is clear that a word has been written into an instrument inadvertently, and it is clearly inconsistent with, and repugnant to the meaning of the parties, as shown by the whole instrument, it will be treated as surplusage and rejected altogether." *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.*, 229 S.W. 483, 485 (Tex. Comm'n App. 1921, judgmt adopted). In *Henry v. Gonzalez*, 18 S.W.3d 684 (Tex. App.--San Antonio 2000, pet. dism'd), the Court of Appeals considered the arbitration provision contained in an employment agreement between an attorney and a client. The Agreement said in one place that it would be governed by the Federal Arbitration Act (FAA) and in another place that it would be governed by the Texas Arbitration Act. The agreement also contained a choice of law clause choosing Texas law. The Court of Appeals could not reconcile the FAA clause with the rest of the agreement and thus disregarded it, commenting that the agreement was signed in Texas by Texas residences and performance was to be in Texas, so that the agreement did not affect interstate commerce, one of the criteria for applying the FAA. *Id.* at 688.

3. Scrivener's Error. A scrivener's error, or lapsus linguae, is an accidental deviation from the parties' agreement made in drafting the writing. "In contract law, a scrivener's error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error; this permits a court acting in equity to reform an agreement." Williston on Contracts § 70:93.

> The rule is well-settled that a court is not permitted to rewrite a document or add terms not included by the parties. . . . A scrivener's error presents an exception to this general rule, because as the United States Court of Appeals for the Seventh Circuit has observed, scrivener's errors "are difficult to prevent, and ... no useful social purpose is served by enforcing ... mistaken term[s]. . . . Our description of scriveners' errors in Wellmore Coal parallels that of the Illinois Court of Appeals, which defined such errors as those evidenced in the writing that can be proven without parol evidence. . . . Scrivener's errors tend to occur singularly; they are not 'continuous, ongoing, and repeated.'

Westgate at Williamsburg Condominium Ass'n, Inc. v. Philip Richardson Co., Inc., 621 S.E.2d 114, 118 (Va. 2005), citing *S.T.S. Transport Service, Inc. v. Volvo White Truck Corp.*, 766 F.2d 1089, 1093 (7th Cir. 1985) ("A merely mathematical or clerical error occurs when some term is either one-tenth or ten times as large as it should be; when a term is added in the wrong column; when it is added rather than subtracted; when it is overlooked").

4. Contractual Definitions. When the contract defines terms that are used in the contract, the court should be guided by the definitions. Where a term is not defined in the contract, the court should "presume the parties intended the term's ordinary meaning." *Intercontinental Group Partnership v. K.B. Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009) (Willett, J.); *Valence Operating v. Dorsett* 164 S.W.3d 656, 662 (Tex 2005) (Wainwright, J.).

5. Plain Meaning Rule. "We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (Baker, J.). "Language used by parties in a contract should be accorded its plain, grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985) (Hill, C. J.). The Texas Supreme Court sometimes looks to Black's Law Dictionary to determine the "common and ordinary meanings of legal terms." *Intercontinental Group*

Partnership v. K.B. Home Lone Star L.P., 295 S.W.3d 650, 665 n.15 (Tex. 2009) (Brister, J., dissenting) (and cases cited therein). In *El Paso Field Services, L.P. v. MasTec North America*, --- S.W.3d ----, 2012 WL 6634023, *6 (Tex. 2012) (Green, J.), the Court looked to Black's Law Dictionary for a definition of "due diligence."

6. Construe Contract as a Whole. In *Haldeman v. Chambers*, 19 Tex. 1, 1857 WL 5041, *24 (1857) (Wheeler, J.), the Court said: "All the stipulations which go to constitute the entire substance of the contract between the parties are to be taken, considered and construed together, so that every part may be interpreted by the whole. And the writing is to be read by the light of the surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties." The authority cited by the court was Volume 1, Section 277, of Simon Greenleaf's Treatise on the Law of Evidence, originally published in 1842. "One of the primary rules of construction is, that the entire instrument must be taken and considered together. If the instrument, when thus considered, is susceptible of a reasonable construction, by which all its provisions are made to harmonize, and by which full effect is given to its various parts, then that will be considered the correct interpretation." *Hearne v. Gillett*, 62 Tex. 23, 26, 1884 WL 8855, *3 (Tex. 1884) (Willie, C. J.). "This court is bound to read all parts of a contract together to ascertain the agreement of the parties. . . . The contract must be considered as a whole. . . . Moreover, each part of the contract should be given effect." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994) (Cornyn, J). "In construing an unambiguous oil and gas lease our task is to ascertain the parties' intentions as expressed in the lease. . . . To achieve this goal, we examine the entire document and consider each part with every other part so that the effect and meaning of one part on any other part may be determined. . . . We presume that the parties to a contract intend every clause to have some effect." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (Baker, J.). "No one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from the other provisions." *Guardian Trust Co. v. Bauereisen*, 132 Tex. 396, 121 S.W.2d 579, 583 (1938) (Hickman, Commissioner).

7. Don't Render Clauses Meaningless. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. . . . To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (Barrow, J.) [citations omitted]. *Coker* cited *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951) (Calvert, J.), as the source for the phrase "so that none will be rendered meaningless." *Universal C.I.T.* uses that standard, with no citation to authority.

8. In the Event of Internal Conflict, Consider the Principal Object. In *Urquhart v. Burleson*, 6 Tex. 502, 1851 WL 4020 (Tex. 1851) (Lipscomb, J.), the Supreme Court was faced with a land patent issued by the Republic of Texas, where the landmarks described in the patent did not fall within the surveyor's calls of course and distance. The Court said:

> It is an acknowledged rule in construing a grant that all of its parts must be taken together and supported, if it can be done. If this cannot be done, the principal object supposed to have been in the mind of the party, and sought by him to be secured by obtaining the patent, must prevail over all subordinate or secondary ones.

Id. *6. In this case, viewing the patent as a whole reflected that the surveyor's calls contradicted the landmarks, which included an old Choctaw village, a post cut down for the starting point of the survey, and the patentee's initials carved into trees near the corners of the tract. *Id.* * 6. The evidence further showed that the actual tract had long been known as Burleson's headright. Justice Lipscomb cited a U.S. Supreme Court case saying that surveyor's calls of course and distance were less reliable, and a Pennsylvania case saying that descriptions of natural landmarks and well-known artificial objects prevailed over the surveyor's calls of course and distance. Lastly, in this case the descriptions and the calls and common knowledge matched if you proceeded south from the starting point instead of proceeding east, as the surveyor's notes said. Justice Lipscomb concluded that the survey was not in error, but rather than the field notes were and, by giving primary weight to the descriptions as against the calls, he resolved the difficulty in interpreting the patent. While the rule was a rule for interpreting land patents, the rule of construction would seem to be applicable to contracts generally.

9. Noscitur a Sociis (Take Words in Their Immediate Context). A Latin maxim which, translated into English, means "a word is known by the company it keeps." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 (Tex. 2006) (Brister, J.).

10. Expressio Unius Est Exclusio Alterius. "The maxim, that 'the express mention of one thing implies the exclusion of another,' is ordinarily used to control, limit, or restrain the otherwise implied effect of an instrument, and not to 'annex incidents to written contracts in matters with respect to which they are silent.'" *Morrow v. Morgan*, 48 Tex. 304 *3 (Tex. 1877) (Gould, J.). "The maxim expressio unius est exclusio alterius, meaning that the naming of one thing excludes another, though not conclusive, is applicable to these facts." *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (Spears, J.). "[I]n construing the agreement we must adhere to the maxim that 'the expression of one thing is the exclusion of another thing.'" *Phillips Petroleum Co. v. Gillman*, 593 S.W.2d 152, 154 (Tex. Civ. App.–Amarillo 1980, writ ref'd n.r.e.).

11. Ejusden Generis. "[W]hen words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) (Hecht, J.). *Dynamic Pub. & Distributing L.L.C. v. Unitec Indus. Center Property Owners Ass'n, Inc.*, 167 S.W.3d 341 (Tex. App.–San Antonio 2005, no pet.) ("The principle of ejusdem generis . . . applies only when a contract is ambiguous").

12. Specific Terms Prevail Over General Terms. "In a contract, a specific term controls over a more general one." *Shell v. Austin Rehearsal Complex, Inc.*, 1998 WL 476728 * 12 (Tex. App.--Austin 1998, no pet.). "[T]he contract in question appears on the surface to be ambiguous; however, we believe the apparent ambiguity may be resolved by the application of a well-settled rule of construction, to wit: that if general terms appear in a contract, they will be overcome and controlled by specific language dealing with the same subject." *City of San Antonio v. Heath & Stich, Inc.*, 567 S.W.2d 56, 60 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.).

13. Earlier Terms Prevail Over Later Terms (Except in Wills). "Another [secondary rule of construction] is the rule which gives effect to an earlier over a later provision." *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 578 (Tex. 1964) (Hamilton, J). However, several cases have held that, in interpreting a will, "if there is an irreconcilable conflict in an earlier and a later clause, the earlier clause must give way to the later one, which prevails as the latest expression of the testator's intention on that particular subject." *Kaufhold v. McIver*, 682 S.W.2d 660, 666 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Morriss v. Pickett*, 503 S.W.2d 344 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.). *See Dougherty v. Humphrey*, 424 S.W.2d 617, 20 (Tex. 1968) (Smith, J.) ("The court of civil appeals applied the rule that when there is a conflict among provisions in a will, the last clause in the will controls. That rule is only applicable when it clearly appears that the clauses conflict and can not be reconciled.").

14. Handwritten Over Typed and Typed Over Preprinted. "[T]here are other secondary rules of construction for resolving apparent conflicts . . . . One is the rule which gives effect to written or typewritten provisions over printed provisions." *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 578 (Tex. 1964) (Hamilton, J.). In *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 663 (Tex. 1964) (Smith, J.), a hand-written line-through of words and adding new words was indicative of intent. In *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781, 782 (1956) (Griffin, J.), typing x's over a clause in a preprinted form was indicative of the parties' intent.

15. Words Prevail Over Numbers or Symbols. "When there is a variance between unambiguous written words and figures the written words control. . . ." *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 496 (Tex. 1965) (Pope, J.).

16. Captions. "While in certain cases, one must consider captions in order to ascertain the meaning and nature of a written instrument, it has been held that the greater weight must be given to the operative contractual clauses of the agreement, for 'An instrument is that which its language shows it to be, without regard to what it is labelled.'" *Neece v. A.A.A. Realty Co.*, 159 Tex. 403, 408, 322 S.W.2d 597, 600 (Tex. 1959) (Norvell, J.).

17. "Notwithstanding Anything Else" Clause. "The expression 'anything in this lease to the contrary notwithstanding,' when used in the final section of a written contract, has priority over any contrary provision of the contract directed to the same question." *See N.M. Uranium, Inc. v. Moser*, 587 S.W.2d 809, 814 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.). "When parties use the clause 'notwithstanding anything to the contrary contained herein' in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich v. Payne Int'l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App.--Houston [14th Dist.] 2005, pet. denied).

18. Utilitarian Standpoint. "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.' *Frost Nat. Bank v. L & F Distributors, Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (per curiam).

19. Construction Must Be "Reasonable." "Courts will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987) (Spears, J.). "We construe a contract by determining how the "reasonable person" would have used and understood its language, considering the circumstances surrounding the contract's negotiation and keeping in mind the purposes intended to be accomplished by the parties when entering into the contract." *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Systems, Inc.*, 245 S.W.3d 488, 500 (Tex. App.--Houston [14 Dist.] 2007, pet. denied.).

20. Use Rules of Grammar. "Courts are required to follow elemental rules of grammar for a reasonable application of the legal rules of construction." *General Financial Services, Inc. v. Practice Place, Inc.*, 897 S.W.2d 516, 522 (Tex. App.--Fort Worth 1995, no pet.).

21. The Rule of the Last Antecedent. The Rule of the Last Antecedent is sometimes used in construing statutes. This rule "limits the application of a qualifying word or phrase to the words immediately preceding it." *Williams v. Vought*, 68 S.W.3d 102, 110 (Tex. App.--

Dallas 2001, no pet.). The rule has been applied to contracts. *Stewman Ranch, Inc. v. Double M. Ranch, Ltd.*, 192 S.W.3d 808, 812 (Tex. App.–Eastland 2006, pet. denied).

22. The Rule of Nearest-Reasonable-Referent. The rule of the nearest-reasonable-referent has been described as follows: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." This rule was described as a "proximity rule" in *Perrine v. Downing*, 2006 WL 1115981, *2 (Mich. App. 2006).[550]

23. Qualifiers of a Series. Bryan Garner describes the Nearest-Reasonable-Referent rule in this way: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.".[551]

24. Exceptions. "The ordinary purpose of an exception is to take something out of the contract which would otherwise have been included in it. . . . When the meaning of an exception is reasonably certain, it must be given effect unless wholly repugnant to the provision intended to be limited by it." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985) (Hill, C.J.).

25. Contra Proferentem (Construe Against the Drafter). "Under the doctrine, an ambiguous contract will be interpreted against its author." *Evergreen Nat. Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 677 (Tex. App.--Austin 2003, no pet.). "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties. . . ." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984) (McGee, J.). "[T]he doctrine of contra proferentem is applied only when construing an ambiguous contract." *Lewis v. Vitol, S.A.*, 2006 WL 1767138 (Tex. App.--Houston [1st Dist.] 2006, no pet.). "[A] contract generally is construed against its drafter only as a last resort under Texas law– i.e., after the application of ordinary rules of construction leave a reasonable doubt as to its interpretation. " *Forest Oil Corp. v. Strata Energy*, 929 F.2d 1039, 1043-44 (5th Cir. 1991). *Accord*, *Evergreen Nat. Indem. Co.*, at 676 ("The doctrine of contra proferentem is a device of last resort employed by courts when construing ambiguous contractual provisions"). In many contracts drafted in Texas, the draftsman attempts to avoid this rule of construction, by reciting that neither party was exclusively responsible for drafting the terms of the contract. This raises issues of party autonomy. See Section XXXIV.D.5 of this Article.

26. Surrounding Circumstances. In *Faulk v. Dashiell*, 62 Tex. 642, 1884 WL 8979 (Tex. 1884) (Walker, P.J., Com. App.), the Court said: "when it becomes necessary to inquire into the intent of the parties to a deed, the court will take into consideration the circumstances attending the transaction and the particular situation of the parties, the state of the thing granted, etc., at the time." In *Self v. King*, 28 Tex. 552, 1866 WL 4032, * 2 (Tex. 1866) (Moore, J.), after citing a New York Court of Appeals case in support of the parol evidence rule, the Court said: "The court may read a written document in the light of surrounding circumstances, which can be proved, in order to arrive at the true meaning and intention of the parties as expressed in the words used, but will not hear parol evidence of language or words other than those used by the parties themselves in the writing." "In determining whether a contract is ambiguous, we look to the contract as a whole, in light of the circumstances present when the contract was executed. . . These circumstances include the commonly understood meaning in the industry of a specialized term, which may be proven by extrinsic evidence such as expert testimony or reference material." *XCO Production Co. v. Jamison,* 194 S.W.3d 622 , 627-28 (Tex. App.–Houston [14th Dist.] 2006, pet. denied).

27. Custom. "[S]ince [the agreement] is one peculiar to the cotton export trade, and somewhat indefinite or inconsistent in its terms, we may interpret it in the light of the custom of the business, and the construction placed upon it by the parties themselves." *E.H. Perry & Co. v. Langbehn*, 113 Tex. 72, 252 S.W. 472, 474 (Tex. 1923)(Cureton, C.J.).

28. Course of Conduct. "It is familiar law that where a contract is ambiguous in its terms, a construction given it by the parties thereto and by their actions thereunder, before any controversy has arisen as to its meaning, with knowledge of its terms, will, when reasonable, be adopted and enforced by the courts." *E.H. Perry & Co. v. Langbehn*, 113 Tex. 72, 82, 252 S.W. 472, 474 (Tex. 1923) (Cureton, C.J.), citing Elliott on Contracts, vol. 2, §§ 1537, 1538, and *Galveston, H. & S.A. Ry. Co. v. Johnson*, 74 Tex. 256, 263, 11 S.W. 1113, 1116 (1889) (Gaines, J.). *Johnson* cited *Chicago v. Sheldon*, 76 U.S. 50, 54 (1869), which said, "In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence." The Court in *Chicago v. Shelton* cited no authority for the proposition. In *International Group Partnership*, 295 S.W.3d 650, 658 (Tex. 2009) (Willett, J.), the Court viewed the parties' failure to request that the trial court rule on the amount of attorney's fees reflected that the meaning of "attorney's fees . . . as fixed by the Court," contained in the contract, meant "as fixed by a jury."

29. Things to Avoid. There are things to avoid in construing a contract.

a. Don't Render Clauses Meaningless. "In the interpretation of contracts the primary concern of courts is to ascertain and to give effect to the intentions of the parties as expressed in the instrument. . . . To achieve this object the Court will examine and consider the entire instrument so that none of the provisions will be rendered meaningless." *R & P Enters. v. LaGuarta,*

Gavrel & Kirk, Inc., 596 S.W.2d 517, 518-19 (Tex. 1980) (Denton, J.).

b. Validity Preferred Over Invalidity. "If, to our minds, the language of the deed is reasonably susceptible of a construction which would identify any definite interest in the land in suit, we should give it that construction, for it is a rule universally recognized that if an instrument admits of two constructions, one of which would make it valid and the other invalid, the former must prevail." *Dahlberg v. Holden*, 150 Tex. 179, 238 S.W.2d 699, 702 (Tex. 1951) (Hickman, C. J.).

c. Avoid Illegality. "While of course courts have no right to depart from the terms in which the contract is expressed to make legal what the parties have made unlawful, nevertheless when the contract by its terms, construed as a whole, is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality. It is presumed that in contracting parties intend to observe and obey the law." *Walker v. Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935, 936-37 (1935) (German, Comm'r). *Accor*d, *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 340 (Tex. 1980) (McGee, J.).

d. Avoid Forfeitures. "[C]ourts will not declare a forfeiture, unless they are compelled to do so, by language which will admit of but one construction, and that construction is such as compels a forfeiture." *Automobile Ins. Co. v. Teague*, 37 S.W.2d 151, 153 (Tex. Comm'n App. 1931, judgmt. adopted).

e. Avoid Conditions. In *Sirtex Oil Industries, Inc. v. Erigan*, 403 S.W.2d 784, 787 (Tex. 1966) (Norvell, J.), the Court borrowed from land law and said : "Conditions subsequent are not favored by the courts, and the promise or or obligation of the grantee will be construed as a covenant unless an intention to create a conditional estate is clearly and unequivocally revealed by the language of the instrument."

XVIII. ENFORCEABLE VERSUS UNENFORCEABLE AGREEMENTS. The Supreme Court once wrote: "Nor can the validity of the contract be doubted, if it be sustained by sufficient consideration and be consistent with public policy." *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915, *5 (Tex. 1851) (Hemphill, C.J.). The rule was stated in *Texas Farm Bureau Cotton Ass'n v. Stovall*, 113 Tex. 273, 253 S.W. 1101 (Tex. 1923):

> Reduced to its last analysis, the rule is simply that a contract must be based upon a valid consideration, and that a contract in which there is no consideration moving from one party, or no obligation upon him, lacks mutuality, is unilateral, and unenforcible.

But other factors can influence whether a contract is enforceable besides consideration and public policy.

A. CONTRACTS UNDER SEAL. In the English Common Law, and into the early Twentieth Century in America, contracts under seal were enforceable, regardless of whether they were supported by consideration. The fact that consideration was not required is attributable to the fact that the Covenant form of action for the enforcement of sealed contracts predated the rise of the doctrine of consideration, but many later cases glossed over this fact by inventing the legal fiction that the seal is evidence of consideration, or creates an irrebutable presumption of consideration. The first contract case decided by the Supreme Court of the Republic of Texas was *Whiteman v. Garrett*, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.), in which the Court ruled that specific performance would lie to enforce a contract under seal that the defendant would pay "certain monies" and the plaintiff would convey land to the defendant. In *English v. Helms*, 4 Tex. 228, 1849 WL 3998 (Tex. 1849), (Hemphill, C.J.), the Chief Justice sketched the history of seals back to early Norman times, but noted the disuse of wax seals in American states and the substitution of "scrolls,"or written flourishes following a signature. Hemphill proposed that it would be better to abolish seals, but did not do so in the Opinion. He did write, however, that a written scroll on a contract had the same effect as a wax seal. In *Vineyard v. Smith*, 34 Tex. 454, 1871 WL 7426, *3 (Tex. 1870) (Roberts, J.), the Court said: "The contract was under seal, which imported a consideration which could only be denied under oath."

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

In 1858, the Texas Legislature enacted a statute that became Article 7093 of the 1911 codification providing as follows: "Every contract in writing hereafter made shall be held to import a consideration in the same manner and as fully as sealed instruments have heretofore done." See *Unthank v. Rippstein*, 386 S.W.2d 134 (Tex. 1964) (Steakley, J.); *Harris v. Cato*, 26 Tex. 338 (1862) (Moore, J.). This statute eliminated the main distinction between sealed and unsealed contracts, which was the absence of a requirement of consideration for contracts under seal. Civil Practice and Remedies Code Section 121.015 now provides: "A private seal or scroll may not be required on a written instrument other than an instrument made by a corporation." The Texas Business and Commerce Code, Section 2.203, provides that "[t]he affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer." The same provision is contained in Code Section 2A.203, applying to leases. Consequently, whether a

contract is with or without seal now makes no difference in Texas.

The presumption that contracts under seal are supported by consideration still prevails in some states. *See Mitchell Bank v. Schanke*, 676 N.W.2d 849 (Wis. 2004) (consideration conclusively established for contract executed under seal). For background, see Williston on Contracts § 2:2, Introduction and history of sealed instruments (Richard A. Lord ed.); Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 Willamette L.Rev. 617 (1993) (arguing that special rules for contracts under seal are justified); Crane, *The Magic of Private Seal*, 15 Colum. L. Rev. 598 (1915); and Backus, *The Origin and Use of Private Seals under the Common Law*, 51 Am. L .Rev. 369 (1917).

B. GIFTS. A promise to make a gift, called a gratuitious promise, is not enforceable, because there is no consideration running to the promissor. *Boze v. Davis' Adm'rs*, 14 Tex. 331, 1855 WL 4894 (Tex. 1855) (Hemphill, C.J.).

"A gift cannot be made to take effect in the future, for the reason that a promise to give is without consideration." *Fleck v. Baldwin*, 172 S.W.2d 975, 978 (Tex. 1943) (Hickman, Comm'r.). "The refusal to enforce gratuitous promises absent consideration is one of the foundations of contract law." Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. Ill. L. Rev. 881, *881 (2007). The Restatement (Second) of the Law of Contracts, Section 90 cmt. f (1981), says: "One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift." However, Section 90(2) makes charitable subscriptions and marriage settlements enforceable without either consideration or proof of reliance. In *Hopkins v. Upshur*, 20 Tex. 89, 1857 WL 5185, *5 (Tex. 1857) (Roberts, J.), the Supreme Court held that a person making a charitable subscription may revoke up until, but not after, "legal liabilities or expense had been incurred on the faith of the promise." Justice Roberts cited a case decided by the Supreme Court of Massachusetts and an intermediate appellate court from New York. In *Williams v. Rogan*, 59 Tex. 438, 1883 WL 9194, *2 (1883) (Stayton, A. J.), where the church committed to building a school in one of six competing counties that raised $5,000 in contributions, the Court held that a donor was contractually bound to make a donation once the subscription agreement that he had signed was accepted by the church, thus imparting mutuality of obligation.

C. ORAL CONTRACTS. Oral contracts can be created the same way as written contracts, and have the same requirements. "The elements of written and oral contracts are the same and must be present for a contract to be binding." *Thornton v. Dobbs*, 355 S.W.3d 312, 316 (Tex. App.--Dallas 2011, no pet.). "In determining the existence of an oral contract, the court looks to the communications between the parties and to the acts and circumstances surrounding those communications." *Prime Products, Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.--Houston [1st Dist.] 2002, pet. denied). "The terms must be expressed with sufficient certainty so that there will be no reasonable doubt as to what the parties intended or what the court is being called upon to enforce." *Wiley v. Bertelsen*, 770 S.W.2d 878, 882 (Tex. App.--Texarkana 1989, no writ). "The terms of an oral agreement may be established by direct or circumstantial evidence." *Inimitable Group, L.P. v. Westwood Group Development II*, , 264 S.W.3d 892, 899 (Tex. App.--Fort Worth, 2008, no pet.).

D. CHANGES TO AN EXECUTORY CONTRACT. Under the traditional pre-existing duty rule, an agreement to amend a binding contract is not enforceable unless new consideration is given. Restatement (Second) of Contracts § 73 (1981) perpetuates the old rule, but adds a new standard in Section 89 that makes such an offer enforceable if the modification of the existing contractual duty is "fair and equitable in view of the circumstances not anticipated by the parties at the time of original contracting, or if a statute so provides, or to the extent that justice requires, based on reliance on the promise."

E. PROMISE TO PAY DEBT BARRED BY LIMITATIONS. It is a rule of Contract Law that a promise to do what the promisor is already legally bound to do does not constitute contractual consideration. Nonetheless, it was long the law of England that a promise to pay a debt that had become unenforceable was enforceable without consideration. This law was adopted in the American states. See Restatement (First) of Contracts § 86 (1932); Restatement (Second) of Contracts § 86 (1981). The Supreme Court of Texas said that a promise to pay debt barred by limitations is not a new contract and does not need to be supported by additional consideration. *Selkirk v. Betts*, Dallam 471, 472 (1842) (Hutchison, J.).

F. INCOMPLETE CONTRACTS. Originally, a contract that failed to specify an essential term was no contract at all. However, the view has developed that parties should be free to bind themselves to an agreement that leaves terms to be determined later. In some commercial communities, the parties have an expectation that unspecified terms will be read into the contract in accordance with accepted practices. Court now routinely engage in what is called "gap filling" to provide terms to make a contract complete enough to enforce. Still, in some instances, where default rules do not operate, no contract is formed "if the parties have agreed that certain terms have been deliberately left open for future negotiation and later agreement."[552]

1. Failure to Specify Time for Performance. In *Self v. King*, 28 Tex. 552, 1866 WL 4032, *2 (Tex. 1866) (Moore, J.), the Court said: "[W]hen no specific time is fixed for the delivery of cumbrous property, it is the settled construction that it is payable within a reasonable time, which is generally a question of law, but often of law and fact." Justice Moore cited two cases from the Supreme Court of Maine and one from the Supreme Court of North Carolina. The case of *Hart*

v. Bullion, 48 Tex. 278 (1877) (Moore, A. J.), held that, when the parties to a contract do not agree upon a time for performance, the law imputes into the contract a reasonable time to perform. When the facts are uncontested, what constitutes a reasonable time for performance is a question of law for the court; if the facts are contested, the jury must decide what is reasonable, based on instructions from the court.

> The contract, as has been previously stated, does not, in terms, fix the time within which Bullion and wife were to make or cause titles to be made to the lands to be conveyed appellant. In the absence of such stipulation, the law allows them a reasonable time to do so. What is a reasonable time depends undoubtedly upon the nature and character of the thing to be done, the circumstances of the particular case, and the difficulties surrounding and attending its accomplishment. As an abstract question, what is a reasonable time for performance may be one of law; but unless the facts upon which its determination depends are admitted, its determination involves a mixed question of law and fact, and must be determined by the jury, under the instructions of the court, where the pleadings and evidence are sufficient to present an issue of fact in regard to it.

In *Cheek v. Metzer*, 116 Tex. 356, 358, 291 S.W. 860 (1927) (Cureton, C.J.), the Court said that, where a contract omits the time for performance, the law implies a reasonable time. In *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940, 942 (1944) (Critz, J.), the Court said that where no time for performance is specified in the contract the law will imply a reasonable time. Where the obligation is to pay money, it is enforceable as soon as the contract is signed. *Id.* at 542. In *Moore v. Dilworth* the plaintiff did not establish either a time for performance or the date on which the alleged oral agreement was made, so the Court held no contract was made.

U.C.C. § 2-309 addresses contracts for merchants to sell goods where no specific time is agreed upon. Under Section 2-309(1), the time for performance under such a contract is a reasonable time. If the contract calls for successive performances with no end provided, Section 2-309(2) allows either party to terminate at any time. If the date for payment is not specified, U.C.C. § 2-310 requires payment when the goods are due to be delivered.

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

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

G. INADEQUATE CONSIDERATION. As a general rule, inadequacy of consideration is not sufficient grounds to set aside a contract. Story, Equity Jurisprudence § 245.

In *Varner v. Carson*, 59 Tex. 303, 1883 WL 9162, *2 (Tex. 1883) (Clayton, J.), the Supreme Court wrote:

> Again, whilst mere inadequacy of consideration may not be sufficient to set aside a contract made between persons standing on equal terms, and in a situation to judge for themselves, it has been held that if it be of so gross a nature as to amount in itself to decisive evidence of fraud, it will avoid a contract made between such parties. *Butler v. Haskell*, 4 Dessaus., 651; Kerr on Fraud & Mistake, 186, 187; *Green v. Thompson*, 2 Ired. Eq., 365.

Thus, an extreme imbalance between the benefit given and the benefit received may support rescission for fraud or taking undue advantage. See Section XXV.B (fraud in the inducement); Section XXV.E (taking unfair advantage).

H. FAILURE OF CONSIDERATION. "Failure of consideration, an affirmative defense, occurs when, because of some supervening cause after a contract is formed, the promised performance fails." *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.--Tyler 2010, no pet.).

I. THE STATUTE OF FRAUDS. The Common Law of England did not discriminate between contracts that were oral and contracts that were in writing. However, in 1677 the Parliament adopted An Act for

Prevention of Frauds and Perjuries, which required certain contracts to be in writing in order to be enforceable. Some American states incorporated the English statute into their law. Initially Texas did not. However, in 1840 the Legislature adopted a statute of frauds that "provided that all contracts for the sale of lands and slaves, in order to be enforced in the courts, should be in writing, and should be signed by the party to be charged thereby. Pasch. Dig. art. 3875." *Ballard v. Carmichael*, 83 Tex. 355, 363, 18 S.W. 734, 737 (1892) (Gaines, J.). The current statute of frauds is set out at Texas Business & Commerce Code Sections 26.01 and 26.02.

In *Dugan's Heirs v. Colville's Heirs*, 8 Tex. 126 (1852) (Lipscomb, J.), the Court held that equity would enforce an oral agreement to convey land where the grantor allowed the grantee to take possession of the land and make valuable improvements. In *Watkins v. Gilkerson*, 10 Tex. 340 (1853) (Lipscomb, J.), the Court found that an oral agreement to buy land jointly, where neither party owned the land at the time, was not a "contract for the sale of lands" covered by the statute of frauds. Where multiple documents relate to a transaction, the documents can be construed together to satisfy the statute of frauds. Restatement (Second) of Contracts § 132 (1981), cited in *City of Houston v. Williams*, 353 S.W.3d 128, 137 n. 9 (Tex. 2011) (Guzman, J.).

J. USURIOUS CONTRACTS. "Money is naturally barren; and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to secure the purpose of exchange, and not profit." *Hill v. George*, 5 Tex. 87, 1849 WL 4063, *3 (1849) (Cravens, S.J.) (quoting "an ancient dictum"). "By statute, however, at this day interest is allowed to be collected in almost if not quite every civilized country in the world." *Id*. at *3.

Texas has a long history of statutes regulating the maximum interest charge allowable by law. On January 18, 1840, the Texas Legislature adopted an act to regulate interest, which provided that any contracts "or instruments in writing" that allow interest in excess of twelve per centum per annum "shall be void and of no effect for the whole premium or rate of interest only, but the principal sum of money, or the value of the goods, wares, merchandise, bonds, notes of hand or commodity, may be received and recovered." Today, Texas Finance Code § 302.001 prohibits contracts for usurious interest.

K. UNCONSCIONABLE CONTRACTS. In *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (O'Neill, J.), the Court wrote: "Unconscionable contracts, however—whether relating to arbitration or not—are unenforceable under Texas law." The Court went on to describe what makes a contract unconscionable:

> A contract is unenforceable if, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." . . . Unconscionability is to be determined in light of a variety of factors, which aim to prevent oppression and unfair surprise; in general, a contract will be found unconscionable if it is grossly one-sided.

The quoted language was taken from *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 n. 36 (Tex. 2001) (Enoch, J.), which took its description of unconscionability in U.C.C. § 2.302, comment 1. The description of factors to be considered is supported by a citation to a treatise on remedies and by the Restatement (Second) of Contracts § 208 (1981). Section 208 is similar in operation to U.C.C. §2.302.

U.C.C. § 2.302 permits a court to refuse to enforce a contract, or part of a contract that the court, as a matter of law, finds was unconscionable at the time of contracting. Or the court can limit enforcement to avoid an unconscionable result. Where unconscionability is claimed, or where it appears to the court that a contract may be unconscionable, the court must permit the parties a reasonable opportunity to present evidence as to the "commercial setting, purpose, and effect." The question of unconscionability is or the court and not the jury. The Official Comment says that "[t]he basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. §2.302, Comment 1.

Restatement (Second) of Contracts § 208 (1981) says this about unconscionable contracts:

> § 208. Unconscionable Contract Or Term
>
> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The Restatement explains: "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy." Restatement (Second) of Contracts, § 208, cmt. a (1981).

One of the first cases to refuse to enforce a contract based on unconscionability was *Williams-Walker v. Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). The case was approvingly cited in a concurring opinion

in *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.3d 493, 499 (Tex. 1991) (Gonzales, J.) (concurring).

L. ILLEGAL CONTRACTS.

1. Illegal Contracts Not Enforceable. In *Heirs of Hunt v. Heirs of Robinson*, 1 Tex. 748, 759 (1846) (Lipscomb, J.), the Court said: "It is believed to be a rule of universal application that to undertake to do an act forbidden by the law of the place where it is to be done is an invalid agreement, and imposes no legal obligation." The Court supported its position by reference to the Spanish Siete Partidas, and the French Code de Napoleon, as well as the French commentator Pothier. *Id.* In *Lewis v. Davis*, 145 Tex. 468, 473, 199 S.W.2d 146, 149 (Tex. 1947) (Smedley, J.), the Court said that "A contract to do a thing which cannot be performed without a violation of the law is void." The Court went on to say that "[W]here the illegality does not appear on the face of the contract it will not be held void unless the facts showing its illegality are before the court." *Id*. Texas Rule of Civil Procedure 94 requires that a defense of illegality be specifically pled.

2. When Performance Becomes Illegal. "[T]he performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law . . . ." *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S.W. 197, 199 (1905) (Brown, J.); *accord*, *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (Gammage, J.).

3. Estoppel to Assert Illegality as a Defense. A party can be estopped to assert illegality as a defense. In *Hunt v. Turner*, 9 Tex. 385 (Tex. 1853) (Lipscomb, J.): "[T]he rule is well established that a party to an illegal contract will not be permitted to avail himself of its illegality until he restores to the other party all that had been received from him on such illegal contract; that so long as he continues to hold on to enjoy the advantages of the contract he shall not be allowed to set up to his advantage its nullity."

M. GAMBLING CONTRACTS. One of Texas' earliest contract cases, *Thompson v. Harrison*, Dallam 466, 466 (1842) (P.C. Jack, J.), held a gambling contract, that was a wager on the outcome of a political election, to be unenforceable as against public policy. However, in *Dunman v. Strother*, 1 Tex. 89 (1846) (Hemphill, C. J.). In *McElroy v. Carmichael*, 6 Tex. 454, 1851 WL 4015 (1851), (Hemphill, C.J.), the Court distinguished wagering on horse racing from other kinds of gambling. The Chief Justice Hemphill wrote: "The sport of horse-racing has for centuries been known by its distinctive designation. It is not prohibited by the law of the land, and it is understood that all attempts in the legislature for that purpose have failed . . . ." The court found that horse racing was not prohibited by a statute banning gambling devices, and that wagering on horse races did not violate public policy. However, by the time of *Monroe v. Smelley*, 25 Tex. 587 (1860) (Bell, J.), cultural mores had changed to the point that the Supreme Court conducted an extensive review of English and American cases on the enforceability of wagers, and then concluded:

> But it is unnecessary to make further reference to the American decisions. The uniform tendency of the later decisions is to treat all gaming contracts and all wagers as utterly void. We feel ourselves authorized to conform our decisions to the public policy and to the sense of morality which the modern decisions and the modern legislation on the subject of gaming and wagers so clearly indicate. We find that the ancient rule of the common law was subject to certain exceptions; and in proportion as the courts have considered these questions, these exceptions to the ancient rule have been adjudged to be more and more comprehensive in their embrace, until, as has been said, the exceptions to the rule have taken the place of the rule itself. We think that, in the true spirit and meaning of the exceptions to the old rule, all idle wagers and all gaming contracts may be properly held to be void.

In *Domingo v. Mitchell*, 257 S.W.3d 34 (Tex. App.--Amarillo 2008, pet. denied), the court held that a person claiming participation in a pool, that went in together to purchase a Texas lottery ticket that earned nearly $21 million, had a right to sue on an oral contract to vindicate her claim.

N. CONTRACTS THAT VIOLATE PUBLIC POLICY. In *James v. Fulcrod*, 5 Tex. 512 (Tex. 1851) (Hemphill, C.J.), the Court wrote: "That contracts against public policy are void and will not be carried into effect by courts of justice are principles of law too well established to require the support of authorities . . . ."

In *Lawrence v. CDB Services, Inc.*, 44 S.W.3d 544, 553 (Tex. 2001) (O'Neil, J.), the Supreme Court said that "[c]ourts must exercise judicial restraint in deciding whether to hold arm's-length contracts void on public policy grounds . . . ." The Court quoted the Beaumont Court of Appeals in *Sherrill v. Union Lumber Co.*, 207 S.W. 149, 153–54 (Tex. Civ. App.—Beaumont 1918, no writ), which in turn was quoted 6 Ruling Case Law § 119, at 710[553]:

> Public policy, some courts have said, is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.

Justice Doggett, in his Dissenting Opinion in *Williams v. Patton*, 821 S.W.2d 141, 148 n. 11 (Tex. 1991) (Doggett, J., dissenting), gave the following list of cases that had declared contracts unenforceable as being against public policy: "Cases invalidating contracts on the basis of public policy include: *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660

(Tex. 1990) (unreasonable covenant not to compete); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987) (exculpatory contract not expressly requiring indemnification from own negligence); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (improper termination of employment-at-will contract); *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984) (policy allowing insurer to avoid liability for plane crash due to insured's unrelated technical breach); *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303 (Tex. 1978) (insurance contract excluding personal injury coverage); *Crowell v. Housing Auth. of Dallas*, 495 S.W.2d 887 (Tex. 1973) (lease provision exempting landlord from tort liability to tenants); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.--Beaumont 1986, no writ) (release from liability for gross negligence); *Lone Star Gas Co. v. Veal*, 378 S.W.2d 89 (Tex. Civ. App.--Eastland 1964, writ ref'd n.r.e.) (contract exempting gas company from liability for own negligence). *See also Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 725 (Tex. 1990) (Doggett, J., concurring) (survey of public policy restrictions on employment contracts)."

In *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008) (Wainwright, J.), the Supreme Court considered whether it violated public policy to allow insurance reimbursement of exemplary damages for gross negligence. Saying that the state's public policy is generally reflected in its statutes, the Court looked to the statutes and found that the Legislature had prohibited insurance reimbursement for exemplary damages in some instances but not others. *Id.* at 658. The Court also looked at the Worker's Compensation statute and determined that it allowed coverage for exemplary damages for gross negligence. *Id.* at 660. Finding no legislative policy against such coverage, the Court turned to a survey of legal literature and the law and court rulings of other states. It found broad disagreement on the point. *Id.* at 661-63. The Court went on to make its own policy determination. It said: "In the absence of expressed direction from the Legislature, whether a promise or agreement will be unenforceable on public policy grounds will be determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement." As support, the Court cited the Restatement (Second) of Contracts § 178(1) (1981). Justice Wainwright listed cases in which the Supreme Court had declared contracts to be unenforceable due to public policy: *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 559 (Tex. 2006) (Jefferson, C.J.) (holding that agreement between lawyer and client providing for termination fee was against public policy); *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 82, 87 (Tex. 2004) (Brister, J.) (holding that assignment of claims for violations of the Texas Deceptive Trade Practices—Consumer Protection Act was against public policy); *Johnson v. Brewer & Pritchard, P. C.*, 73 S.W.3d 193, 205 (Tex. 2002) (Owen, J.) (holding that lawyer fee-sharing agreement was against public policy); *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 698, 705 (Tex. 1996) (Hecht, J.) (holding that insured's prejudgment assignment of claims against liability insurer was against public policy); . . . *Elbaor v. Smith*, 845 S.W.2d 240, 241 (Tex. 1992) (Gonzalez, J.) (holding that Mary Carter agreements, in which the defendant receives assignment of part of plaintiff's claim and both remain parties at trial were against public policy); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990) (Hecht, J.) (holding that unreasonable non-competition agreement was against public policy); *Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 663 (Tex. 1990) (Hightower, J.) (same); *Int'l Proteins Corp. v. Ralston–Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988) (Ray, J.) (holding that assignment of plaintiff's claims against one tortfeasor to another tortfeasor was against public policy); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex.1987) (Wallace) (holding that indemnity against one's own negligence was against public policy without express language); *Trevino v. Turcotte*, 564 S.W.2d 682, 690 (Tex. 1978) (Barrow) (holding that assignment of right to challenge will to one who had taken under will was against public policy); *Crowell v. Housing Auth. of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973) (Walker) (holding that lease provision exempting landlord from tort liability to tenants was against public policy); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1118 (Tex. 1921) (Phillips, C.J.) (holding that contract transferring custody of a child in exchange for permitting the child to inherit from the transferee was against public policy). *Fairfield Ins. Co.*, 246 S.W.3d at 665 n. 20. In the end, the Court held that the Legislature allowed insurance reimbursement for exemplary damages in worker's compensation cases, but declined to rule on whether public did or did not allow it in instances not covered by statute. *Id.* at 670. In his Concurring Opinion, Justice Hecht repeated dictum from an English judge: "public policy 'is a very unruly horse, and when you once get astride it, you never know where it will carry you.'" *Id.* at 672-73 (Hecht, J.) (concurring).

XIX. CAVEAT EMPTOR. The case of *Laidlaw v. Organ*, 15 U.S. 178 (1817) (Marshall, C. J.), has gained notoriety as the case that imported the doctrine of caveat emptor into American law. It is easy to read too much into this case. Chief Justice Marshall's Opinion is very brief, barely more than one column of three inches, and cites no authority for its conclusion. The case has nothing to do with the condition of goods being sold, the usual focus of caveat emptor. And the claim was that the *vendee* failed to disclose to the *vendor* external information that would have affected the price the vendor asked for the goods. General history, coupled with the bill of exceptions signed by the trial judge, reveals the following facts: the contract for the sale of 111 hogsheads of tobacco was entered into in New Orleans, Louisiana, on February 19, 1815, just 14 days after the British Army had withdrawn in defeat by American forces under General Andrew Jackson at the Battle of New Orleans. Late in the previous evening, the vendee, through chance or industry, learned that the War of 1812 had been concluded by a peace treaty signed at Ghent, Belgium. This meant that an embargo that had depressed the price of tobacco would soon be lifted. The vendee called

upon the vendor shortly after sunrise the next day, Sunday, February 19, to effect the purchase. *Id.* at 183. Before the transaction was consummated, the vendor asked the vendee if the vendee had news that might affect the price of tobacco, and the vendee remained silent about what he knew. *Id.* The contract was made, but before delivery the news was reported of the peace treaty and the value of the tobacco rose by 30 to 50 per cent. *Id.* at 183. The vendor reclaimed the tobacco, and the vendee sued. The vendor attempted to avoid the contract on the ground that the vendee's failure to report information known to the vendee but not accessible to the vendor was tantamount to fraud or a breach of good faith. *Id.* at 185. The argument between the lawyers (Francis Scott Key represented the buyer) turned on whether the law not only prohibits affirmative misrepresentation but also imposes on a contracting party a duty to disclose information the other party would want to know. Chief Justice Marshall made short shrift of the vendee's arguments, saying:

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

Chief Justice Marshall cited no authority for the Court's decision, but did offer a policy argument, that "[i]t would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." *Id.* at 194. However, the Chief Justice went on to state a rule against affirmatively misleading the other contracting party: 'But at the same time, each party must take care not to say or do any thing tending to impose upon the other." *Id.* at 194.

The rule of caveat emptor did not take firm hold in Texas. In *Lynch v. Baxter*, 4 Tex. 431, 1849 WL 4044, *6 (Tex. 1849) (Lipscomb, J.), the Court wrote that the rule of caveat emptor applied to judicial sales of foreclosed property, and that the buyer takes without express or implied warranty. In *Randon v. Barton*, 4 Tex. 289, 293 (1849) (Wheeler, J.), the Court held that a person who purported to transfer land certificates where he had no title to them had committed a fraud and was liable. In *Mitchell v. Zimmerman*, 4 Tex. 75, 1849 WL 3970, *3 (Tex. 1849) (Wheeler, J), the Court encountered a lease for real estate where the lessor misrepresented that 140 acres were suitable for cultivation, when in truth it was less than fifty acres. Justice Wheeler made a number of broad and important statements regarding the duties attending the creation of contracts. He wrote:

> If the party, says Story, intentionally misrepresents a material fact or produces a false impression by words or acts, in order to mislead or obtain an undue advantage, it is a case of manifest fraud. (1 Story Eq., sec. 192.) It is a rule in equity that all the material facts must be known to both parties to render the agreement just and fair in all its parts. (2 Kent Com., 491.) And if there be any intentional misrepresentation or concealment of material facts in the making of a contract, in cases in which the parties have not equal access to the means of information, it will vitiate and avoid the contract. (2 Kent Com., 482; 2 Bail. R., 324.) It is immaterial whether the misrepresentation be made on the sale of real or personal property, or whether it relates to the title to land or some collateral thing attached to it. (7 Wend. R., 380.)

It is interesting to note that Justice Wheeler cited to two American writers (Story and Kent) on principles of equity jurisprudence and bailment. It is also interesting to note that the equitable principles announced by Justice Wheeler are generic, in that they apply to sales of both personalty and realty, and the duty extends not just to title but to anything collaterally attached to the land (in this instance, the amount of land that could be cultivated). Justice Wheeler went on to write that the duty not to mislead extends not just to statements known to be false but also to statements represented as true when the truthfulness had not been ascertained. *Id.* at *4. Justice Wheeler then stated a general rule regarding *caveat emptor* that "[i]t is indeed true that every person reposes at his peril in the opinion of others when he has equal opportunity to form and exercise a correct judgment of his own . . . ." *Id.* at * 5.

In *Mathews v. Allen*, 6 Tex. 330, (1851) (Hemphill, C.J.), a buyer was entitled to recission of the purchase price of a land certificate conveyed by someone who had no title. This was true with or without warranty.

In *Miller v. Miller*, 10 Tex. 319, 1853 WL 4347 (1853) (Lipscomb, J.), the Court held that a sale of land pursuant to order of a probate court did not pass title to the purchaser where the probate court was without jurisdiction to order the sale.

In the landmark case of *Brantley v. Thomas*, 22 Tex. 270, 1858 WL 5635 (Tex. 1858) (Bell, J.), the Court said: "The old rule, and the general rule, as stated in the books, is that a fair price implies a warranty of title, but that, as respects the quality of the article sold, the seller is not bound to answer. This rule, however, has received certain modifications, which have been generally recognized by the courts. One of these modifications, for example, is, that where goods are sold by sample, there is an implied warranty, that the bulk of the goods delivered, shall correspond with the sample exhibited." The Court then went on to establish in Texas law an implied warranty of merchantability:

> If goods are sent, upon order, by a New York merchant, to a Texas merchant, the law will imply a warranty, that the goods sent are such as were ordered; or, if goods are sent by a New York merchant, to a Texas merchant, without a special order, but upon a general engagement to forward

> goods, the law will imply a warranty, that all goods sent are valuable and merchantable.

This implied warranty of merchantability has remained through today as part of Texas law.

In the landmark case of *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (Norvell, J.), which established an implied warranty of habitability and good and workmanlike construction for newly-built homes, the Supreme Court recounted the decline of caveat emptor in American and Texas law. In *Kellogg Bridge Company v. Hamilton*, 110 U.S. 108 (1884), the U.S. Supreme Court recognized an implied warranty in connection with a real estate transaction. In *Wintz v. Morrison*, 17 Tex. 372 (1856) (Wheeler, J.), the Court approvingly quoted Justice Story's treatise on sales for the proposition that "[t]he maxim of Caveat emptor seems gradually to be restricted in its operation and limited in its dominion, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but a shadow of itself." See *Humber v. Morton*, 426 S.W.2d at 558.

An historical overview of the doctrine of caveat emptor was included in *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 574-76 (Tex. 1991) (Phillips, C.J.). The Court noted that by the end of the 1900s, courts had curtailed the doctrine of caveat emptor, by relaxing the requirements for creating express warranties and expanding the role of implied warranties. The Uniform Sales Act of 1906, never adopted in Texas, provided that no specific wrods were required to create an express promise, and the Act also recognized an implied warranty of merchantability and fitness for a particular purpose. *Id.* at 575. U.C.C. Section 2.313 carried forward a looser standard for express warranties ("[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain"). Section 2.312 contained a warranty of title, Section 2.314 created an implied warranty of merchantability, and Section 2.315 created an implied warranty of fitness for a particular purpose. See Section XX.B.2.e of this Article.

See Walter H. Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 Yale L.J. 1133 (1931).

XX. THE LAW OF WARRANTIES. Professor Williston wrote that "[t]here is no more troublesome word in the law than the word 'warranty.'" Samuel Williston, The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act § 12 (1909). The breach of a warranty can be the basis of a suit for damages, or ground for rescission, or can be asserted as a defense against a claim asserted by the party who breached the warranty. All warranties are contractual, in the sense that they arise from a sale of real or personal property or the delivery of services, or a contract for either. However, some breaches of warranty are treated as a tort, some as a breach of contract, and some as a violation of public policy that is neither a tort nor a breach of contract. Warranties can be express or implied. To be express, a warranty must be communicated in some way to the buyer, whereby it becomes part of the transaction. An implied warranty is not expressly communicated between the parties and instead arises by operation of law. Warranties can be narrowed or eliminated, subject to certain limitations. In his famous article *Assault on the Citadel: Strict Liability to the Consumer*, 69 Yale L. J. 1099, 1126 (1960), Dean Prosser had this to say about warranty: "The adoption of this particular device was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract." Because the conceptual foundation for warranty law is so disconcerting, in some instances courts have resorted to identifying whether the warranty claim arises in tort or contract by determining the remedy available, rather than determining the remedy available from whether the claim is for tort or contract.

A. THE ROOTS OF WARRANTY LAW. English warranty law developed incident to sales transactions, where the item purchased was not as it was represented to be. Under the doctrine of caveat emptor, the fact an item was not what the buyer expected gave rise to no claim (i.e., there were no implied warranties). However, if the sale involved an express warranty, and that warranty was breached, then the deficiency in the item purchased was actionable under the form of action called Deceit. See Section V.D of this Article. According to Professor Williston, the law of warranty is at least a century older than the rise of Special Assumpsit.[554] He says that the first breach of warranty claim brought in Assumpsit occurred in 1778.[555] In English law, a warranty was considered to be collateral to the main transaction, perhaps a result of the claim for breach of express warranty originally sounding in Deceit, which was akin to a modern tort, and not in a claim brought on the underlying transaction.[556] According to Williston, by the early 1700s, cases recognized the right to recover for breach of an express warranty even where the representation of the seller was not knowingly false.[557] Williston attributes part of the modern confusion about the legal basis of warranty law to the fact that warranty claims arose as tort claims (i.e., Deceit) but ended up as contract claims (i.e., Assumpsit).[558] In *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987) (Spears, J.), the Court said: "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract." The Uniform Commercial Code (1962) says this about warranties: "[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . ."[559]

B. PARTICULAR WARRANTIES. Under the English Common Law, an affirmation at the time of sale was a warranty only if the seller intended it to be.[560] However, the Uniform Sales Act ("U.S.A.") provided that an "express warranty" is "[a]ny affirmation of fact or any promise by a seller relating to goods" or services, where the affirmation or promise has "the natural tendency . . . to induce the buyer to purchase the goods" or services, and "if the buyer purchases the

goods" or services "relying thereon."[561] This definition indicates that an express warranty does not have to be a promise; instead it can be just an affirmation. So an express warranty need not meet the requirement of offer-and-acceptance in order to the warranty to arise. Another thing to note about the U.S.A definition is that the affirmation becomes an express warranty only if the buyer relies on it, and the affirmation has "the natural tendency . . . to induce the buyer" to buy. Thus, under the U.S.A. proof of an express warranty depended upon actual reliance and an objective assessment that the affirmation had the required "natural tendency." The U.C.C. lists several express warranties, although to some extent they impliedly arise by operation of law, if certain things occur. Under U.C.C. Section 2.313(b), a warranty can arise even when the seller does not "use formal words such as 'warrant' or 'guarantee,'" and can arise even if the seller does not "have a specific intention to make a warranty."[562] This last point is worth repeating: under U.C.C. Section 2.313, *an express warranty can arise even if the seller does not intend to make an express warranty.*[563] The U.C.C. does require that the affirmation of fact or promise "become[] part of the basis of the bargain." This is not the equivalent of the U.S.A.'s consideration of reliance and the "natural tendency . . . to induce" the buyer to buy. The U.C.C. standard appears to move closer to requiring that the warranty be included in the terms of the contract before the warranty can arise.

1. Express Warranties. An express warranty was defined by William Story: "Any positive affirmation, or representation, made by the vendor, at the time of the sale, with respect to the subject of sale, which operates, or may operate, as inducement, unless it be the expression of mere matter of opinion, in a case where the vendee had no right to rely upon it, or be purely matter of description, or identification, without fraud, and not intended as a warranty, constitutes a warranty." William Wetmore Story, A Treatise on the Law of Sales of Personal Property § 357 (1853) (cited in *Blythe v. Speake*, 23 Tex. 429, 1859 WL 6294, *3 (1859) (Roberts, J.).

a. Express Warranty by Affirmation or Promise. U.C.C. Section 2.313(a)(1) provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[564]

b. Express Warranty by Description. However, U.C.C. Section 2.313(a)(2) provides that "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."[565] However, U.C.C. Section 2.313(b) says that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. Mere descriptions do not create an express warranty.[566]

c. Warranty Mixed With Descriptions. It sometimes happens that a description made in a contract or at the time of sale is coupled with a warranty about the object being sold. The question then arises whether the description is part of the warranty. In *Blythe v. Speake*, 23 Tex. 429, 1859 WL 6294, *4-5 (Tex. 1859) (Roberts, J.), Speake and Willard sold a male slave to Ury using a real estate deed that described the slave's age and good physical condition, and concluded with a general warranty of title. The Supreme Court concluded that the general warranty was not a warranty of title, but instead was a warranty of soundness.

d. Express Warranty Regarding Samples. U.C.C. Section 2.313(a)(3) provides that any sample or model "which is made part of the basis of the bargain" creates an express warranty "that the whole of the goods shall conform to the sample or model."[567]

e. Warranties of Future Performance. In *Henderson v. San Antonio & M.G.R. Co.*, 17 Tex. 560, 1856 WL 5057, *12 (Tex. 1856) (Wheeler, J.), Justice Wheeler wrote: "The representations as to what the defendants would do, when used as inducements to others to contract with them, became assurances and undertakings which they were bound to fulfill. They were obligatory upon them, and must be so held, or the contract would be void for the want of mutuality. If such assurances were not binding, there could be no binding promise to perform an act in future."

2. Implied Warranties. An implied warranty is a duty between a seller and a buyer, or between a service-provider to a customer, that arises by operation of law and not by express agreement of the parties. "implied warranties are created by operation of law and are grounded more in tort than in contract. . . . Implied warranties are derived primarily from statute, although some have their origin at common law." *La Sara Grain Co. v. First Nat. Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) (Spears, J.) [citation omitted].

a. Implied Warranty of Title and Quiet Possession. In the world of sales of goods, Williston noted in his Treatise on Sales that early English law did not imply a warranty of title, but that by Blackstone's time such an implied warranty arose.[568] Section 13(1) of the Uniform Sales Act of 1906 ("U.S.A.") provided that, in a merchant sale of goods, there is "an implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods . . . ."[569] U.S.A. Section 13(2) provides for an implied warranty that the buyer shall "have and enjoy quiet possession of the goods . . . ."[570] U.S.A. Section 13(3)created an implied warranty that the goods are free of any charge or encumbrance in favor of a third person.[571] U.S.A. Section 12 was supplanted by Section 2.312 of the Uniform Commercial Code of 1962 ("U.C.C."), which contains an implied warranty that "the title conveyed shall be good, and its transfer rightful", and that "the goods shall be delivered free from any security interest or encumbrance of which the buyer has no knowledge at the time of contracting.[572] The Comment to Section 2.312 notes that "the warranty of quiet possession is

abolished," since it is subsumed in the warranty of title.[573] Under U.C.C. Section 2.312(b), the implied warranty of title can be excluded or modified "only by specific language or by circumstances" which give the buyer reason to know that the person selling either does not claim title or is purporting to sell only the title or interest he does have."

b. Implied Warranty That Goods Delivered Match Goods Ordered. The Texas Supreme Court, in *Brantley v. Thomas*, 22 Tex. 270, 1858 WL 5635, *3 (Tex. 1858) (Bell, J.), recognized three implied warranties in merchant transactions, one being an implied warranty that goods delivered match the goods ordered:

> Without pursuing this branch of the subject further, we may assume, as a correct rule, deducible from the authorities, that where sales are made by sample, there is an implied warranty, that the goods delivered shall correspond with the sample. And where goods are ordered by one dealer and sent by another, there is an implied warranty, that the goods sent shall correspond to the order, or that they are merchantable, and suited to the market where they are to be sold.

c. Implied Warranty that Samples are Representative. The Texas Supreme Court, in *Brantley v. Thomas*, 22 Tex. 270, 1858 WL 5635, *3 (Tex. 1858) (Bell, J.), recognized three implied warranties in merchant transactions, one being an implied warranty that, where goods are sold based on a sample, the goods delivered will match the sample:

> Without pursuing this branch of the subject further, we may assume, as a correct rule, deducible from the authorities, that where sales are made by sample, there is an implied warranty, that the goods delivered shall correspond with the sample. And where goods are ordered by one dealer and sent by another, there is an implied warranty, that the goods sent shall correspond to the order, or that they are merchantable, and suited to the market where they are to be sold.

This warranty regarding samples was included in Section 16 of the Uniform Sales Act of 1906.[574] It is now included in U.C.C. Section 2.313(3).[575]

d. Implied Warranty of Merchantability. Under Roman law, and later under French, Spanish and Italian law, the vendor impliedly warranted that goods sold were merchantable.[576] In *Brantley v. Thomas*, 22 Tex. 270, 1858 WL 5635, *3 (Tex. 1858) (Bell, J.), the Texas Supreme Court recognized three implied warranties in merchant transactions, one being an implied warranty that the goods are merchantable and suited to the market:

> Without pursuing this branch of the subject further, we may assume, as a correct rule, deducible from the authorities, that where sales are made by sample, there is an implied warranty, that the goods delivered shall correspond with the sample. And where goods are ordered by one dealer and sent by another, there is an implied warranty, that the goods sent shall correspond to the order, or that they are merchantable, and suited to the market where they are to be sold.

In *Joy v. National Exchange Bank of Dallas*, 74 S.W.325 (Tex. Civ. App. 1903, no writ), the court held that the rule of caveat emptor applied where the buyer was able to inspect the goods being purchased. U.S.A. Section 15(2) and later U.C.C. Section 2.314 establish a warranty of merchantability for a merchant's sale of goods. U.C.C. warranties can be varied by agreement. U.C.C. Section 2.316. Section 2.316 excludes blood and blood products, as well as cattle, from the warranty. In *Chaq Oil Co. v. Gardener Machinery Corp.*, 500 S.W.2d 877, 878 (Tex. Civ. App.–Houston [14th Dist.] 1973, no writ), the court held that there is no implied warranty of merchantability for used goods.

e. Implied Warranty of Fitness for a Particular Purpose. Where a buyer buys goods for a particular purpose, the law will imply a warranty of fitness for that particular purpose. This warranty is an extension of a warranty of merchantability, which warrants the fitness of the goods only for a general purpose.[577] Uniform Sales Act Section 15(1) contained a warranty of suitability for a particular purpose, in situations where the buyer made known to the seller the particular purpose for which the goods were being acquired. U.C.C. Section 2.315 establishes a warranty of fitness for a merchant's sale of goods, where the seller has reason to know of a particular purpose for which the goods will be used, and the buyer is relying on the seller's skill and judgment to select the right items. Section 2.316 excludes blood and blood products, as well as cattle, from the warranty.

f. Implied Warranty of Habitability and Good and Workmanlike Construction of New Houses. In *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (Norvell, J.), the Supreme Court recognized in Texas that the house was suitable for human habitation and constructed in a good workmanlike manner. The Court does not say whether the warranty sounded in tort or contract, but the sense of the case is that the existed between the seller and the buyer, and went no further.

g. Implied Warranty of Good Workmanship in Repairs to Personal Property. In *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (Spears, J.), the Court established an implied warranty of good workmanship in the repair or modification of tangible goods or property.

h. Implied Warranty of Fitness for Food and Drink. The English Common Law imposed liability on purveyors of "corrupt victuals."[578] In *Walker v. Great Atlantic & Pacific Tea Co.*, 131 Tex. 57, 61, 112 S.W.2d 170, 172 (Tex. 1938) (Martin, Comm'r), the Supreme Court ruled that the sale of food carried with it an implied warranty that the food was safe, and that the seller could be sued if a consumer was harmed by

bad food. In *Bowman Biscuit Co. of Tex. v. Hines*, 151 Tex. 370, 251 S.W.2d 153, 372 (Tex. 1952) (Smith, J) (on rehearing), the Court, in a 5-4 vote that reversed on rehearing, ruled that a wholesaler who provided bad good to a retailer could not be sued by the consumer. In *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 618 164 S.W.2d 828, 832 (Tex. 1942) (Alexander, C.J.), the Court held that a manufacturer could be held liable to a consumer for bad food, even though there was no contractual privity between the consumer and the manufacturer. The warranty was described in *Jacob E. Decker & Sons v. Capps* as an implied warranty that food sold is wholesome and fit for consumption. The Court stated that the warranty arose not in tort or contract but rather in public policy. In *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 78 (Tex. 1977) (Pope, J.), the Supreme Court discredited *Decker & Sons v. Capps* as a foundation for further expansion of the law, which is now analyzed in the context of Section 402A of the Restatement (Second) of Torts or the warranty sections of the U.C.C.

C. WARRANTIES UNDER THE UNIFORM SALES ACT OF 1906. Section 12 of the Uniform Sales Act (1906) provided for express warranties in the following terms:

> Section 12. [Definition of Express Warranty.] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statmeent purporting to be a statement of the seller's opinion only shall be construed as a warranty.[579]

The Uniform Sales Act (1906) describes implied warranties as follows:

> Section 13 – implied warranty of title
> Section 14 – implied warranty in sale by description
> Section 15 – implied warranties of quality
> Section 16 – implied warranties in sale by sample.[580]

D. WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE OF 1962. The U.C.C. recognizes the following express warranties: a warranty of title, Section 2.312; a warranty by affirmation of fact, Section 2.313(a)(1); a warranty by description, Section 2.313(a)(2); and a warranty by sample or model, Section 2.313(a)(3).[581] The U.C.C. recognizes the following implied warranties: merchantability, Section 2.314; and fitness for a particular purpose, Section 2.315.[582]

E. CISG. The Convention on Contracts for the International Sale of Goods (1980) ("CISG"), Article 35, contains an implied warranty of merchantability, an implied warranty of fitness for a particular purpose (made known to the seller, unless non-reliance is shown), an implied warranty of representativeness of samples or models, and an implied warranty of customary packaging. These implied warranties can be waived by agreement. The warranties are released if the buyer knew of nonconformity when the contract was concluded.[583]

F. DISCLAIMERS OF WARRANTIES. Some implied warranties can be disclaimed, and some cannot. In *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982) (Sondock, J.), the Court held that the parties could waive the warranties of habitability and good and workmanlike construction, recognized in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (Norvell, J.). In *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (Spears, J.), the Court established an implied warranty of good workmanship in the repair or modification of tangible goods or property, and held that it could not be waived. In *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002) (Phillips, C.J.), the Supreme Court held that the implied warranty of habitability cannot be waived except under limited circumstances, but that the implied warranty of good and workmanlike construction cannot be disclaimed. However, the Court ruled that an express warranty could replace the implied warranty of good and workmanlike construction.

U.C.C. Section 2.316 recognizes that parties may limit the express warranties and limit or waive the implied warranties described by the U.C.C. Implied warranties under the U.C.C. can be waived by words such as "as is," "with all faults," and other words that make plain that there is no implied warranty.[584] If a buyer examines the goods "as fully as he desired, then there is no implied warranty regarding defects visible upon examination.[585] The U.C.C. also permits implied warranties to be modified or excluded based on course of dealing or course of performance.[586] In *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) (Phillips, C.J.), the Court found that the U.C.C. waiver of warranty provisions applied to a service transaction (publishing an advertisement in the Yellow Pages), and held that Southwestern Bell could limit the damages for such failure to the amount paid for the directory advertising.

G. REMEDIES FOR BREACH OF WARRANTY. In *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) (Phillips, C.J.), the Court noted that a claim for breach of warranty is not a claim for breach of the underlying contract:

> The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer "[w]here the seller fails to make delivery." Tex.Bus. & Com.Code § 2.711(a). The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Tex.Bus. & Com.Code § 2.714, § 2.711 (Comment 1); see

also 1 J. White & R. Summers, Uniform Commercial Code 501 (3rd ed. 1988).

Thus, the Texas Supreme Court carried forward the distinction that arose out in the Common Law between a claim in Deceit and a claim in Assumpsit.

1. Election of Rescission or Damages. In *Mathews v. Allen*, 6 Tex. 330, 1851 WL 3992, *2 (1851) (Hemphill, C.J.), the Court faced a sale of land where the seller had no title in the land. The sale occurred when Spanish law was in place. Chief Justice Hemphill said: "Under the system of Spanish jurisprudence then in force it is an established rule that a sound price warrants a sound commodity. An implied warranty was annexed to every sale, and if the vendor's title partially or wholly failed the purchaser was entitled to partial or entire relief." The Court held that the purchaser was "entitled to a rescission of the contract and to the repayment of the sums advanced." In *Garrett v. Gaines*, 6 Tex. 435, 1851 WL 4014 (Tex. 1851) (Hemphill, C.J.), the Chief Justice gave extensive analysis of Spanish law applied to a contract signed in 1837, and determined that the remedy for breach of warranty of title for a slave was the return of the purchase price plus the cost of suit. In *Blythe v. Speake*, 23 Tex. 429, 1859 WL 6294, (Tex. 1859) (Roberts, J.), a representation that a slave was "sane and healthy (except one finger stiff) in mind and body" was a warranty of soundness, and if the seller knew that the slave suffered from an unknown illness that later made him unable to work, then a claim for fraud existed, and the buyer had the option to rescind the sale and receive back his purchase money or he may sue for damages. In *Wright v. Davenport*, 44 Tex. 164, 1875 WL 7672, *2 (Tex. 1875) (Moore, A.J.), the Supreme Court held that, absent fraud in the inducement, a party cannot rescind a contract for a breach of warranty; the only remedy is to sue for damages. This was the law of England.[587] However, the American states were divided on this question.[588] In *Scalf v. Tompkins*, 61 Tex. 477, 1884 WL 8799, *3 (1884) (Willie, C.J.), held that a party who accepts defective merchandise, and uses it, thereby loses his right to rescission and the sole remedy is for "damages for any loss he might sustain by reason of a failure of the machinery to come up to contract."

2. Damages for Breach of Warranty. In *Randon v. Barton*, 4 Tex. 289, 1849 WL 4012, *4 (1849) (Wheeler, J.), the Court held that "[w]hen contracts for the sale of chattels are broken by the failure of the vendor to deliver the property according to the terms of the contract, it is well settled that as a general rule the measure of damages is the difference between the price contracted to be paid and the value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor." In *Wintz v. Morrison*, 17 Tex. 372 (1856) (Wheeler, J.), the Court held that a claim for failure to disclose that horses were diseased, and misrepresenting related facts, would be treated a warranty claim, and would permit recovery of the difference between the value paid and the value received, plus damages that were an immediate consequence of the wrong. The proper measure of damages is further discussion in Section XXVII.B of this Article.

3. Attorneys Fees for Breach of Warranty. In *Medical City Dallas, Ltd. v. Carlisle Corporation*, 251 S.W.3d 55, 59 & 63 (Tex. 2008) (Jefferson, C.J.), the Court held that attorney's fees can be recovered under Texas Civil Practice & Remedies Code Section 38.001(8) for breach of an U.C.C. Article 2 express warranty claim, concluding that "a claim based on an express warranty is, in essence, a contract action" because it "involves a party seeking damages based on an opponent's failure to uphold its end of the bargain."

H. WARRANTIES AND COVENANTS FOR REAL PROPERTY. Land does not sell with an implied warranty of perfect title, but case law does suggest that a claim for rescission or fraud will lie if the vendor has no title at all. A buyer who accepts real property knowing that there is a defect in title has no defense to paying the purchase price. *Brock v. Southwick*, 10 Tex. 65, 1853 WL 4274 (1853) (Wheeler, J.). A purchaser is charged with notice of a possible adverse claim by parties in possession of land when the possession is "visible, open, exclusive, and unequivocal." *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (per curiam), citing *Strong v. Strong*, 128 Tex. 470, 98 S.W.2d 346, 350 (1936) (Smedley, Comm'r).

The law recognized implied covenants in connection with land transactions. For example, oil and gas leases entail three broad covenants: (1) to develop the premises, (2) to protect the leasehold, and (3) to manage and administer the lease. *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 567 (Tex. 1981) (Campbell, J.). The legal duty expressed by these covenants is that of a "reasonably prudent operator under the same or similar facts and circumstances." However much that may sound like a negligence standard, in the *Amoco Production Co.* case, the Supreme Court held that "a breach of the implied covenant to protect against drainage [part of the covenant to protect the leasehold] is an action sounding in contract and will not support recovery of exemplary damages absent proof of an independent tort." *Id.* at 571.

XXI. DUTY OF GOOD FAITH AND FAIR DEALING. In *Mitchell v. Zimmerman*, 4 Tex. 75, 1849 WL 3970, *3 (Tex. 1849), Justice Wheeler wrote: "It is a rule in equity that all the material facts must be known to both parties to render the agreement just and fair in all its parts." He cited Kent's Commentaries in support. The passage is in danger of being misunderstood if taken out of context. Justice Wheeler cited the rule in support of a conclusion that, where a vendor fraudulently misrepresented the condition of land he was leasing, the lessee was required to pay only what the property was worth, not the full contract amount.

In *Varner v. Carson*, 59 Tex. 303, 1883 WL 9162, *2 (Tex. 1883) (Clayton, J.), the Supreme Court said:

> The duty to observe the rules of fair dealing becomes still more obligatory when the person dealt with is not only not in a proper condition to enter into agreements, but confides in the opposite party and implicitly trusts to his statements in reference to the subject of the transaction. The most usual instances of relations of trust are those of guardian and ward, attorney and client, trustee and cestui que trust, etc. But these are not the only ones, and no enumeration can be made of the many different relations which may grow between parties in which the one confides to the other in business transactions. Some of these may require a more strict adherence to honesty than others, but in any case where it is clear that one party relied on the other, and had a right to do so, and such reliance must have been known, a sufficient relationship of confidence is shown to require more than ordinary good faith in dealing. *Butler v. Miller*, 1 Ired. Eq., 215; *McCormick v. Malin*, 5 Blackf., 509; *Wilson v. Watts*, 9 Md., 356.

Id. at *3.

In *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) (Wallace, J.), the Supreme Court held that a duty of good faith and fair dealing does not arise in connection with ordinary contractual relationships. However, that duty has been recognized in Texas as arising between and insurer and an insured, *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (Ray, J.), and between a workers' compensation insurance carrier and injured workers, *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212–13 (Tex. 1988) (Spears, J.). *Aranda* was overruled in *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 451 (Tex. 2012) (Johnson, J.), due to the Legislature's revamping of the worker's compensation system.

XXII. SURETY AGREEMENTS. "A guaranty agreement is a contract in which one party agrees to be responsible for the performance of another party even if he does not have direct control." *Material Partnerships, Inc. v. Ventura*
102 S.W.3d 252, 258 (Tex. App.--Houston [14th Dist.] 2003, no pet.).

In *Violett v. Patton*, 9 U.S. (5 Cranch) 142 (1809), a case decided under Virginia law, Chief Justice Marshall wrote that a guarantee to pay the debt of another was an enforceable promise, even though consideration did not flow to the guarantor. Chief Justice Marshall wrote:

> To constitute a consideration, it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made and that the promise is the inducement to the transaction.

Chief Justice Marshall[589] thus recognized that consideration could consist of either (i) a benefit to the promissor, or (ii) a detriment to the promissee. Chief Justice Marshall's authority for the enforceability of surety agreements is the prevailing practice in his home state, rather than case law or legal treatises. He wrote:

> It is common in Virginia for two persons to join in a promissory note, the one being the principal and the other the security. Although the whole benefit is received by the principal, this contract has never been considered as a nudum pactum with regard to the security.

The statute of frauds requires that surety obligations, or agreements to guarantee the debt of another, be in writing to be enforceable. Tex. Bus. & Comm. Code § 26.01(2). In *Lemmon v. Box*, 20 Tex. 329, 333 (1857) (Hemphill, C.J.), the Court held that the statute of frauds did not apply where the main purpose or leading object of the agreement is, not to answer to another, but rather to subserve some purpose of his own. The rule was applied again in *Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 891 (Tex. 1970) (McGee, J.). The Supreme Court revisited the issue in *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 81 (Tex. 2012 (Jefferson, C.J.), where the Court articulate the elements of the doctrince: "The main purpose doctrine requires that: (1) the promisor intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for the promisor's own use and benefit-that is, the benefit it received was the promisor's main purpose for making the promise." Id. at 828.

In *Wallace & Co. v. Hudson*, 37 Tex. 456, 1872 WL 7640, *11 (Tex. 1872) (Walker, J.), the Court held that a wife can guarantee a previously existing debt of her husband only if the guaranty is supported by consideration.

XXIII. BREACH OF CONTRACT.

A. MATERIAL BREACH. A breach of contract does not give rise to damages or a right to rescission unless it is material. Restatement (Second) of Contracts § 241 (1981) lists five circumstances that affect materiality: "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

In *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195 (Tex. 2004) (per curiam), the Court held that failure to perform by the deadline was a material breach, where the deadline was specified in the contract and the contract said that "time is of the essence."

Article 25 of the CISG defines a "fundamental breach" as a breach that "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."[590]

B. PARTIAL PERFORMANCE. In *Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990) (per curiam), the Court recounted Texas law that "'a party to a contract who is himself in default cannot maintain a suit for its breach'" but that "[t]his strict rule has been ameliorated in the law of building contracts by the doctrine of substantial performance, which allows a contract action by a builder who has breached, but nevertheless substantially completed, a building contract." Dobbins is also a lesson in pleading claims and defenses. Plaintiff Redden agreed to build an earthen tank and dam on defendant Dobbins' property for $10,000. During construction, Redden found that the conditions of the land would increase the cost of construction. Redden kept on working, but the parties disagreed whether Dobbins ever agreed to pay Redden more than $10,000. Redden eventually stopped building the tank, but he billed Dobbins $24,905, of which Dobbins paid $10,000. Redden then sued on account, for $24,905. Dobbins countersued for the difference in value between the partially-constructed tank and a completed tank. The jury found that Dobbins owed Redden $14,905, but that Redden had caused damages of $10,000 to Dobbins. The trial court ignored Dobbins' counter-claim and granted Redden a judgment for $14,905.00. The Court of Appeals ruled that the two sums should be offset against each other. The Supreme Court ruled that Redden could not recover on the contract, because he had breached it. Also, Redden did not plead or request from the jury a finding on quantum meruit as an alternative ground of recovery, and so waived it. The Supreme Court nullified Redden's recovery. This is a simple case, involving basic contract concepts, and yet they were misunderstood by the plaintiff's lawyer, the trial court, and the court of appeals.

C. CONDITIONS TO PERFORMANCE. "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) (Gammage, J.). "Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty." *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, *3 (Tex. 1976) (Denton, J.). The Court distinguished between a condition to the creation of the contract and a condition to performance of the contract. Looking to the latter, whether a recital in a contract is a condition to performance or an independent promise is a matter of interpretation.

While no particular words are necessary to create a condition, such terms as 'if', 'provided that', 'on condition that', or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties.

Hohenberg Bros. Co., at *3. In *Sirtex Oil Industries, Inc. v. Erigan*, 403 S.W.2d 784, 787 (Tex. 1966) (Norvell, J.), the Court borrowed from land law and said: "Conditions subsequent are not favored by the courts, and the promise or or obligation of the grantee will be construed as a covenant unless an intention to create a conditional estate is clearly and unequivocally revealed by the language of the instrument." The quoted language was taken from *Hearne v. Bradshaw*, 158 Tex. 453, 456, 312 S.W.2d 948, 951 (1958) (Walker, J.), which related to conditions subsequent in land transfers.

D. DISCHARGE OF OTHER PARTY'S DUTIES UNDER THE CONTRACT. In *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam), the Court said that "[i]t is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance."

E. STRICT LIABILITY FOR COMMON CARRIERS. Texas law recognized that common carriers are responsible for damages to the goods being transported, without the necessity of proving how the damage occurred. *Chevaillier v. Straham*, 2 Tex. 115 (1847) (Hemphill, C.J.). Exceptions from this rule are recognized for acts of God, acts of public enemies, and exception by express agreement. *Id.* at 5. The policy reason is that, as a practical matter, the party shipping goods would never be able to prove how injury to the goods occurred. *Id.* at 6. In *Chevaillier v. Patton*, 10 Tex. 344 (1853) (Lipscomb, J.), the Supreme Court allowed an implied exception where the owner of cotton being transported by boat was advised that the river could be navigated only by boats with no cover for the freight. The scope of the exception in *Chevaillier v. Patton* was limited the circumstances of that case, in *Philleo v. Sanford*, 17 Tex. 227 (1856) (Wheeler, J.).

XXIV. DEFENSES TO CONTRACT CLAIMS.

A. DEFENSES THAT ARE ALLOWED.

1. Impossibility of Performance. In *Houston I. & B. Co. v. Keenant*, 99 Tex. 79, 86, 88 S. W. 197, 200 (1905) (Brown, J.), the Court ruled that a lessee who

had agreed to rent a premises "for the saloon business" was not relieved of his lease obligation by the fact that a county election had made the county a "dry" county. The Court cited no authority for its decision.

In *Levy Plumbing Co. v. Standard Sanitary Mfg. Co.*, 68 S.W.2d 273, 274-75 (Tex. Civ. App.--Dallas 1933, writ refused), the fact that banks in Texas were closed by executive order from March 2, 1933, to March 13, 1933, was no excuse for defaulting on notes during that period when the payment was not made after the banks reopened.

The Restatement (First) of Contracts Section 457 (1932) provided that the party seeking to be excused from performing the contract due to impossibility must have "had no reason to anticipate" the subsequent occurrence. By the time the Restatement (Second) was issued, the term had moved away from impossibility toward "impracticability." Section 261 of the Restatement (Second) of Contracts (1981) provides:

> § 261. Discharge By Supervening Impracticability
>
> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

The current law of Texas is that a party is discharged from his duty to perform a contract where performance has been made impractical without his fault by an occurrence or non-occurrence of an event that was "a base assumption on which the contract was made." In *Centex Corp. v. Dalton*, 840 S.W.2d 952, 955 (Tex. 1992) (Gammage, J.), citing Restatement (Second) of Contracts Section 261(1981).

Texas courts have recognized and impracticability defense where the person supposed to render personal services died, and where a contract to lease or insure a building was rendered impracticable because the building was destroyed, and where a change in the law that makes performance illegal. See *Tractebel Energy Marketing, Inc. v. E.I. Du Pont De Nemours and Company*, 118 S.W.3d 60, 66 (Tex. App.–Houston [14th Dist.] 2003, pet. denied).

In *Centex Corp. v. Dalton*, 840 S.W.2d at 956-57 (Maugy, J.) (dissenting), the raised the question of whether a party who performs work and cannot recover judgment due to an impossibility defense can assert a claim for quantum meruit.

2. Later Change in Law. In *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S.W. 197, 199 (1905) (Brown, J.), the Court approved the defense of impossibility due to illegality, saying: "the performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law . . . ." The Supreme Court accepted Restatement (Second) of Contracts § 261 (1981) in *Centex Corp. v. Dalton*, 840 S.W.2d 952, 955 (Tex. 1992) (Gammage, J.), and extended the excuse for non-performance to situations where the contract was made unenforceable by a governmental regulation.

3. Performance Conditioned on Acts of Other Contracting Party. Texas law has long recognized that a party is not in breach of a contract where that party's performance is dependent on performance by the opposite contracting party. In *Dorr v. Stewart*, 3 Tex. 479, 1848 WL 3932, *4 (1848) (Lipscomb), the Court considered an agreement where Stewart, a carpenter, agreed to do work on a brick building being constructed by Dorr. There was a delay in delivery of the bricks, and Dorr asked Stewart to stand down, then later asked him to continue the job. Stewart refused. The Supreme Court held that Stewart was not entitled to the full contract price. For present purposes, the significance of the case is that the Court found the promises of the parties to be dependent promises.

B. DEFENSES THAT ARE DISALLOWED.

1. Reliance on Third Parties. In *Toyo Cotton Co. v. Cotton Concentration Co.*, 461 S.W.2d 116, 118 (Tex. 1970), the Court affirmed 6 Corbin on Contracts (1962) Section 1340 that "[o]ne who contracts to render a performance or produce a result for which it is necessary to obtain the co-operation of third persons is not excused by the fact that they will not co-operate. This is a risk that is commonly understood to be on the promisor, in the absence of a provision to the contrary." The Court cited 6 Williston on Contracts (Rev. Ed.) Section 1932 as additional support. *Id.* at 119.

XXV. RESCISSION OF THE CONTRACT. In *Gann v. Shaw & Son*, 3 Tex. 310 (1884) (Wilson, J.), the Court said that "a court of equity will not rescind a contract unless fraud appear, or there has been a plain and palpable mistake affecting the very substance of the subject matter of the contract." The actual grounds for rescission are broader than just fraud and mutual mistake. *Hart v. Bullion*, 48 Tex. 278, 1877 WL 8682, *6 (Tex. 1877) (Moore, A.J.): "A suit for the rescission of a contract being an appeal to the chancery jurisdiction of the court, it is not to be determined by the harsh and strict rules of law, but upon broad and liberal principles of equity." In fact, if a party breaches an executory contract in a material way, the other party has a right to unilaterally rescind the contract. *Powers v. Sunylan Co.*, 25 S.W.2d 808, 811 (Tex. Com. App. 1930, judgm't adopted).

A. HARDSHIP IN PERFORMANCE. A party will be relieved of his obligation under a contract when it is no longer feasible to perform, through no fault of his own. Restatement (Second) of Contracts Section 261 provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the

> non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Section 261 was cited favorably in *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954, 955 (Tex. 1992 (Gammage, J.).

B. FRAUD IN THE INDUCEMENT. It has long been the law of Texas that "one who is induced by fraud to enter into a contract has his choice of remedies. 'He may stand to the bargain and recover damages for the fraud, or he may rescind the contract, and return the thing bought, and receive back what he paid.'" *Dallas Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 238-39 (Tex. 1957) (Calvert, J.), quoting *Blythe v. Speake*, 23 Tex. 429, 436 (Tex. 1859) (Roberts, J.). In *Mitchell v. Zimmerman*, 4 Tex. 75, 1849 WL 3970, *5 (Tex. 1849) (Wheeler, J.), the Court held that a buyer who is a victim of fraud in the inducement can set the contract aside, or as an alternative have the purchase price adjusted to reflect the real value of what was received.

In *Gann v. Shaw & Son*, 3 Tex. 310, 311 (1884) (Wilson, J.), the Court said that "every misrepresentation in regard to anything which is a material inducement to sale, which is made to deceive, and which actually does deceive the vendee, is fraud and vitiates the contract." The case of *Wintz v. Morrison*, 17 Tex. 372 (1856) (Wheeler, J.), involved both fraudulent concealment and misrepresentation, either of which be fraud. In this case, the claim was treated as a breach of warranty. *Turner v. Lambeth*, 2 Tex. 365, 369 (1847) (Lipscomb, J.) (Fraud is not presumed).

The Texas Supreme Court, in *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 258 S.W. 462, 462 (Tex. 1924) (Pierson, J.), endorsed the definition of fraud contained in Judge Simkins' treatise on Contracts and Sales:

> Fraud is an act or concealment involving a breach of legal duty, trust or confidence justly reposed, and from which injury results to another, or by reason of which an undue and unconscientious advantage is taken of another.

In *Henderson v. San Antonio & M.G.R. Co.*, 17 Tex. 560, 1856 WL 5057 (Tex. 1856), Justice Wheeler wrote that knowledge that a representation is false is not required to prove fraud. Making an assertion as true, that the speaker does not know is true, is also fraudulent. Wheeler cited Story on Contracts § 506 for the proposition that "[i]f, therefore, a party undertake to make a material statement, not knowing whether it is true or false, and thereby mislead another to his injury, it is no difference that he did not know that the statement was false; since, before making the affirmation, he should have ascertained its truth." *Id.* at *11.

However, certain representations cannot be considered fraudulent. There is a general rule, of law and equity, that "misrepresentations of value, either present or prospective, are mere matters of opinion, and no relief is afforded to those who are deceived by them." *Varner v. Carson*, 59 Tex. 303, 1883 WL 9162, *2 (Tex. 1883) (Clayton, J.). There are exceptions to this rule and, in *Varner v. Carson*, the Supreme Court considered that the entire circumstances removed the case from the application of the rule. Courts have said that "mere puffing" cannot be the basis of a fraud claim. "'Puffing' has been described by most courts as involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." *Cook, Perkiss and Liehe, Inc. v. Northern California* , 911 F.2d 242, 246 (9th Cir. 1990) (internal quotation marks removed).

"Courts of equity will not interpose to rescind a contract for fraud, except where it becomes necessary to relieve the complaining party against some injury." *Hoeldtke v. Horstman*, 128 S.W. 642, 648 (Tex. Civ. App. 1910), *aff'd sub nom. Hill v. Hoeldtke*, 104 Tex. 594, 142 S.W. 871 (Tex. 1912), citing *Atlantic Delaine Co. v. James*, 94 U.S. 207, 24 L.Ed. 112 (1876), among other cases. In *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 258 S.W. 462, 462 (Tex. 1924), (Pierson, J.), the Court held that "some injury must be shown in an action to rescind a contract for fraud."

Sometimes the circumstances of a case can give rise to a presumption of fraud. In *Crosby v. Huston*, 1 Tex. 203, 1846 WL 3613, *22 (1846) (Hemphill, C.J.), the Court said that where "the property mortgaged exceeded greatly in value the amount of the debt," the disproportion is a suspicious circumstance that created a presumption of fraud.

In *Wooters v. I. & G. N. R. Railway Co.*, 54 Tex. 294 (1881) (Moore, C.J.), the Court ruled as inadmissible evidence of oral representations, contrary to the written agreement, that were alleged to have fraudulently induced the contract.

In *Isenhower v. Bell*, 365 S.W.2d 354, 357 (Tex. 1963) (Greenhill, J.), the Court said: "Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care." The Court cited to *Labbe v. Corbett*, 69 Tex. 503, 6 S.W. 808 (1888) (Stayton, J.).

In *Chaney v. Coleman*, 77 Tex. 100, 103, 13 S.W. 850, 851 (Tex. 1890) (Henry, J.), the Court wrote that where a transfer of real estate is set aside for fraud, the party in possession is entitled to recover for the value of "permanent and beneficial improvements."

Bryant v. Kelton, 1 Tex. 415 (Tex. 1846) (Lipscomb, J.), the Court held that no per se fraud was committed upon vendor in retention of sold property, although noting a deep historical legal split on the issue. The Court reversed in favor of plaintiff due to error in jury

charge that any valuable consideration sufficed to rebut a fraud presumption.

The case of *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 331-37 (Tex. 2011) (Green, J.), contains an extensive discussion of when a "merger clause" precludes a claim of fraud in the inducement. See Section XXXIV.D.1 of this Article.

C. DURESS AT THE TIME OF CONTRACTING. The concept of what constitutes duress sufficient to rescind a document has expanded over time, from a threat to life and limb or unlawful deprivation of freedom to now include "economic duress." The earliest Texas case on duress was *Hall v. Phelps*, Dallam 435, 1841 WL 3125 (1841) (Hutchinson, J.). The Court cited no law but did express outrage at the facts, in upholding a decision to nullify a deed signed under duress. The case of *Walker v. McNeils*, Dallam 541 (1843) (Morris, J.), involved a defense of duress related to threats of violence. The Court ruled that the fear from the duress must exist at the time the deed is executed, but the threats giving rise to the fear need not be made at that time. *Id.*

In *McGowen v. Bush*, 17 Tex. 195, 1856 WL 4992 (1856) (Lipscomb, J.), the Court considered duress raised as a defense to a promissory note. The defendant said he signed the note out of fear that if he did not, he would "find himself looking up a tree," which was common practice for being tied to a tree and whipped. *Id.* at *3. In upholding the policy of allowing danger to property to suffice as legal duress, Justice Lipscomb went on to describe Texans of the day: "Whatever may have been the policy of the Romans, or the feudal barons of England, such is not the policy in this country; for if there is any peculiarity in the people of this country, especially this state, that should be restrained, it is a disregard for personal danger and a reckless indifference not only to the life of a fellow being, but to their own lives." In *Landa v. Obert*, 45 Tex. 539, 1876 WL 9240, *4 (1876) (Moore, A.J.), the Court said: "Duress which avoids a contract is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation, or danger; or when the arrest, though made under legal authority, is for an unlawful purpose, . . . or from threats calculated to excite fear of some grievous injury to one's person or property." [Citations omitted.]

In *Van der Hoven v. Nette*, 32 Tex. 183, 1869 WL 4793 (1869) (Lindsay, J.), the plaintiff sued on a promissory note that had been paid in Confederate currency which became worthless. The plaintiff did not object to payments at the time, he claimed, due to fear of rebel authorities who threatened anyone who would not take their currency. He argued that he had accepted the payment in Confederate currency due to duress. Court said that "[v]ague and undefined fears of violence from nobody in particular, but from everybody in general, at some uncertain period, without some cotemporaneous demonstration of violence, is not the duress contemplated by law. Besides, a general threat of violence to a whole community for the non-observance of the popular will, is not a personal imposition of that duress defined by law, of which a party may judicially avail himself in avoidance of his contracts or engagements."

A history of the Common Law of duress was given in *Dallas Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 877 (Tex. 2005) (Wainwright, J.). The Court stated the current conception of duress in this way: "A common element of duress in all its forms (whether called duress, implied duress, business compulsion, economic duress or duress of property) is improper or unlawful conduct or threat of improper or unlawful conduct that is intended to and does interfere with another person's exercise of free will and judgment." *Id.* at 878-79.

D. INCAPACITY AT THE TIME OF CONTRACTING. As a general rule, persons who are factually or legally incompetent are not bound by their contracts, and they may at their option rescind the contract. The contracts are voidable, not void.

1. Under Age. Historically, the age of majority in Texas was 21 years. Effective August 27, 1973 the age of majority was lowered to 18. *City of Denton v. Mathes*, 528 S.W.2d 625, 635 (Tex. Civ. App.–Ft. Worth 1975, writ ref'd n.r.e.). The age of majority in Texas today continues to be 18 years. Tex. Civ. Prac. & Rem. Code § 129.001.

Under Spanish law, minors could neither buy nor sell property without the consent of their "curator" or legal guardian. A sale of real property or valuable personal property had to be approved by a court. *Means v. Robinson*, 7 Tex 502, 1852 WL 3875, *7 (1852) (Hemphill, C. J.). A minor of 14 years of age or older, without a guardian, could sell personalty that was not valuable. As to contracts, contracts with a minor made without the guardian's consent, were void if prejudicial but valid if beneficial to the minor. *Id*. at *8. In *Searcy v. Hunter*, 81 Tex. 644, 646, 17 S.W. 372, 373 (1891) (Gaines, J.), the Court stated the long-standing law on this issue: "An infant's deed is voidable, not void; and it is well settled in this state that, in order to avoid it, he must disaffirm it within a reasonable time after attaining his majority." In *Brown v. Farmers' & Merchants' Nat. Bank of Cleburne*, 88 Tex. 265, 274, 31 S.W. 285, 288 (1895) (Denman, J.), the Court said that a contract with a minor is not void. In *Dairyland County Mut. Ins. Co. of Texas v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973) (Walker, J.), the Court said that "the contract of a minor is not void, it is voidable at the election of the minor."

The court in *Hancock v. Haile*, 171 S.W. 1053, 1055 (Tex. Civ. App.-Fort Worth 1914, no writ), said that a minor who contracts for necessaries that are actually provided is not bound to pay the contract amount, but is bound to pay the reasonable value of the necessaries provided.

2. Mental Infirmity. In *Varner v. Carson*, 59 Tex. 303, 1883 WL 9162, *2 (1883) (Clayton, J.), the

Supreme Court quoted Story on Equity for the proposition that--

> [t]he general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good and evil on each side."

Id. at *3, quoting 1 Story's Eq., 222. The *Varner* court went on to say:

> A deliberate mind presupposes the possession of mental faculties capable of reflection and rational thought. If these faculties are lacking for want of sufficient development, or by reason of natural decay or other physical infirmity, the law requires greater fairness on the part of those dealing with such subjects, and less proof of deceit, oppression or imposition will be sufficient to set aside contracts made with them than in ordinary cases. *Ellis v. Mathews*, 19 Tex., 390; *Wurtemberg v. Spiegel*, 31 Mich., 400.
>
> No definite rule of law can be laid down as to what condition of mind or degree of mental imbecility is sufficient to avoid a contract made with a party taking advantage of it. As in the case of fraud itself, each case will depend upon its own circumstances, and the state of the mind must be taken in connection with the other facts of the transaction to determine whether or not the contract may be avoided. Big. on Fraud, 283, 284.
>
> It is not necessary that the incapacity should be permanent in order to avoid a contract, but a temporary suspension of faculties by fear or overwhelming grief is enough to require the strictest good faith on the part of those making representations to one in such condition. *Wilson v. Watts*, 9 Md., 356; *Lavitte v. Sage*, 29 Conn., 577.

Id. at *3.

In *Mandell and Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969), the court described the test for capacity to contract in this way: "Mrs. Thomas had the mental capacity to contract if she appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting. *Missouri-Pacific Ry. Co. v. Brazzil*, 72 Tex. 233, 10 S.W. 403 (1888); 17 C.J.S. Contracts § 133(1)a; 13 Tex.Jur.2d, Contracts, § 10."

Williams v. Sapieha, 94 Tex. 430, 61 S.W. 115 (1901) (Brown, J.), held that a deed from an insane person was not void but was instead voidable at the election of the insane person.

3. Disability During Coverture. Up until 1967, married women in Texas have been, to varying degrees, unable to enter into binding contracts. See Section XXXXIII of this Article.

E. EXPLOITING WEAKNESS. In *Varner v. Carson.* In *Varner v. Carson*, 59 Tex. 303, 1883 WL 9162 (1883) (Clayton, J.), the Supreme Court held that a grieving widow stated grounds to rescind a contract, reached with elders of her church, to release a promissory note for $2,000 in exchange for land worth $150.00. The Court recognized as the legal basis for rescission: breach of confidence reposed by her in the church elders; fraudulent misrepresentations on their part; and the cancellation of the note for an unconscionably small consideration. *Id.* at *2.

The Court cited 1 Story's Equity, 222:

> The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good and evil on each side.

F. MUTUAL MISTAKE. Where a contract is the result of a mutual mistake of fact, it will be rescinded, because the requisite intent to make a contract is lacking. *Harrell v. De Normandie*, 26 Tex. 120 (1861) (Wheeler, C.J.). The Court cited only Story's Treatise on Equity Jurisprudence. *Id*. Chief Justice Wheeler went on to note that equity will not relieve a party from a mistake of law. *Id.* In *May v. San Antonio & A.P. Town Site Co.*, 83 Tex. 502, 502, 18 S.W. 959, 960 (1892) (Marr, J.), the Court said: "A court of equity may grant relief in case of a mutual mistake, but not on account of one entirely unilateral, and in the absence of fraud."

G. RESCISSION FOR MATERIAL BREACH. It is widely recognized that where one party to a contract materially breaches the contract, the other contracting party may choose to receive damages for breach of contract or may instead declare the contract to be rescinded. The right to rescind a contract when the other contracting party commits a material breach goes back far in time. Under the Siete Partidas, circa 1260 A.D., in force in Texas prior to 1840, if the buyer fails to pay the purchase price when due the seller has the option to rescind the contract or to recover the purchase price. The right of the non-breaching party to rescind the contract was recognized in the English Common Law. The right of the non-breaching party to rescind the contract was recognized in Texas law in *Todd v. Caldwell*, 10 Tex. 236 (1853) (Wheeler, J.), and is well-established today. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam).

H. RESTORING THE PARTIES TO THE PRE-CONTRACT STATE. "The general equitable rule is that a plaintiff in a suit for the rescission or cancellation of a contract to which he is a party must return, or offer to return, any consideration which he has received under the contract." *Tex. Employers Ins. Ass'n v. Kennedy*, 135 Tex. 486, 143 S.W.2d 583, 585 (1940) (Hickman, Comm'r). In *Johnson v. Cherry*, 726 S.W.2d 4, 8 (Tex .1987) (Spears, J.), the Court said that "[r]estoration or an offer to restore consideration received by one seeking to cancel a deed is a condition precedent to maintaining a suit for cancellation of an instrument," citing *Texas Co. v. State*, 154 Tex. 494, 281 S.W.2d 83, 91 (1955). Restoration or an offer to restore consideration received by one seeking to cancel a deed is a condition precedent to maintaining a suit for cancellation of an instrument. *Texas Co. v. State*, 154 Tex. 494, 281 S.W.2d 83, 91 (1955). In *Cummings v. Powell*, 8 Tex. 80 (1852) (Hemphill, C.J.), the Court held that a minor, asserting that a conveyance during minority was voidable, should offer to restore the purchase money. In *Pearson v. Cox*, 71 Tex. 246, 249-50, 9 S.W. 124, 125-26 (Tex. 1888) (Walker, J.), the Supreme Court ruled that parties setting aside a conveyance based on the insanity of the grantor had to repay all money they had received from the sale. The Court said: "He that seeks equity must do equity."

XXVI. REFORMATION OF THE CONTRACT. Courts of equity can reform a contract in certain circumstances. In the case of *Wheeler v. Boyd*, 69 Tex. 293, 6 S.W. 614 (Tex. 1887) (Gaines, J.), the buyer gave a promissory note as part of the purchase price of land. The holder of the note sued the buyer, and the buyer pled for a reduction in the note, because the amount of land involved was less than what had been contracted for. The Supreme Court held that, in a land sale where both buyer and seller were mistaken as to the amount of land sold, and "the deficiency be great," and the "quantity being a material element of inducement in the sale," then equity will relieve the buyer of paying for land he did not receive. The Court cited *O'Connell v. Duke*, 29 Tex. 299, 1867 WL 4527 (Tex. 1867) (Coke, J.), where the Supreme Court affirmed a seller recovery for extra land conveyed in excess of the amount originally intended in the deed. Justice Coke gave the following cautionary note: "The conduct of the parties, the value, extent, and locality of the land, the date of the contract, the price, and other nameless circumstances, are always important, and generally decisive. In other words, each case must depend upon its own peculiar circumstances and surroundings." *Id.* at *8.

XXVII. REMEDIES FOR BREACH OF CONTRACT. The Restatement (Second) of Contracts § 344, cmt. a (1981), addresses the subject of damages for breach of contract:

> Every breach of contract gives the injured party a right to damages against the party in breach, unless the contract is not enforceable against that party, as where he is not bound because of the Statute of Frauds. The resulting claim may be one for damages for total breach of one for damages for only partial breach.

A. PROFESSOR FULLER'S THREE INTEREST ANALYSIS. In 1936, Lon Fuller, then a Professor at Duke University, wrote a seminal article of lasting fame, entitled *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52 (1936). Professor Fuller wrote that the legal rules can be understood only in the context of the purposes they serve. *Id.* at 52. This insight was absent from legal treatises, which Fuller said failed to clearly define the purposes which the definitions and legal distinctions were designed to serve. *Id.* at 52. Sorting through Contract Law from the perspective of remedies, Fuller divided the purposes in awarding contract damages into three interests: the expectation interest, the reliance interest, and the restitution interest. *Id.* at 53-54. This division is reflected in the Restatement (Second) of Contracts Section 344, which provides:

> Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
>
> (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

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

1. General and Special Damages. The scope of damages for breach of contract was addressed in *Hope v. Alley*, 9 Tex. 394, 1853 WL 4211 (Tex. 1853) (Wheeler, J.). In that case, the plaintiff bought two slaves at auction, and tendered payment, but the payment was refused and the slaves were not delivered. The plaintiff sued for breach of contract, and claimed loss of the labor of the slaves, and that he had advanced expenses of enlarging his plantation and splitting many rails. At trial, the buyer offered proof of the lost profit in the cotton production. The Supreme Court rejected lost profits as a measure of damages, in that the proof was "too remote and depended upon too many contingencies, and was too speculative." *Id.* at 2. The Court would have allowed recovery for a loss that was certain, such as the value of his preparation for the crop in anticipation of the labor of the two slaves. *Id* at *2.

The Court further held that, even absent proof of special damages, the plaintiff could recover nominal damages. In *Calvit v. McFadden*, 13 Tex. 324, 1855 WL 4782, *1 (Tex. 1855) (Wheeler, J.), the seller failed to fulfill a contract to sell certain cattle. The Court held that the buyer could recover the highest market value of the cattle between the appointed date for deliver and the date of trial. Id. at *3. But the court rejected additional damages for making inclosures and improvements. Id. at *2. In *Moore v. Anderson*, 30 Tex. 224, 1867 WL 4583 (Tex. 1867), (Coke , J.), the Court described the distinction between general and special damages. General damages necessarily result from the breach of contract; special damages are a natural consequence of, but not the necessary result of, the contract breach. *Id.* at *5. In *Buffalo Co. v. Milby*, 63 Tex. 492, 500 (Tex. 1885) (Walker, P.J. Com. App.), the Court ruled that "where the parties, at the time of making the contract, contemplate or had reason to contemplate particular losses and more remote damages from the delay, that such may be recovered for its violation."

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

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

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

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

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

3. Lost Profits. The recoverability of lost profits in a claim for breach of contract turns on the consequential damage test, which turns on forseeability. The case of *Hadley v. Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854), has gained fame, mainly through law school casebooks, for its statement regarding the recovery of lost profits for breach of contract. In that case, B. Alderson said:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

The foregoing passage from *Hadley v. Baxendale* was quoted in *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901-02 (Tex. 2011) (Hecht, J.). Justice Hecht wrote that an essential condition for recovering consequential damages is forseeability. *Id.* Justice Hecht went on to quote the Restatement (Second) of Contracts (1981) on the point:

> Restatement (Second) of Contracts § 351--
>
> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

In *Hunt & Manning v. Reilly*, 50 Tex. 99, 1878 WL 9232 (1878) (Gould, A.J.), the Court allowed a partner to recover lost profits resulting from his two partners breaching their partnership agreement when a creditor of the two partners, through execution, seized the printing press and materials being used by the partnership.

4. Damages for Failure to Deliver Personal Property. In *Calvit v. McFaddin*, 13 Tex. 324 (1855)

(Wheeler, J.), the purchase price was paid in advance, and the Court held that measure of damages for the failure to deliver personal property, that had been paid for was "the highest value of the article between the time of breach and the time of trial." In *Calvit* the property in question was cattle. Where the contract is for delivery of personal property, and the property is not delivered when due, and the purchase price has *not* been paid, then the measure of damages is the difference between the price contracted to be paid and the value of the article at the time when the property should have been delivered. *Randon v. Barton*, 4 Tex. 289 (1849) (Wheeler, J.). However, a different rule applies to the failure to deliver securities when due. In *Randon v. Barton*, 4 Tex. 298 (1849) (Wheeler, J.), the Supreme Court measured the damages to the highest value of the security, at the time of breach and at the time of trial, where the purchase had been paid. The Supreme Court revisited *Randon* in *Miga v. Jensen*, 96 S.W.3d 207, 215 (Tex. 2003) (Enoch, J.), where the court noted that *Randon* had been premised on an English and early New York rule that was subsequently modified by New York. Also, the rule had been described as "unworkable" by the U.S. Supreme Court. *Miga* at 214, citing *Galigher v. Jones*, 129 U.S. 193 200-01 (1889). *Miga* at 215. However, the Court applied a rule that the measure of damages was the difference between the price contracted to be paid and the value of the article at the time of breach. *Miga*, 96 S.W.3d at 215. The Supreme Court assumed, but did not say, that the *Randon* measure of damages is "usable today."

C. RECOVERY OF RELIANCE DAMAGES. The reliance interest described by Professor Fuller is remedied by awarding recovery to the plaintiff to reimburse the expenses incurred in reliance on the unenforceable promise. Fuller, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52, 54 (1936). The remedy also permits the injured party to recover damages that result from the plaintiff having changed position in reliance on the defendant's promise. The goal is to put the innocent party back into the position she was in before she acted in reliance on the promise. *Id.* at 54. Texas law now permits a party to recover reliance damages based on promissory estoppel. See Section XXVIII of this Article.

D. RESTITUTION AS RECOVERY. According to Professor Fuller, the restitution interest addresses the benefit conferred upon a defendant who has failed to perform his promise. Fuller, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52, 53-54 (1936). To vindicate this interest the defendant may be forced to disgorge the benefit he received from the plaintiff. *Id.* at 54. The foundation for this recovery is unjust enrichment. *Id.* at 54. In the Restatement (First) of Contracts (1932), restitution was based on restoring the parties to the status quo before the contract was entered into. The Restatement (Second) of Contracts (1981) based restitution on unjust enrichment.[591] Reliance in unjust enrichment has two components, one being the loss suffered by the innocent party and the other the gain resulting to the party who reneges on his promise. Fuller, at 54-55. See Section XXXVII.B of the Article regarding restitution.

E. RECOVERY ON UNILATERAL CONTRACTS. In *Vanegas v. American Energy Services*, 302 S.W.3d 299, 302 (Tex. 2009) (Green, J.), the Supreme Court approved the definition of a unilateral contract given in the case by the Eastland Court of Appeals:. "[a] unilateral contract may be formed when one of the parties makes only an illusory promise but the other party makes a non-illusory promise. The non-illusory promise can serve as the offer for a unilateral contract, which the promisor who made the illusory promise can accept by performance." See Section XV.E.3 of this Article. Once performed, the performing party is entitled to recover the contract price.

Houston & T.C. Ry. Co. v. Mitchell, 38 Tex. 85, 1873 WL 7366 (Tex. 1873) (Walker, J.), involved a written contract whereby Mitchell and the railroad company agreed in writing that the company would pay Mitchell to cut and stack up to 200-tons tons of hay in exchange for "$22.5 coin" per ton, to be paid as each 25-tons of hay was cut. After Mitchell cut 25-tons of hay, the company told him it did not want the hay. Mitchell continued to work until he had cut 200-tons of hay, and sued for the full contract price. The Supreme Court determined that the contract was not mutual, that Mitchell was free to cut as much hay as he was willing, up to 200-tons, and that the company was obligated to pay Mitchell for whatever hay he cut, up to the maximum or until the company gave notice to stop. *Id.* at *7. The Court said that "the measure of damages in such a case is not the full contract price; but the damages must be measured by the actual injury sustained." *Id.* at *7. The Court went on to say: "If it ever was a rule that the contract furnishes the measure of damages, it is subject to the rule that compensation is only given for actual loss." *Id.* at *7. The Court cited an earlier Texas Supreme Court case,[592] and two Indiana Supreme Court cases.[593] The Court invoked another rule, that requires a party who seeks redress for breach of contract to mitigate damages. *Id.* at 7. The Court adds that, if the contract had been mutual, "[h]ad this been a contract binding on both parties, for the sale of two hundred tons of hay, the company would have been bound by the facts in the case to pay the contract price for twenty-five tons, and the actual loss in damages which Mitchell sustained by reason of not being allowed to fulfill the entire contract . . . ." *Id.* at 7.

F. NO RECOVERY OF EXEMPLARY DAMAGES. In *Houston & T.C.R. Co. v. Shirley*, 54 Tex. 125, 1880 WL 9375, * 9-10 (1880) (Gould, A.J.), the Court ruled that there was no precedent for allowing the recovery of exemplary damages for breach of contract, and to do so would be "greatly to increase the intricacy and uncertainty" of contract litigation. The rule was reiterated in *A. L. Carter Lumber Co. v. Saide*, 140 Tex. 523, 526, 168 S.W.2d 629, 632 (Tex. 1943) (Alexander, C.J.), where the Court said: "The rule in this State is that exemplary damages cannot be recovered for a simple breach of contract, where the

breach is not accompanied by a tort, even though the breach is brought about capriciously and with malice." In *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 659 (Tex. 2012) (Lehrmann, J.), the Court said: "The rule in this State is that exemplary damages cannot be recovered for a simple breach of contract, where the breach is not accompanied by a tort, even though the breach is brought about capriciously and with malice."

G. RECOVERY ON APPORTIONABLE CONTRACTS. Texas law distinguishes between contracts that are apportionable and those that are not. If a contract is apportionable, a party can recover for partial performance. The earliest Texas case was *McMillen v. Kelso,* 4 Tex. 235 (1849) (Hemphill, C.J.), where the Court said that recovery for part performance of a contract was permitted when (i) the contract was conditional and provided for divisible performance, or (ii) where an act of God–such as death of a contracting party–prevents full performance, in which case "an apportionment should be allowed." The Court went on to say that the question of the divisibility of the contract is one of law, to be determined by the court and not the jury. The issue was again addressed in *Baird v. Ratcliff*, 10 Tex. 82 (1853) (Hemphill, C.J.), where Chief Justice Hemphill wrote that an attorney-client employment agreement was apportionable when the lawyer was elected judge and was legally prohibited from continuing representation. Chief Justice Hemphill concluded that the lawyer was entitled to be paid for the value of work done.

In *Meade v. Rutledge*, 11 Tex. 44, 1853 WL 4402, *8 (1853) (Hemphill, C.J.), the Court held that a plantation overseer's employment agreement was apportionable, in that his labors were made over time and not in a single act. Where the plantation owner terminated the employment prematurely, the overseer's recover was not for a full year's work; instead he was entitled to recover his damages suffered, but not to exceed the amount to which the overseer would have been entitled, had the contract been fulfilled. The right to recover on a contract that was partially performed arose in *Hillyard v. Crabtree's Adm'r*, 11 Tex. 264, 1854 WL 4276, * 4 (Tex. 1854) (Hemphill, C.J.), where the plaintiff was a builder who contracted to build a gin-house, cotton press, and gristmill. The builder performed partially but was unable to finished due to illness. Citing a New Hampshire Supreme Court case, Chief Justice Hemphill wrote that in such a situation the builder could recover the contract price, less the defendant's damages resulting from the builder's failure to complete the job, including the cost to the defendant of hiring someone else to complete the job. This limited the property owner's liability to the original contract price. The recovery was not measured by the value of the work completed, minus damages. Instead it was the contract price less the cost of completion, less other damages from the breach. *Accord*, *Carroll v. Welch*, 26 Tex. 147, 1861 WL 3909, *3 (Tex. 1861) (Wheeler, J.), (where the contractor quits before completion, he can recover the reasonable worth of his part performance, not to exceed the contract price less and damages caused by the breach); *Colbert v. Dallas Joint Stock Land Bank of Dallas*, 129 Tex. 235, 241, 102 S.W.2d 1031, 1034 (Tex. 1937) (Smedley, Comm'r), ("Texas is one of the states that have adopted the doctrine of *Britton v. Turner*, 6 N.H. 481, 26 Am. Dec. 713, that one who has but partially performed an entire contract may recover on quantum meruit the reasonable value of the services rendered and knowingly accepted, in an amount not exceeding the contract price, with the right accorded the defendant to recoup or reconvene his damages for the breach of the contract by the plaintiff"). In *Hassell v. Nutt*, 14 Tex. 260 (1855) (Wheeler, J.), the Court held that a plantation overseer who was terminated before the end of his contract, "was entitled to recover not only for the services actually rendered, but the damage he sustained by reason of the defendant's breach of his contract."

A seemingly contrary rule of recovery was reached by Justice Roberts in *Gonzales College v. McHugh*, 21 Tex. 256, 1858 WL 5447 (Tex. 1858) (Roberts, J.), where a builder, who contracted to build a college building, completed part of the project in a satisfactory manner, but failed to complete the project. The builder sued. The Court rejected the builder's contention that the proper measure of damages was the contract price less what it would take to complete the building. *Id.* at *3.The Court held that the builder who breached the contract could not have advantage of the contract price, and that his claim would be an implied promise to pay what the partially-constructed building was worth.

The issue of an apportionable contract arose in *Hollis v. Chapman*, 36 Tex. 1, 1872 WL 7486 (Tex. 1871) (Ogden, J.), where Hollis was hired as a carpenter to furnish materials and do the carpenter's work on two brick buildings being constructed by Chapman on his own property. Before the job was completed, the buildings burned. Hollis sued to recover. Justice Ogden wrote:

> It may be admitted, that by the civil and common law, where there is a specific and positive contract, absolutely to do an entire piece of work, or job, subject to no conditions either expressed or implied, and to be paid for only when the work is completed according to the contract, such a contract is not apportionable, and the contractor is not entitled to any pay until the work is completed. But when there is a condition, or when the contract is dependent upon the execution of another contract, or where the payment is not specifically deferred to the completion of the undertaking, in such a case the contract is apportionable, and in case of an accident rendering the completion of the contract impossible, the contractor is entitled to a pro rata pay for his work; and this appears to have been the rule recognized by the best authorities.

Id. at *3. Justice Ogden cited Story on Bailments, 363. The Court found that Hollis's performance was dependent on performance by Chapman, including the erection of brick walls, plastering, glazing, and painting, and that Hollis could not be charged with the

failure to complete the job. Justice Ogden also cited four earlier Texas Supreme Court decisions recognizing contracts as being apportionable. *Id.* at 4. The builder was entitled to recover the value of his labor and materials expended. *Id.* at 3.

In *Weis v. Devlin*, 67 Tex. 507, 510, 3 S.W. 726. 727 (Tex. 1887) (Stayton, J.), a contractor agreed to furnish material and labor to remodel the dining-room of an existing home. After some work was done, the house was destroyed in the Great Fire of November 13, 1885, in Galveston, which began in the alley behind the Vulcan Iron Foundry and ultimately destroyed forty-two blocks of the city, and 568 buildings with an estimate of damage of $1.5 million.[594] Justice Stayton stated the rule that, if the builder had promised to build a house and, when it was partially built it was burned through no fault of either party, then the builder could not recover for his part performance. The rationale for the rule was that the builder could still fulfill his obligation to complete the house. However, in this case, the contractor's obligation to remodel the dining-room could not be done. *Id.* at 510-511, 728.

The cases reflect that the concept of recovery for partial performance was sometimes based on the apportionability of the contract and sometimes on the theory of implied contract and the equitable claim for quantum merit. See Section XXXVII of this Article.

H. STIPULATED DAMAGES. In the mid-1300s in England, when the concept of a suit to enforce a contractual promise had not yet been developed, transactions were often structured as "bonds," whereby one person promised to deliver a certain sum of money to another on a certain date, unless a specified condition was met (i.e., performance of some task). If the performance did not occur, then a suit would be brought--not to enforce the promised performance, but instead–to enforce the promised payment.[595] In England, by the end of the 1400s, the Chancery courts developed a principle that it was inequitable for a claimant to recover more than he had actually lost.[596] Early Texas real estate sales were often structured by the seller giving a "bond" to deliver title to the land by a deadline or else pay a specified sum of money. A bond was the structure of the underlying transaction in the Supreme Court of the Republic of Texas's first contract case, *Whiteman v. Garrett*, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.). In *Sutton v. Page*, 4 Tex. 142, 1849 WL 3983, *4 (Tex. 1849) (Wheeler, J.), the plaintiff sued the defendant for damages on a $4,000 bond for title. Justice Wheeler cited Kent's Commentary (5th ed.) for the rule that the measure of recovery for the failure to convey land is the money paid by the buyer, plus interest. Thus, although the bond set the penalty for non-performance at $4,000, the disappointed buyer could recover only what he had paid to buy the land, plus interest. In *Durst v. Swift*, 11 Tex. 273, 1854 WL 4278 (Tex. 1854) (Wheeler, J.), the bond was to convey a set acreage, with no specified boundaries, and upon failure to convey, the buyer's suit was treated as a suit on the bond for the amount specified as liquidated damages. Justice Wheeler announced the rule that "where the agreement provides that a certain sum shall be paid, in the event of performance or non-performance of a particular specified act, in regard to which, damages, in their nature uncertain, may arise, in case of default, and there be no words evincing an intention that the sum reserved, in case of a breach, shall be viewed only as a penalty, such sum may be recovered as liquidated damages." *Id.* at *7. Wheeler cited Chitty on Contracts, p. 666, 866, and the New York Supreme Court case of *Pearson v. Williams*, 26 Wend. R., 630. In *Moore v. Anderson*, 30 Tex. 224, 1867 WL 4583 (Tex. 1867), (Coke, J.), the Court quoted Greenleaf's treatise on Evidence, section 257, for the proposition that stipulated damages could be construed as either "liquidated damages" or as a "penalty," and if a penalty then the contractually specified amount will not be binding. In *Collier v. Betterton*, 87 Tex. 440, 29 S.W. 467 (1895) (Gaines, C.J.), the Court said: "although a sum be named 'as liquidated damages,' the courts will not so treat it, unless it bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss, if there be no approximation between them, and this be made to appear by the evidence, then, it seems to us, and then only, should the actual damages be the measure of the recovery."

In *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 487 (1952) (Hickman, C.J.), the Supreme Court invalidated a stipulated damage clause, saying: "Our conclusion is that, since the contract provided the same reparation for the breach of each and every covenant, and since it would be unreasonable and a violation of the principle of just compensation to enforce it as to some of them, the provision for stipulated damages should be treated as a penalty." The case of *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 431 (Tex. 2005) (Medina, J.), states the current law on stipulated damages: "If damages for the prospective breach of a contract are difficult to measure and the stipulated damages are a reasonable estimate of actual damages, then such a provision is valid and enforceable as 'liquidated damages;' otherwise it is void as a 'penalty.'"

Interesting presentation: Saul Levmore, "Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law," orally presented at <http://www.law.uchicago.edu/node/203> [2-18-2013].

I. NOMINAL DAMAGES. "Nominal damages," or damages eo nomine, are "a small sum usually fixed by judicial practice in the jurisdiction in which the action is brought."[597] Nominal damages are awarded when a breach of contract has been proven but no damages resulted, or where damages are precluded by some rule of law.[598]

The recovery of nominal damages has long been part of Texas law. Nominal damages were recognized in *Hope v. Alley*, 9 Tex. 394, 395 (1853) (Lipscomb, J.) ("The

law is, that if the contract is proven to be broken, the law would give some damage, sufficient to authorize a verdict for the plaintiff, although, in the absence of proof of special loss, the damages would be nominal only"). In *Moore v. Anderson*, 30 Tex. 224, 231 (1867) (Coke, J.), the Court said that where a breach of contract was proved but no injury was proved, the plaintiff was entitled to recover nominal damages. In *Stuart v. W. Union Tel. Co.*, 66 Tex. 580, 18 S.W.351, 352 (1885) (Robertson, J.), the Court said that nominal damages are permitted for failure to timely deliver a telegraph. In *M.B.M. Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 665 (Tex. 2009) (Brister, J.), the Court held that nominal damages are not available when the harm is purely economic and subject to proof. The court also said that nominal damages are $1.00. *Id.* There is a suggestion in *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 659 n. 43 (Tex. 2009) (Willett, J.), that a party must request nominal damages, although the Opinion is not clear whether the request must be made in the pleadings, or requested from the jury, or requested from the court.

The Dallas Court of Appeals has held that nominal damages will not support an award of attorney's fees under the Civil Practice and Remedies Code. *Ameritech Services, Inc. v. SCA Promotions, Inc.*, 2004 WL 237760, *3 (Tex. App.--Dallas 2004, no pet.) (memo. opinion). *Accord*, V*ersata Software, Inc. v. Internet Brands, Inc.*, 2012 WL 4793239 (E.D. Tex. 2012).

J. SPECIAL MEASURES OF DAMAGES.

1. Breach of Covenant or Warranty of Title. In *Sutton v. Page*, 4 Tex. 142, 1849 WL 3983, *4 (Tex. 1849) (Wheeler, J.), the Supreme Court of Texas addressed the proper measure of damages when the seller of land did not own title to all of the land sold. Justice Wheeler noted that some American states permitted recovery of the value of the land at the time the buyer was evicted. Louisiana observed that rule, but excluded "any enormous increase produced by unforeseen or fortuitous causes." *Id.* at *4. But other states had the same rule as the Common Law of England, that the recovery was for the value of the land upon execution, as determined by the purchase price. *Id.* at *4. Wheeler noted that Kent's Commentaries stated the recovery for breach of covenants in the deed is "the purchase-money with interest." *Id.* at *4. Wheeler noted that it was not necessary to decide upon a rule in Texas, because the buyer had not plead or proven damages beyond the original purchase price. *Id.* at *4. In *Garrett v. Gaines*, 6 Tex. 435, 1851 WL 4014, *7 (Tex. 1851) (Hemphill, C.J.), the Court noted some difference of opinion but held that "[t]he general rule is that in case of eviction the plaintiff is allowed to recover the consideration money paid with interest . . . ." Chief Justice Hemphill cited four cases from the Supreme Court of New York. In *Hall v. York's Adm'r.*, 16 Tex. 18, 1856 WL 4847 (Tex. 1856) (Wheeler, J.), Justice Wheeler said by way of judicial dicta to be applied on retrial that the buyer's right to recover for a failure of title was limited to the purchase price. For this rule he cited *Sutton v. Page*, but as noted that question was not actually determined in that case. On appeal after retrial, *Hall v. York's Adm'r*, 22 Tex. 641, 1859 WL 6220 (Tex. 1859) (Bell, J.), the Court reiterated that, "where the vendor of land is not able to make title, the vendee's measure of damages is the purchase money and interest, and nothing more." *Id.* at *2 . The Court did not address the recovery of special damages in cases where the buyer could prove that the seller committed fraud going beyond his lack of title to the land conveyed. *Id.* at *2. In *Wheeler v. Styles* , 28 Tex. 240, 1866 WL 3998 *3 (Tex. 1866) (Donley, J.), the Court stated a measure of damages for breaches of all kinds of contracts, that where the payor has deposited or paid sums on the contract, and there is no benefit received and no performance by the promissee, then the payor is entitled to receive back the money paid. By 1909, the court of civil appeals in *Clifton v. Charles*, 116 S.W. 120, 122 (Tex. Civ. App.--1909, writ ref'd), could say that, where a buyer pays for land but the seller did not have title to all the land purportedly conveyed, the buyer cannot not recover the difference between the contract price and the value of the land conveyed; instead, the buyer can recover the purchase price paid, plus interest, plus "special damages." Where the buyer has not paid for the land, the buyer is confined to his special damages.

2. Failure to Deliver Chattels. In *Randon v. Barton*, 4 Tex. 289, 1849 WL 4012 (1849) (Wheeler, J.), the Court ruled that the failure to transfer land certificates was a failure to deliver personal, not real, property. *Id.* at *3. Justice Wheeler announced the general rule that normally the recovery was the difference between the price contracted and the value of the personalty at the time allotted for delivery. *Id.* at 4. However, the case law was conflicting about the recovery when the full purchase price had been paid in advance. The Court adopted the rule permitting recovery of the value as of the date of trial. *Id.* at *5. In *Calvit v. McFadden*, 13 Tex. 324, 1855 WL 4782, *1 (1855) (Wheeler, J.), the seller failed to fulfill a contract to sell certain cattle. The Court noted: "The general rule is well settled, that in a suit by the vendee for the breach of the contract to deliver, where no money has been advanced, the measure of damages is the value of the article at the time and place of delivery." However, a rule existed in some states that, where part of the purchase price had been paid but the goods not delivered, the buyer was entitled to recover the highest price between the appointed date for delivery and the time of trial. In *Calvit*, part of the price had been paid, and the Court held that the buyer could recover the highest market value of the cattle between the appointed date for deliver and the date of trial. *Id.* at *3. The court rejected additional damages for making inclosures and improvements. *Id.* at *2. The *Calvit* case was discussed in *Miga v. Jensen*, 96 S.W.3d 207, 214-15 (Tex. 2002) (Enoch, J.), where the Court said seemed to limit the "highest price" rule to cases where personal property was not delivered after they were paid for. *Miga* also held that the price on the day of breach should be used for the failure to deliver corporate stock.

K. SPECIFIC PERFORMANCE. The remedy of specific performance is a court order that requires a contracting party to fulfill his obligation under a contract. Historically, in England, specific performance was considered to be an equitable remedy and was therefore available only from equity courts. Because Texas combined its law and equity courts into one system, a party in Texas can seek specific performance in the same Court and in the same suit as he seeks a money recovery of damages for breach of contract.

The very first contract case decided by the Supreme Court of the Republic of Texas was *Whiteman v. Garrett*, Dallam 374, 1840 WL 2790 (1840) (Rusk, C.J.), where the court afforded the seller specific performance against the buyer in connection with the sale of land. Texas courts require greater specificity in the contract before they will award specific performance. The idea was expressed in the Restatement (First) of Contracts § 370 (1932), Uncertainty of Terms: specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due. In *Durst v. Swift*, 11 Tex. 273, 1854 WL 4278 (1854) (Wheeler, J.), the Court noted that a contract to convey land generally, that does not specify any particular tract of land, cannot be specifically enforced. *Id.* at *5.

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

U.C.C. Section 2.716 discusses specific performance, saying that "specific performance may be decreed where the goods are unique or in other proper circumstances." The Texas version of U.C.C. Section 2.716 was adopted with the entire Code in 1967, and was amended in 2001.[599]

L. ATTORNEY'S FEES. Attorney's fees are not recoverable in litigation in Texas unless authorized by contract or statute. *Tony Gullo Motors, L.L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006) (Brister, J.). Section 38.001 of the Texas Civil Practice & Remedies Code says that "[a] person may recover reasonable attorneys' fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." Attorney's fees cannot be recovered under this statute unless the party recovers some relief, whether that be money damages or specific performance. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009) (Brister, J.). The same principle applies where the contract provides that attorney's fees can be recovered by the "prevailing party." *Intercontinental Group Partnership v. KB Home Lone Star L.L.P.*, 295 S.W.3d 650, 652, 655, & 659 (Tex. 2009) (Willett, J.) (prevailing includes recovering money damages, specific performance, injunction, or declaratory judgment). What constitutes a reasonable fee is a fact question to be determined by the jury if one is requested.

XXVIII. PROMISSORY ESTOPPEL. Promissory estoppel is a term used to describe an equitable doctrine, originating from estoppel in pais, which has developed over time into a basis for enforcing an otherwise unenforceable promise. When used not as a defense but as the basis for affirmative recovery, promissory estoppel essentially offers reliance by the promisee as a substitute for the normal requirement of contractual consideration.

What may be the first appearance of promissory estoppel in Texas was the case of *Longbotham v. Ley*, 47 S.W.2d 1109 (Tex. Civ. App.–Galveston 1932, writ ref'd). There the holder of a note represented to the maker that she would not insist on immediate payment of interest on the note. When an interest payment was late, the holder accelerated the note. The jury found that the holder had made the representation alleged, and that the maker had relied on it. The trial court refused to treat the note as accelerated. The court of civil appeals affirmed, calling the defense an estoppel in pais. The court of civil appeals noted that consideration is not required to establish estoppel in pais. As authority the court quoted *Dickerson v. Colgrove*, 100 U. S. 578, 581 (1879):

> The rule does not rest on the assumption that he [the promisor] has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

The court of civil appeals also cited *Edwards v. Dickson*, 66 Tex. 613, 617, 2 S.W. 718, 720 (Tex. 1886) (Gaines, J.), which had recognized an estoppel in pais. In *Risien v. Brown*, 73 Tex. 135, 142-43, 10 S.W. 661, *664 (Tex. 1889) (Hobby, J.), the Court applied the doctrine of estoppel to a landowner who acted in such as way to lead another to build a dam across a creek and similar activities suggesting the continuation of an existing agreement or license. The theory relied upon was called "estoppel" and "estoppel by conduct." The rule applied was this: "If Brown, by a course of conduct or actual expressions, so conducted himself that Risien might reasonably infer the existence of an agreement or license, whether so intended or not, the effect would be that Brown could not subsequently gainsay the reasonable inference to be drawn from his conduct." The Court was clear that fraud need not be intended for the principle to apply.

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

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

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

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

Thus, in *Wheeler v. White*, the Supreme Court recognized promissory estoppel, not just as a defense that prohibited a party from exercising a contract right, but as a basis for an affirmative claim of damages despite the fact that there was no enforceable promise. The recovery was not for the benefit of a bargain that is unenforceable; instead it was for reliance damages.

It is the use of promissory estoppel to allow a recovery of damages that makes the doctrine controversial, as recovery is allowed in the absence of contractual consideration. The concept was included in Section 90 of the Restatement (First) of Contracts (1932), and that Section clearly contemplated that promissory estoppel can make a promise binding, whether the promise is to forbear a right or to make a payment. However, the term "promissory estoppel" was not used in the Restatement, and Professor Corbin objected to the conception that this was an estoppel, rather than just a promise made enforceable by reliance and not consideration. See *Moore Burger, Inc. v. Phillips Petroleum Co.,* 492 S.W.2d 934, 937 (Tex. 1973) (Calvert, C.J.).

In *English v. Fischer,* 660 S.W.2d 521, 524 (Tex. 1983) (Wallace, J.), the Court said that "[t]he requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." Justice Wallace cited a 1964 Fort Worth Court of Civil Appeals decision as the sole authority for this rule.

Further reading:

David G. Epstein, et al., *Contract Law's Two "P.e.'s": Promissory Estoppel and the Parol Evidence Rule*, 62 Baylor L. Rev. 397 (2010).

XXIX. DISTINGUISHING TORT FROM CONTRACT CLAIMS. In English history, the earliest claim that we would now identify as a contract claim was in Debt-Detinue, which existed prior to the date of Glanville's treatise in 1188. Debt was a claim to recover payment (in coin) of a particular amount stated in a properly-executed document. But suing to recover a sum stated in a document is only one aspect of modern Contract Law. Today's contract claims also include claims for misrepresentation, misfeasance, and nonfeasance connected with contractual duties.

The historical record suggests that the earliest English cases brought for misrepresenting the quality of something being sold were in Deceit, separate and apart from the underlying transaction. The earliest cases for negligent performance of a contractual duty were brought in Trespass and later Trespass on the Case. Eventually what we would call pure breach-of-contract cases were brought in Assumpsit. See Section V.F of this Article. Today, the law allows someone to sue for a misrepresentation related to a contract either in tort or in equity for fraudulent inducement or in contract for breach of warranty. Implied warranties arise by operation of law in the same manner as tort duties arise by operation of law, not by agreement of the parties. The law now allows someone to sue in negligence for a negligently-performed contractual undertaking. Thus, a breach of a contractual duty can give rise to both contractual and tort claims, with different measures of damages. It is becoming increasingly difficult to distinguish a tort claim arising out of contract from a contract claims arising out of contract, and harder to determine what kinds of damages are recoverable in such a situation. Professor Grant Gilmore, in his book Death of Contract (1974), argued that Contract Law was being absorbed back into tort law. Courts are struggling with that problem.

A. FRAUD IN THE INDUCEMENT. The Texas Supreme Court has long held fraudulent inducement of a contract is grounds for relief in both contract and tort. In *Edward Thompson Co. v. Sawyers*, 111 Tex. 378, 234 S. W. 874 (1921) (Greenwood, J.), the Court said: "Promises made without intention of fulfillment, in order to induce others to make contracts, are as culpable and as harmful as are willful misrepresentations of existing facts. Hence contracts may be avoided alike for such fraudulent promises and for such misrepresentations." In *Formosa Plastics Corp. USA v.*

Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998) (Abbott, J.), the Court said:

> [T]ort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract. Allowing the recovery of fraud damages sounding in tort only when a plaintiff suffers an injury that is distinct from the economic losses recoverable under a breach of contract claim is inconsistent with this well-established law, and also ignores the fact that an independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement.

However, the plaintiff first must prove that he was induced to enter into a contract. *Haase v. Glazner* 62 S.W.3d 795, 798 (Tex. 2001) (Enoch, J.). And he must prove a material misrepresentation of fact, including a misrepresentation of the intent to fulfill a promise made at the time of contracting, and reliance. The Supreme Court has ruled that "[a] promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made. " *Schindler v. Austwell Farmers Coop.*, 841 S.W.2d 853, 854 (Tex. 1992) (per curiam). "Failure to perform, standing alone, is no evidence of the promisor's intent not to perform when the promise was made. However, that fact is a circumstance to be considered with other facts to establish intent." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (McGee, J.). In *Spoljaric*, the Court cited to *Chicago, T. & M.C. Ry. Co. v. Titterington*, 84 Tex. 218, 224, 19 S.W. 472, 474 (Texas Comm'n App. 1892), where the Court held that making a promise, in connection with entering into a contract, with the "intention to cheat and defraud existed at the time of the making of the contract," constitutes fraud that will justify setting aside the contract. *Titterington* did not rule that such a false promise would serve as the basis for damages for fraud.

In *Miga v. Jensen*, 96 S.W.3d 207, 210 (Tex. 2002) (Enoch, J.), an employee sued his employer for breach of contract and tort for failure to deliver stock options to him as part of his compensation. The Supreme Court said: "Jensen's conduct after Miga's resignation in 1994 and his dispute at trial over the contract's terms are not evidence that Jensen did not intend to perform when he offered Miga the PGE option in 1993. This is a classic breach of contract case; Miga has no cause of action for fraud." [Footnotes omitted.]

B. TORT CLAIMS ARISING OUT OF CONTRACTUAL RELATIONSHIPS. Dating back to early Trespass claims, then progressing through Trespass on the Case, English law permitted an injured party to recover damages for negligent performance of a contractual duty. In modern terms, in the old law of England, what is now a contractual duty gave rise to what is now a tort duty, and the breach of the duty gave rise to what is now a recovery of tort damages, not what is now contract damages. The ability to recover tort damages for breaching a contract undertaking is not easily reconciled with the modern division between contract claims and tort claims.

In *Sawyer v. Delany*, 30 Tex. 479, 1867 WL 4638 (1867) (Morrill, C.J.), the Court considered a claim by spouses where the wife had been injured when a stagecoach, overloaded and driven by a drunk driver, overturned, causing severe injury to the wife. The jury returned a damage award of $23,542 on tickets costing $42.00. The Court said that the claim was for breach of contract, not tort, but that the jury's assessment of damages was not error.

In *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (Brewster, J.), the Supreme Court said:

> Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.

The case of *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (Phillips, C. J.), involved the telephone company's failure to publish a yellow page listing for a person in the real estate business, despite having contracted to do so. The question arose whether the claim sounded in contract or tort. Chief Justice Phillips wrote: "If the defendant's conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort." *Id.* at 494. He continued: "Conversely, if the defendant's conduct--such as failing to publish an advertisement--would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract." *Id.* at 494. Chief Justice Phillips also suggested looking at the nature of the loss to determine if the claim sounded in tort or contract. "When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract." *Id.* at 494. In this case, since the plaintiff pled negligence, but sought to recover the benefit of his bargain, his claim was in contract. *Id.* at 495. The *DeLanney* case was an unsuccessful attempt to use tort law to make an end run around *Hadley v. Baxendale*, EWHC J70 (1854), denying the recovery of lost profits for breach of contract unless they were forseable.

Then-University of Texas School of Law Professor William C. Powers, Jr. (later Dean of U.T. Law School and now President of the University of Texas) wrote back in 1992:

> Texas law is murky, to say the least, on the question of whether a plaintiff can recover under a "tort" theory (rather than merely a "contract" theory) for economic consequences of negligence

> during a defendant's performance (or non performance) of contractual obligations. This issue has important practical consequences, such as whether a plaintiff can recover punitive damages in a dispute with a contracting partner or can recover in the absence of contractual privity. This issue also has important theoretical consequences for understanding the intersection of tort law and contract law. [Footnote omitted.]

William C. Powers, Jr. and Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 Tex. Tech L. Rev. 477, 477 (1992). While a number of Texas Supreme Court cases since the early 1990s have grappled with the subject, it seems that a firm basis has not yet been established for distinguishing contract claims from tort claims that arise from contractual relationships.

C. CONTRACTUAL PRIVITY AS A RESTRAINT ON LIABILITY. It is a fundamental rule of contract law that only parties in privity with promisor can sue for breach of contract. *Pagosa Oil and Gas, L.L.C. v. Marrs and Smith*, 323 S.W.3d 203, 210 (Tex. App.--El Paso 2010, pet. denied) ("To establish its standing to assert a breach of contract cause of action, a party must prove its privity to the agreement, or that it is a third-party beneficiary"). Since most suits for breach of contract are brought by a contracting party or his assigns against the other contracting party or his assigns, the issue of privity is not often mentioned. We most often hear of the Common Law's requirement of privity as the historical barrier that kept consumers from suing manufacturers for injuries caused by a defective product. In that situation, the transaction giving rise to the relationship was a sale, and the actual sale was between a retailer and the consumer, and there was no contract between the manufacturer and the consumer, so that a claim for breach of warranty would not lie, nor would a claim of negligent performance of a contract lie because the manufacturer's sale to the retailer had been concluded prior to the consumer purchases, and because the manufacturer's sale to the retailer was a different transaction from the retailer's sale to the consumer.

In *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 612 ,164 S.W.2d 828, 829 (Tex. 1942) (Alexander, C.J.), the Supreme Court held a manufacturer of food liable for breach of an implied warranty that food is wholesome and fit for consumption. The Court said that the claim did not arise in tort or contract; instead it arose from public policy. And the manufacturer was liable even absent privity of contract between the manufacturer and the consumer. English law had long held purveyors of food and drink strictly liable for unsafe consumables. The Supreme Court's innovation was to adapt that strict liability concept to a multi-level distribution system and to extend liability back to the manufacturer, who created the problem and who was in the best position of all participants to avoid the harm in the first place.

Eventually the doctrinal problem was solved with the tort concept of "strict liability" espoused in Section 402A of the Restatement (Second) of Torts (1964).[600] Privity was not required for strict liability claims. The Texas Supreme Court adopted Section 402A into the law of Texas in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788–89 (Tex. 1967) (Norvell, J.). And in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977) (Pope, J.), the Supreme Court eliminated a privity requirement for suing a manufacturer for economic loss resulting from a breach of the Uniform Commercial Code's implied warranty of merchantability. With *McKisson* and *Nobility Homes*, the privity barrier for Texas suits by a consumer against the manufacturer was eliminated for both qualifying tort claims and qualifying contract claims. With the privity barrier gone, the battle shifted to whether the claim sounded in contract or in tort, because the damages recoverable in tort are more extensive than in contract. See Section XX.G.2.

Section 2-318 of the U.C.C. took no position on whether privity of contract was necessary to a suit for breach of warranty. However, U.C.C. Section 2-318 extended a seller's warranties to a guest in the buyer's home and to members of the buyer's family or household.[601] In adopting the U.C.C. in 1966, the Texas Legislature omitted U.C.C. Section 2-318, and instead enacted a comment saying that the scope of the seller's warranty would be determined by common law.[602]

Although a legal malpractice claim sounds in tort, since the underlying relationship incepts in contract, the concept of privity of contract is still applied to determine who can sue a lawyer for legal malpractice. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996) (Phillips, C.J.) ("an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust").

D. DAMAGES IN TORT VERSUS DAMAGES IN CONTRACT.

1. Mental Anguish Damages. One key difference between a breach of contract and breach of a tort duty is the recoverability of emotional distress damages. *Compare City of Tyler v. Likes*, 962 S.W.2d 489, 494-96 (Tex. 1997) (Phillips, C.J.) (discussing when emotional distress damages can be recovered in tort), *with Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997) (Cornyn, J.) ("a breach of contract action will not support mental anguish damages"). However, in *City of Houston v. Rhule*, 377 S.W.3d 734, 751 (Tex. App.--Houston [1st Dist.] 2012, pet. pending), the court affirmed the recovery of emotional distress damages for breach of a settlement agreement, reciting both a "special relationship" and the foreseeability of the emotional distress, and limiting the recovery "under the circumstances of this case." (At the time this Article was written, the City of Houston's petition for review is pending, but the City did not challenge the award of mental anguish damages for

breach of contract.) In *Freeman v. Harris County*, 183 S.W.3d 885, 890 (Tex. App.--Houston [1st Dist.] 2006, pet. denied), the same court of appeals permitted the recovery of emotional distress damages when a coroner wrongly disposed of an infant's body, based on a "special relationship" that grew out of the "contract-like" duty under statute.

2. Exemplary Damages. In *Gulf Coast & Santa Fe Ry. Co. v. Levy*, 59 Tex. 542 (1883) (Stayton, A. J.), the Supreme Court held that a husband could recover mental anguish damages and exemplary damages for the failure of the telegraph company to timely deliver a telegram advising family members that his wife and child had died. Admitting that the case arose from a contractual relationship, the Court nonetheless permitted the recovery of tort-like damages.

"The rule in this State is that exemplary damages cannot be recovered for a simple breach of contract, where the breach is not accompanied by a tort, even though the breach is brought about capriciously and with malice." *A. L. Carter Lumber Co. v. Saide*, 140 Tex. 523, 168 S.W.2d 629, 631 (Tex. 1943) (Alexander, C.J.). "Even if the breach is malicious, intentional or capricious, exemplary damages may not be recovered unless a distinct tort is alleged and proved." *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (Campbell, J.). The rule goes back to *Houston & T.C.R. Co. v. Shirley*, 54 Tex. 125, 1880 WL 9375 (1880) (Gould, A.J.). However, the inability to recover exemplary damages for breach of contract was stated in *Graham v. Roder*, 5 Tex. 141 (1849) (Wheeler, J.), but in that case the Court permitted the plaintiff to recover because he was fraudulently induced to enter into a contract to sue in tort and recover exemplary damages. The Court said exemplary damages can be recovered in cases where "fraud, malice, gross negligence, or oppression 'mingle in the controversy . . . .'" *Id.* at *4.

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

In *Briggs v. Rodriguez*, 236 S.W.2d 510 (Tex. Civ. App.–San Antonio 1951, writ ref'd n.r.e.), Briggs acted as agent in the Rodruguez's purchase of land. Shortly before closing the purchase, the Briggs falsely told the Rodriguezes, who could not speak or write English, that the seller was demanding additional money for the sale. The plaintiffs payed this money, and discovered later that they had been defrauded by Briggs. The Rodriguezes did not sue for fraud. Instead they sued for money had and received, and recovered a judgment for the extra payment, plus exemplary damages. The question was whether exemplary damages were available. In the majority Opinion, Justice Norvell (later a Justice of the Texas Supreme Court) acknowledged, without citation, the general rule that "a recovery of exemplary damages cannot be based upon a mere breach of contract." *Id.* at 514. The rule, he wrote, should be limited to actual contracts, not fictitious ones. *Id.* Justice Norvell cited to a law review article, Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L. Rev. 221 (1910), criticizing the vestiges of the old form of pleading called "waiver of tort and suit in assumpsit," which was classified as a contractual action (assumpsit) that would not support exemplary damages. *Id.* at 514. Corbin noted in his law review article that the claim was not based upon agreement or consent and was not truly a contract action in the modern sense. Justice Norvell wrote that where a breach of contract also constituted a tort accompanied by fraud, malice or oppression, exemplary damages could be recovered. *Id.* at 515, citing *Gulf Coast & Santa Fe Ry. Co. v. Levy*. Justice Norvell extended that rule to situations where "the act giving rise to a fictitious implied contract amounts to a wilful tort." *Id.* at 515. Justice Norvell wrote that the rule allowing exemplary damages for wilful, malicious or fraudulent behavior was of general application, and was not dependent upon common law form of actions, which were never recognized in Texas. *Id.* Justice Norvell suggested that, under the old common law forms, the claim in the case at hand might better have been characterized as a trespass on the case and not assumpsit. *Id.* In dissent, Justice Murray suggested that the plaintiffs selected a claim in implied contract (money had and received) for the overpayment as opposed to tort, because a claim for fraud would have been measured by the value paid versus the value received, and the land proved to be worth much more than what the buyers paid. *Id.* at 518 (J. Murray, dissenting).

E. "CONTORTS." Given the historical nexus between tort law and Contract Law, it is easy to understand that some claims fall near the dividing line between the two types of claims. There are many reasons a claimant might prefer one category over the other: some tort claims based on contractual relations required privity of contract, while torts do not. You can recover mental anguish damages and exemplary damages in tort, but not contract. You can recover attorneys' fees in contract but not in tort. The statute of limitations for most tort claims is two years; for contract claims the limitation is four years. The "hard cases" have caused the Texas Supreme Court to try to articulate a standard to differentiate a contract claim from a tort claim.

If "the defendant's conduct would give rise to liability only because it breaches the parties' agreement, the plaintiff's claims ordinarily sound only in contract." *Noah v. University of Texas Medical Branch at Galveston*, 176 S.W.3d 350, 357 (Tex. App.--Houston [1st Dist.] 2004, pet. denied).

"'When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract.'" *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) (Jefferson, C. J.)

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

In *George v. Hesse*, 100 Tex. 44, 93 S.W. 107, 107 (1906) (Gaines, C. J.) the Supreme Court held that, where the "plaintiff sues to recover damages for a fraudulent representation by which he has been induced to enter into a contract to his loss[,]" the proper recovery is the "difference between the value of that which he has parted with, and the value of that which he has received under the agreement." This recovery has come to be known as the "out-of-pocket" rule. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984) (Robertson, J.).

However, where the claim is failure to fulfill representations made at the time of contracting, "the measure of damages . . . would ordinarily be the difference between the contract price and the actual value of the property." *Greenwood v. Pierce*, 58 Tex. 130, 1882 WL 9588, *3 (1882) (Watts, J. Com. App.). Where an action is brought for misrepresentations that are essentially breaches of warranty, the law provided for recovery for "the difference between the value of the goods as warranted and the value as received." *Johnson v. Willis*, 596 S.W.2d 256, 262-63 (Tex. Civ. App.–Waco 1980), *writ ref'd n.r.e., per curiam*, 603 S.W.2d 828 (Tex. 1980). *Accord*, *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d at 373.

XXX. DUTY TO MITIGATE DAMAGES. The doctrine of mitigation of damages "prevents a party from recovering for damages resulting from a breach of contract that could be avoided by reasonable efforts on the part of the plaintiff." *Great Am. Ins. Co. v. North Austin MUD*, 908 S.W.2d 415, 426 (Tex. 1995) (Owen, J.). The duty was described in *Walker v. Salt Flat Water Co.*, 128 Tex. 140, 96 S.W.2d 231, 232 (1936) (Critz, J.), in this way:

> Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions.

The doctrine was recognized in *Houston & T.C. Ry. Co. v. Mitchell*, 38 Tex. 85, 1873 WL 7366, *8 (1873) (Walker, J.), where the Court said: "Mitchell, in this case, should have observed the rule that a party who seeks redress against another for breach of contract, is bound to use due diligence himself in preventing, as far as possible, the loss by reason of the breach." Justice Walker cited no authority for that principle. The principle was repeated in *Brandon v. Gulf City Cotton Press & Mfg. Co.*, 51 Tex. 121, 1879 WL 7650, *5 (1879) (Bonner, A.J), where the Court cited Theodore Sedgwick's Treatise on the Measure of Damages (1847).

The duty to mitigate damages does not apply where a seller has breached a covenant of title to land, and a third party asserts an adverse claim against the property. *Schneider v. Lipscomb County Nat. Farm Loan Ass'n*, 146 Tex. 66, 79, 202 S.W.2d 832, 839 (Tex. 1947) (Smedley, J).

XXXI. THIRD PARTY BENEFICIARIES. In this simplest case, a contract is between two parties, the promisor and the promisee. Between two contracting parties, privity of contract exists. Ordinarily privity of contract is a necessary condition of a party's right to enforce a contract. See Section XXIX.C. In some instances, however, the parties enter into a contract for the promisor to provide a benefit to a third party, not the promisee. The third party has no contractual privity, and has provided no consideration, both normally required as a condition to enforceability. The law has long reflected the right of the promisee to enforce the contract against the promisor who breached his promise to provide a benefit to the third party. A separate question arises whether the third party can bring suit against the promisor to enforce the benefit to the third party. Another complication is the question of whether and when the promisee can cancel the promisor's obligation to the third-party beneficiary.

A. ACTIONS OF THE PROMISEE THAT RELEASE THE PROMISOR. Since the promisee, of a contract that has a third-party beneficiary, created the contractual obligation, he generally has the right to release it. However, that right to release terminates when the third-party beneficiary acts in reliance on the contract, or otherwise expresses assent and approval.[603] Since the promisor's obligation to the third party arose from contract, breach by the promisee discharges the promissor from his obligation.[604] However, once the right of the promisee to release the promisor expires, so too do breaches by the promisee have no effect on the third party's right to performance by the promisor.[605]

B. THE THIRD PARTY'S RIGHT TO ENFORCE.

> "In no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the answer to the question: Whether a right of action accrues to a third person from a contract made by others for his benefit? Nor is the strife ended; for if it be granted that the scale inclines in favor of practice, yet the advocates of this result are continually endeavoring to extend the territory which they have conquered and to apply the doctrines thereby established to cases which should be governed by other principles."

So begins Harvard Law School Professor Samuel Williston in his article, *Contracts for the Benefit of a Third Person*, 15 Harvard L. Rev. 767 (1902). Williston is quoting the opening lines of a treatise on German law, but he says "[t]he fact that they are as applicable to the common law in America as to the system of law of which the author wrote is enough to

show that the subject presents intrinsic difficulties." *Id.* at 767. Williston suggests that "[t]he first step towards a clear understanding of contracts for the benefit of third persons is to differentiate several legally distinct states of fact in which third persons are interested." *Id.* at 767.

The law of third party contracts continues to be affected by the type of promise that is made. In Professor Corbin's article on the subject, Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 37 Yale L. Rev. 1008, 1008 (1918), he begins with trust beneficiaries, who are classic third-party beneficiaries of a contract between the trustor and the trustee. In the typical express trust that is created for the benefit of another, the beneficiary has no privity with the trustee, and provided no consideration, and yet the beneficiary has the right to sue the trustee for breach of the trust. While the law has always treated express trusts differently from ordinary contracts, Corbin sees no distinction great enough to justify treating express trusts differently from other contracts with third-party beneficiaries. *Id.* at 1008-1009. Corbin goes on to discuss the right of third-party beneficiaries to recover assets from the promisor that in equity belong to the third party. *Id.* at 1009-1010. He also discusses beneficiaries of insurance policies, creditor-beneficiaries, mortgagee-beneficiaries, and more. *Id.* at 1111-1118. While surety agreements have maintained a law of their own, in the years since Williston wrote his article on third-party beneficiaries, the law has moved away from fact patterns to generally-stated rules. At the present time, setting aside surety agreements, Texas law provides that "[a] third party may enforce a contract it did not sign when the parties to the contract entered the agreement with the clear and express intention of directly benefitting the third party." *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (Green, J.). "When the contract confers only an indirect, incidental benefit, a third party cannot enforce the contract." *Tawes*, 340 S.W.3d at 425. "Traditionally, Texas courts have maintained a presumption against third-party beneficiary agreements." *Tawes*, 340 S.W.3d at 425. Thus, the question of enforcement by a third-party beneficiary is a question of the intent of the promissor and the promisee. *Accord*, *South Texas Water Authority v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam).

The right of a third-party beneficiary to sue on the contract was recognized in *McCown v. Schrimpf*, 21 Tex. 22, 1858 WL 5413, *4 (Tex. 1858) (Wheeler, J.), where Justice Wheeler wrote:

> "Where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon such promise." *Schemerhorn v. Vanderhayden*, 1 Johns. 139. Nor is it necessary that the name of the person for whose benefit the promise is made, should, in terms, be used. It will be sufficient if he be in some measure pointed out and designated as the person intended.

The *Schemerhorn* case was per curiam opinion from the Supreme Court of New York in 1806. *Schemerhorn* relied on *Dutton v. Pool*, (2 Lev. 210.), decided by the King's Bench in England in 1677, later affirmed in the Exchequer Chamber. The third party's right to enforce was reconfirmed in *Edds v. Mitchell*, 143 Tex. 307, 319-20, 184 S.W.2d 823, 829-30 (1945) (Smedley, Comm'r.).

The principle, that "where one person for a valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action thereon," was stated in *Allen v. Traylor*, 212 S.W. 945, 946 (Tex. Com. App. 1919, judgm't adopted). The sole authority cited for the rule was 3 Pomeroy, A Treatise on Equity Jurisprudence § 1207. *Id.*

C. ARTICLES OF INTEREST.

- Samuel Williston, *Contracts for the Benefit of a Third Person*, 15 Harv. L. Rev. 767 (1902).
- Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 Yale L. J. 1008 (1918).
- Ira P. Hildebrand, *Contracts for the Benefit of Third Parties in Texas*, 9 Tex. L. Rev. 125 (1931).

XXXII. CHOICE OF LAW. Where the law of another state or nation affects the "validity, nature, obligation and interpretation of a contract," the law must be made known to the court or else it is presumed that the sister-state or foreign law is the same as the law of Texas. *Crosby v. Huston*, 1 Tex. 203, 1846 WL 3613, *21 (1846) (Hemphill, C. J.) (the Supreme Court declined to take judicial notice of the law of Mississippi).

A. THE LEX LOCI CONTRACTU/LEX FORI RULES. The validity and legal effect of contracts and land grants, made in Texas before the adoption of the Common Law of England in 1840, was governed by the Spanish civil law of the time of contracting or of the grant. *Miller v. Letzerich*, 121 Tex. 248, 254 49 S.W.2d 404, 408 (1932) (Cureton, C. J.). After the Common Law was adopted, the rule on choice of law and contracts was that the formation and construction of a contract was governed by the law where the contract was formed (lex loci contractus), and the remedies available to enforce the contract were governed by the law of the forum (lex fori). *Hill v. McDermot*, Dallam 419, 422 (1841) (Hutchinson, J.); *Huff v. Folger*, Dallam 530 (1843) (Baylor, J.). Where the law of the place of contracting was not proven, the law of the forum would be applied. *Hill v. McDermot*, Dallam 419, 422, 1841 WL 3123 *2 (1841) (Hutchinson, J.) (refusing to take judicial notice of laws of Georgia).

The Supreme Court of the Republic of Texas early on decided that, where a contract was made in one state and the place of payment was another state, interest was to be computed according to the law of the place of payment . *Cook v. Crawford*, 1 Tex. 9 (1846)

(Lipscomb, J.); *Burton v. Anderson*, 1 Tex. 93 (1846) (Lipscomb, J.); *Andrews v. Hoxie,* 5 Tex. 171, 1849 WL 4073 (Tex. 1849) (Wheeler, J.) (Louisiana usury law applied)[606]; *Wheeler v. Pope*, 5 Tex. 262 (1849) (Lipscomb, J.). The rule also developed that, upon failure to prove the interest allowable under the other state's law, no interest could be recovered. *Anderson v. Hoxie*, 5 Tex. 171 (1849) (Wheeler, J.), *criticized by Able v. McMurray*, 10 Tex. 350 (1853) (Wheeler, J.) (saying that he would prefer to presume that the sister state's law was identical to Texas law).

B. THE MOST SIGNIFICANT RELATIONSHIP RULE. In 1945 Indiana became the first state to overturn the lex loci contractu rule and to apply a "modern" rule instead, the most significant relationship rule.[607] The American Law Institute published the Restatement (Second) of Conflict of Laws in 1971. The centerpoint of the Restatement (Second)'s approach to choice of law issues was the "most significant relationship" test. As applied to contracts, Restetement (Second) § 188 provides:

> § 188. Law Governing In Absence Of Effective Choice By The Parties
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

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

C. CHOICE OF LAW CLAUSES. Chief Justice Marshall wrote, in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48, 1825 WL 3149, *23 (1825), that "in every forum a contract is governed by the law with a view to which it was made." *Accord*, *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677–78 (Tex.1990) (Hecht, J.). However, if the parties choose the law of a state that would declare a law invalid, that choice of law will not be honored. Restatement (Second) of Conflict of Laws § 187, cmt. on Subsection 2 (1971).

XXXIII. THE ASSIGNMENT OF CONTRACTUAL RIGHTS AND OBLIGATIONS. An assignment is a contract in which a right or obligation is transferred from the assignor to the assignee. *D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 200-01 (Tex. App.--Dallas 2011, no pet.). When the item transferred is a contract right, then the assignment is a contract between the assignor and the assignee to transfer to the assignee the assignor's rights or obligations under the underlying contract. After the assignment of a contract right, the assignee now becomes the counterparty on the original contract. Thus, an assigned contract right involves two contracts, and the two must be analyzed separately.

A. WHAT CONTRACTUAL RIGHTS ARE ASSIGNABLE? Under the English Common Law, contract rights were not assignable. *Cartwright v. Roff*, 1 Tex. 78, 82 (1846) (Lipscomb, J.) (action in Debt could not be maintained by an indorsee of a note or bill due to lack of privity of contract). Under Texas law, however, "[a]s a general rule, all contracts are assignable." *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992) (Cornyn, J.). That law goes very far back. In *Hopkins v. Upshur*, 20 Tex. 89, 1857 WL 5185, *5 (Tex. 1857) (Roberts, J.), the Supreme Court upheld the assignability of a charitable subscription to a church, which assigned the subscription to a contractor who sued upon it. In *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706 (Tex.1996) (Hecht, J.), the Supreme Court traced the history of the assignability of contractual rights, from the period when no rights were assignable to the period when all but certain tort claim were not assignable. Justice Hecht's Opinion demonstrated that assignability of contract claims was an exception, not the norm.

Uniform Commercial Code Section 2.210(a) permits a contracting party to "perform his duty through a delegate" unless otherwise agreed, or unless the other contracting party "has a substantial interest in having his original promisor perform or control the acts required by the contract."[608] Section 2.210(b) permits all rights of either a seller or a buyer to be assigned, except where the contract negates that right, or where "the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance."[609]

B. WHAT CONTRACTUAL RIGHTS ARE NOT ASSIGNABLE? A contract may contain an anti-assignment clause, and when it does, it is usually given effect. *Reef v. Mills Novelty Co.*, 126 Tex. 380, 89 S.W.2d 210, 211 (1936) (Harvey, Comm'r).

There are some instances where an assignment cannot be made by virtue of public policy. Typically these prohibitions involve tort claims. See *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706 (Tex. 1996) (Hecht, J.) (medical malpractice claim not assignable). "Rights arising out of contract cannot be transferred if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *Moore v. Mohon*, 514 S.W.2d 508, 513 (Tex. Civ. App.–Waco 1974, no writ), cited in *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992) (Cornyn, J.). This was the law announced in *Hudson's Adm'rs v. Farris*, 30 Tex. 574 (1868) (Lindsay, J.), where the Court held that an agreement to convey part of a tract of land to a surveyor in exchange for his services was not assignable, since it was "based upon the skill, the intelligence, and the practical knowledge" of the surveyor. *Accord*, *Menger v. Ward*, 87 Tex. 622, 626, 30 S.W. 853, 855 (1895) (Brown, J.). In *Missouri, K & T. Ry. Co. of Texas v. Carter*, 95 Tex. 461, 479-80

68 .S.W. 159, 166 (1902) (Brown, J.), the Court interpreted a Texas statute allowing contracts to be assigned as allowing a successor railroad to accede to the duties of the assignor with regard to maintaining equipment. Williston's Treatise on Contract § 74:32 notes that the rights under a personal service contract can be assigned even if the obligations cannot.

C. EFFECTS OF ASSIGNMENT. Generally speaking, an assignment of a claim under a contract gives the assignee legal title to the right. *Devine v. Martin*, 15 Tex. 25, 26 (1855) (Wheeler, J.). "After making a valid assignment, an assignor loses all control over the chose and can do nothing to defeat the rights of the assignee." *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 722 (Tex. App.--Dallas 2004, no pet.). Further, "[a]n assignee can recover either in his own name or in that of the assignor." *Texas Machinery & Equipment Co. v. Gordon Knox Oil Co.*, 442 S.W.2d 315, 317 (Tex. 1969) (Smith, J.). Where it is an obligation that is assigned (or delegated), generally speaking the assignment is effective only if the other contracting parties consents to the assignment, and the original assignor of the obligation remains liable as a surety on the obligation.

D. LAND TITLE RECORDING STATUTES. Recordation statutes say that a buyer's true ownership interest in land is not good against the claim of a later bona fide purchaser for value without notice of the prior claim, unless the transfer by which the owner took title is recorded in the deed record office of the county where the land is located. *Miller v. Alexander* 8 Tex. 36, 1852 WL 3904, *6 (1852) (Wheeler, J.). The Texas Property Code, Section 13.001(a) provides that "[a] conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."

E. BONA FIDE PURCHASERS FOR VALUE. In *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (per curiam), the Supreme Court gave this overview of the doctrine of a bona fide purchaser for value:

> A bona fide purchaser is not subject to certain claims or defenses. . . . To receive this special protection, one must acquire property in good faith, for value, and without notice of any third-party claim or interest. . . . Notice may be constructive or actual. . . . Actual notice rests on personal information or knowledge. . . . Constructive notice is notice the law imputes to a person not having personal information or knowledge.[Citations omitted.]

This has always been the law of Texas. In *Pierson v. Tom*, 1 Tex. 577, 1846 WL 3658, *5 (1846) (Lipscomb, J.), the Court held that a buyer who paid consideration had valid title to slaves as against the claim of the seller's creditor, even if the sale was in fraud of the creditor's rights, as long as the buyer was not aware of the fraudulent circumstances. Justice Lipscomb wrote: "the law protects and favors innocent purchasers fully as much as creditors. The reason in founded in good sense and the convenience of mankind; were it otherwise, the most innocent transaction would often be visited with the penalties of fraud." *Id.* at *5. The creditor argued, unsuccessfully, that the fact the seller did not have possession of the slaves at the time of sale put the buyer on notice of an adverse claim. *Id.* at *5. Pierson lost on retrial, and lost his subsequent appeal. *Pierson v. Tom*, 10 Tex. 145, 1853 WL 4292 (1853) (Wheeler, J.).

In *Chandler v. Fulton*, 10 Tex. 2, 1853 WL 4265 (Tex. 1853) (Wheeler, J.), the Court considered whether a vendor who sold goods on credit properly stopped delivery to a purchaser who had become insolvent. The "right of stoppage *in transito*" was not contested. The questions in the case were (i) whether delivery had occurred, in which event the right of stoppage ended; and (ii) whether the assignment of the bill of lading to a BFP cut off the right of stoppage. In the case, the transport company refused to deliver the goods to the vendee because of delinquent payments, so Justice Wheeler felt that delivery had not been accomplished, and the right of stoppage had not terminated. Justice Wheeler held that the assignment of the bill of lading did not defeat the right of stoppage because the assignee had notice of the vendees insolvency, and because the assignment was really a mortgage and not a sale. Justice Wheeler's Opinion is thick with the law of sales. He cited to Kent's Commentaries, Abbot on Shipping, and decisions of various American states. He even adverted without citation to the view of the Court of King's Bench. *Id*. at *12. Wheeler nonetheless reversed on behalf of the assignee of the bill of lading because the trial court's jury instructions were excessively favorable to the vendor. He concluded with an informational statement that the right of stoppage *in transito* does not rescind the contract or divest the vendee of title, but rather recognizes the vendor's lien for non-payment of the purchase price, which persists until delivery to the vendee. Wheeler also commented that, when the fight is between an unpaid vendor and a creditor of the vendee, it is not right that the goods of one man should be used to pay the debts of another. *Id*. at *14. He stated that, when the bill of lading is transferred by way of mortgage or pledge, the vendor is entitled to all value in excess of the mortgagee's claim. *Id*. at *14. Wheeler also said that the vendor's lien would not be defeated by the purchaser's general assignment for the benefit of creditors, or by a seizure of the property by the buyer's creditors, as the creditor would be on notice of the buyer's insolvency. And Wheeler said that a sale to a BFP, without a bill of sale, would not extinguish the seller's lien, since the absence of the bill of sale gave constructive notice that the goods had not been paid for. *Id.* at 11.

In *Todd v. Caldwell*, 10 Tex. 236 (1853) (Wheeler, J.), the Court stated that where the owner of land contracted to sell the land, but the buyer failed to make payment when due, the owner was free to rescind the contract. The rule was extended in this case to a situation where

the buyer presented a draft drawn on a third party without good reason to believe that the draft would be honored. The rule was not changed simply because the buyer assigned his claim under the contract to a third party for value.

In *Mosely v. Gainer*, 10 Tex. 393, 1853 WL 4360 (1853) (Hemphill, C.J.), the Court held that a party buying personal property with notice of an adverse claim buys the property subject to that claim. Where the transfer is in fraud of creditors, and the transferee knows that, the sale is void.

In *Watson v. Chalk*, 11 Tex. 89, 1853 WL 4408 (1853) (Lipscomb, J.), Curtis sold land to Smith who sold the land to Fletcher who sold it to Watson. Neither Smith nor Fletcher registered their deeds, but Watson did. Curtis then sold the same land to Chalk, for valuable consideration. The Court held that Chalk was a BFP, and that he acquired good title from Chalk. Smith and Fletcher did pass title as between them and Fletcher, but because they failed to record the deeds, Chalk had no notice of their claims and his title was superior. The filing of Watson's deed was not notice that Curtis' title had passed to Fletcher or Watson. Justice Lipscomb wrote, without citation to authority: "[i]It is a well-established rule of equity jurisprudence, that when one of two innocent persons must suffer, the loss must fall on the party who has been least diligent to prevent the fraud." *Id.* at 3.

In *Mayfield v. Averitt's Adm'r*, 11 Tex. 140, 1853 WL 4419 (1853) (Lipscomb, J.), the Court held that a buyer, who purchased slaves with notice that they were claimed by another, was not a BFP and thus took subject to that claim. The fact that the adverse claims was not "general and notorious," would matter only if notice to the purchaser "had been attempted to be established as a fair deduction from such notoriety." Here, actual notice was proven, and it was sufficient.

In *Watkins v. Edwards*, 23 Tex. 443, 1859 WL 6299, *2 (1859) (Wheeler, C.J.), the Court wrote that in order to prove BFP status, the proponent must show three things: (i) that he was a purchaser "bona fide"; (ii) that he purchased without actual or constructive notice of the third person's title; and (iii) that he paid consideration (mere recitals of consideration are not enough). As authority, Chief Justice Wheeler cited an appellate case from the Ontario Chancery Court, and from appellate courts of Alabama, Tennessee, New York, South Carolina, and the U.S. Supreme Court.

When it comes to notice of the seller's right to transfer ownership, in *Davis v. Loftin*, 6 Tex. 489, 1851 WL 4019 , *6 (1851) (Wheeler, J.), the Court said: "Possession of property is prima facie evidence of ownership. As against a mere wrongdoer it is sufficient evidence of title to enable the plaintiff to recover the possession of which he has been wrongfully deprived, although the plaintiff claim under a title which is defective."

U.C.C. Section 2.403 contains a BFP rule. Under Section 2.403(a) provides that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer . . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value."[610]

F. NEGOTIABLE INSTRUMENTS.

1. Early Texas Law. Chief Justice Hemphill, in *Ross v. Smith*, 19 Tex. 171, 1857 WL 5079, *2 (1857) (Hemphill, C.J), summarized the early Texas law on negotiable instruments in this way:

> The only instruments in which the law recognizes the property as passing, like coin, with the possession, are those termed negotiable, and which are transferable by delivery, viz.: bills and notes payable to bearer, or payable to order and indorsed in blank. The legal right to the property secured by such instruments passes by delivery; and the possession is prima facie evidence of right in the property. Such instruments pass by delivery from hand to hand; and though they may have been lost or stolen from the true owner, yet the possession of the holder is prima facie proof of right; and if he be a bona fide transferee for value, his title will be perfect, whether the one from whom he receives the instrument had any title or not.

The case of *Selkirk v. Betts*, Dallam 471, 472 (1842) (Hutchison, J.), decided under the Spanish law existing before the Common Law was introduced into Texas, established that an assignee of a note payable to the holder could enforce payment of the note against the original maker of the note. On January 28, 1840, Texas adopted a law permitting the assignment of both negotiable and non-negotiable instruments, and permitted assignees to sue on negotiable instruments in their own names.[611] *Knight v. Holloman*, 6 Tex. 153, 1851 WL 3947, 86 (1851) (Wheeler, J.). The statute applied not just to promissory notes and bills, but also to all written instruments. *Id.* That law did not apply to notes signed prior to its effective date. Such notes were governed by the civil law. *Selkirk v. Betts*, Dallam 471 at 472. In *Cavenah v. Somervill*, Dallam 532, 532 (1843) (Ochiltree, J.), the purchaser of a note was entitled to collect against the maker, despite a claim that the note resulted from a bet on a horse race, which was not illegal anyway.

In *Diamond v. Harris*, 33 Tex. 634, 1870 WL 5803, *3 (Tex. 1870) (Walker, J.), the Court indicated that a note assigned after it has matured is "subject to all outstanding equities." The Court explained: "The note was dishonored by being over due, and this should have put him upon inquiry."

The 1840 statute prohibited the maker of the note from asserting against an assignee any claims the maker knew about prior to signing the note. In *Jones v. Primm*, 6 Tex. 170, 1851 WL 3951 (1851) (Wheeler, J.), a bona fide purchaser of a promissory note could

enforce it as against a co-maker's claim that his signature was not property affixed to the note. In *Greneaux v. Wheeler*, 6 Tex. 515, 1851 WL 4021, *5-6 (1851) (Hemphill, C.J.), the Court noted the general rule that personal property cannot be acquired from one who has no title to it. The Court noted, however, an exception for promissory notes and bills payable to bearer, which are transferable as cash, although they must be acquired bona fide and for good consideration. Under early Texas law, promissory notes that were not negotiable were held by assignees subject to all equities and all defenses available to the payee. *Boyd v. Tarrant*, 14 Tex. 230, 1855 WL 4870, (Tex. 1855) (Wheeler, J.).

2. Uniform Negotiable Instruments Act. The Uniform Negotiable Instruments Act (NIA) was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1896. The NIA was adopted in Texas in 1919, and was repealed June 30, 1966, the effective date of Texas's adoption of the U.C.C.

3. U.C.C. Section 3.305. U.C.C. Section 3.104 defines a negotiable instrument as an "unconditional promise or order to pay a fixed amount of money . . . ," provided it is payable to bearer or to order, upon demand or at a definite time, and does not contain an undertaking to do additional acts, with certain exceptions. In *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 383-84 (Tex. 2011) (Guzman, J.), the Court held that a check is a written contract and a negotiable instrument. U.C.C. Section 3.305 sets out the defenses that are available to a negotiable instrument that has been assigned and is held by a holder in due course. Defenses that are recognized are infancy, duress, lack of legal capacity, illegality, fraud such that he signer does not know the character or essential terms of the instrument, and bankruptcy discharge.

XXXIV. PARTY AUTONOMY. Since Contract Law is at its core the law governing consensual relationships between contracting parties, one would expect that freedom to contract, or party autonomy, would be the watchword in the field. This is only party true. Parties are free to contract only within certain bounds (public policy, illegality, usury limits, restraint of trade, invidious discrimination, etc.). If the contract is to be enforced by the state, it must be created in accordance with certain requirements on which enforcement is conditioned. If a contract is brought into court, it will be interpreted according to standards that exist independently from the parties to the contract. In many fields, extensive legislation has been adopted that provides default provisions for contracts that do not expressly address an issue. At an even more fundamental level, there are opposite views, one extreme being that consenting parties should be free to define their contractual rights and remedies without override by the government, and the other extreme being that the government should enforce contracted rights and obligations only when that meets current notions of "distributive justice," or a sense of fairness.

A. THE LIBERTY TO CONTRACT. In *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001) (O'Neil, J.), the Supreme Court said: "we have long recognized a strong public policy in favor of preserving the freedom of contract." In *Curlee v. Walker*, 112 Tex. 40, 244 S.W. 497, 498 (Tex. 1922) (Pierson, J.), the Court said: "[T]he law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal." The *Curlee v. Walker* articulation is that Contracts must be enforced unless they are illegal or violate public policy. In fact, these two constraints give the Legislature and the courts wide latitude to curtail the enforcement of contracts.

B. CONSTITUTIONAL RESTRAINTS ON IMPAIRMENT OF EXISTING CONTRACTS. For the most part, the Federal government is subject to the ordinary rules of contract once it enters into a contract. However, the Federal government reserves the ultimate power of the sovereign, such as the power to appropriate property during wartime, the power of eminent domain (while paying just compensation), etc. The state governments are prohibited by the U.S. Constitution's Contract Clause from impairing the obligation of existing contracts. They are also limited by the Privileges and Immunities Clause from discriminating against residents of other states, and they are probably still limited to some extent by substantive due process of law, although that legal doctrine is used infrequently at the present time.

C. LIMITS ON AUTONOMY. While some contract theorists have talked about how contracts are the epitome of freedom of choice, in fact parties' ability to contract has always been restricted to some extent. Examples of legislative and Common Law limitations on the freedom to contract include the statute of frauds, statutes of limitations, statues setting limits on usurious lending, limits on the right of married persons to contract, voidability of contracts of minors and incompetents, laws and court rulings establishing that certain contractual warranties cannot waived, and the like.

D. ALTERING PROCEDURE AND EVIDENCE RULES. Contracting parties have some authority to alter by agreement rules of procedure and rules of evidence. Most of the authority to do so relates to agreements reached after the law suit has been filed. However, the law allows the parties to contract in advance of litigation, in some instances.

1. Altering Statutes of Limitations. In *Gautier v. Franklin*, 1 Tex. 732 (1847) (Hemphill, C.J.), the Court held that parties are not able to alter the statute of limitations.

2. Confession of Judgment. Texas Rule of Civil Procedure 314 permits a party to confess judgment, but subject to certain restrictions. A petition must be filed and the justness of the debt or cause of action sworn to by the person taking the judgment. If the confession of judgment is given by an attorney, his/her power of

attorney must be filed and recited in the judgment. The judgment can be impeached for fraud "or other equitable cause." In Texas Finance Code § 342.504, lenders are outright prohibited from taking a confession of judgment.

3. Waiver of Service. Texas Rule of Civil Procedure 119 permits a party to waive service of citation, but only after the suit is filed, and the waiver must be sworn, and the party must first be shown a copy of the petition. An alleged father who executes a waiver of interest in a child born out of wedlock can waive service of citation prior to the suit being filed, Tex. Fam. Code § 102.009(a)(8), as can a parent who executes an affidavit of relinquishment of parental rights, Tex. Fam. Code § 161.103(c)(1). *See Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390, 393 (Tex. 1982) (Wallace, J.) (approving a pre-suit waiver of citation in an affidavit relinquishing parental rights)

4. Presuit Waiver of Jury. In that case of *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (Hecht, J.), the Supreme Court held that parties can include in their contracts a waiver of the right to a jury if the contract ends up being the subject of litigation. In that case, the contractual waiver was attacked as violating public policy because it "gives parties the power to alter the fundamental nature of the civil justice system by private agreement." Justice Hecht responded that this is already true with regard to choice of law, choice of forum, submission to personal jurisdiction, and opting out of litigation in favor of arbitration. *Id.* at 131.

5. Waiver of Hearsay Rule. In *Thompson v. Ft. Worth & R.G.RY*, 31 Tex. Civ. App. 583, 73 S.W. 29, 30 (Tex. Civ. App. 1903, no writ), the court upheld a pre-suit agreement to allow a fact to be proved by hearsay evidence. This particular case has an estoppel component that may distinguish it from a purely contractual principle.

6. Altering Presumption and Burden of Proof. The Texas Family Law Practice Manual, published by the State Bar of Texas Book Fund in conjunction with the State Bar's Family Law Section, contains a form premarital agreement form (Form 48-3) that says that property held in a spouse's individual name is presumed to be that spouse's separate property (¶ 18.3). That is the opposite of what Texas Family Code Section 3.003(a) says. Paragraph 3.4 of the form negates any presumptive ownership resulting from commingling. Paragraph 3.9 lists facts that cannot be considered evidence of intent to create community. Paragraph 7.1 says that jointly-held property "may not be deemed to be community property," and that absent records of each party's contribution (that is, oral testimony has no probative weight), ownership is conclusively presumed to be 50-50. There are no appellate cases that validate this kind of tinkering with presumptions and rules of evidence, and no law review articles appear to have been written on the subject.

7. Arbitration Agreements. Studies of the German roots of Anglo-Saxon law suggest that legal disputes were largely resolved by arbitration, not litigation. This may have been much more civilized than trial by battle or trial by ordeal. Arbitration was recognized as a valuable alternative to litigation from the birth of the United States and the birth of Texas, and parties were considered free to contract themselves right out of the courthouse. However, a question of party autonomy arose in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), where the U.S. Supreme Court held that the Federal Arbitration Act did not allow parties to agree to expand judicial review of an arbitration award beyond the statutory grounds for vacatur listed in the Act. As a practical matter, that made the arbitrator's decision difficult to overturn and was a disincentive to arbitration. When the equivalent issue was brought before the Texas Supreme Court, in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011) (Hecht.J.), the Court rejected the rationale of *Hall Street* for purposes of the Texas Arbitration Act ("TAA"). A unanimous Court held that, under the TAA, parties can agree that the arbitrators may not reach a decision based on reversible error, and if that happens, then the award may be set aside by the trial or appellate court, on the TAA § 171.088(a)(3)(A) ground that "the arbitrators exceeded their powers." *NAFTA Traders*, 399 S.W.3d at 93. Such an agreement is no more, Justice Hecht wrote, than agreeing to limit an arbitrator's power to that of a judge. *Id.*

8. Recovery of Attorney's Fees. Texas Civil Practice and Remedies Code Section 38.001 provides that a successful party in a suit to enforce an oral or written contract is entitled to receive attorney's fees. In *International Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650 (Tex. 2009) (Willett, J.), the court said that "[p]arties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's . . . ." *Id.* at 653.

D. THE ABILITY TO ALTER RULES OF CONTRACT LAW.

1. Merger Clauses. In *Milliken v. Callahan County*, 69 Tex. 205, 210, 6 S.W. 681, 684 (Tex. 1887) (Willie, C.J.), the Court said: "The general rule is that where the written contract is clear and certain, it must be taken to express the will of the parties; and it is not proper to look elsewhere for their intention. Jones, Com. & Tr. Cont. § 174. All preliminary negotiations, whether written or unwritten, which have led to the execution of the agreement, are deemed to have been absorbed and merged in it, and the writing must be taken as expressing the final views of the parties. 2 Whart. Cont. § 643." The rule of merger is particularly strong when the written contract contains a recital that the agreement "contains the entire agreement between the parties" or similar merger provision. *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 679 (Tex. App.—Dallas 1984, no writ); *Ragland v. Curtis Mathes Sales Co.*, 446 S.W.2d 577, 579 (Tex. Civ. App.–Waco 1969, no writ) ("The parol or extrinsic evidence rule 'is particularly applicable where the writing contains a recital that it

contains the entire agreement between the parties' and the other recited provisions in the present written agreement"), which cited 30 Am.Jur.2d, Evidence, Sec. 1019, p . 155. See *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011) (Green, J.), for further discussion of the effect of merger clauses on claims of fraud in the inducement.

2. Waiver of Consideration. It does not seem feasible for parties to waive the requirement of consideration as a condition to creating a binding contract. Such a promise would not be enforceable without consideration, and if consideration were present, then the waiver would be of no consequence.

3. Requiring Amendments to be in Writing. Many contracts contain a clause providing that any amendments to the agreement must be in writing and signed by both parties. Texas courts have held that "[a] written contract not required by law to be in writing may be modified by a subsequent oral agreement even though it provides that it can be modified only by a written agreement." *American Garment Properties, Inc. v. CB Richard Ellis- El Paso, L.L.C.*, 155 S.W.3d 431,435 (Tex. App.--El Paso 2004, no pet.); *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 153 (Tex. App.--Texarkana 1988, writ denied) ("A written agreement is of no higher legal degree than an oral one, and either may vary or discharge the other").

4. Definitions. The parties are free to adopt special definitions for the terms of the contract, and these definitions can vary from common usage. Special definitions are an area where contracting parties can retain a great degree of control over the way their contract is interpreted by the court.

5. Altering Rules of Interpretation. There are a number of drafting techniques designed to circumvent or neutralize rules of contract interpretation. For example, introducing a list with the words "including, but not limited to . . . ," is an effort to circumvent the rule of expressio unius est exclusio alterius. However, simply asserting that a rule of interpretation will not apply may be more vulnerable to being ignored by the courts.

6. Severability Clauses. A severability clause provides that a court's decision that part of a contract is unenforceable does not cause the balance of the contract to fail. Although a severability clause is routinely used, there may be provisions of a contract that are so central to the bargain that failure of that provision should invalidate certain related provisions, or perhaps invalidate the contract as a whole. The Texas Supreme Court applied this standard of severability to a premarital agreement, in *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978). There the Supreme Court upheld a premarital agreement, after invalidating a significant portion of the agreement, saying: "We are of the opinion that the agreement here is controlled instead by the rule that where the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement." According to *In re Kassachau*, 11 S.W.3d 305, 313 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding): "Severability is determined by the intent of the parties as evidenced by the language of the contract . . . . The issue is whether the parties would have entered into the agreement absent the illegal parts." In *City of Beaumont v. International Ass'n of Firefighters, Local Union No. 399*, 241 S.W.3d 208 (Tex. App.--Beaumont 2007, no pet.), the court found that an arbitration agreement failed in its entirety because one clause was invalidated, despite the presence of a severability clause. The court said: "a severability clause does not transmute an otherwise dependent promise into one that is independent and divisible." *Id*. at 216. In *In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) (O'Neil, J.), the Court gave effect to a severability clause, after determining that in the Court's opinion the clause was severable.

7. Waiving the Statute of Frauds. In *Erhard v. Callaghan*, 33 Tex. 171, 1870 WL 5720, *5 (1870) (Morrill, J.), the Court said: "Parties have a right to waive, either openly or tacitly, the statutes of 29 Charles II, or 13 Elizabeth, re-enacted in this state, and having done so, they must abide the consequences." In that case the waiver resulted from the failure to assert the defense during trial. In *League & Lufkin v. Davis*, 53 Tex. 9, 1880 WL 9276, *3 (1880) (Gould, A.J.), the Court said that a party could waive the statute of frauds by failing to plead it. In *Wyche v. Noah,* 288 S.W.2d 866, 867-68 (Tex. Civ. App.–Dallas 1956, writ ref'd n.r.e.), the Court noted that "An oral contract is not void, illegal, or inherently wrong because it does not conform to the statute of frauds," and that the protection of the statute could be waived. Can parties waive that defense in advance, by contracting away their right to raise that defense?

8. Waiving a Claim of Fraud in the Inducement. Is it possible to effectively waive a claim for fraudulent inducement in signing a contract when the fraud, if proved, would nullify the waiver clause along with the rest of the agreement? In *Dallas Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 234 (1957) (Calvert, J.), the Court held that a "merger clause" in a contract did not preclude proof of fraud in inducing the contract. In *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) (Enoch, J.), the Court said:

> . . . we hold that a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement. We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim. See Prudential, 896 S.W.2d at 162 (identifying some circumstances in which "as

> is" clause would not preclude fraudulent inducement claim). We conclude only that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project needed to support the Swansons' claim of fraudulent inducement.

In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008) (Willett, J.), the Court said: "Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." See *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011) (Green, J.), for further analysis of the effect of a non-reliance clause.

9. Stipulated Damages. A contractual provision stipulating the damages that must be paid if the contract is breached will be enforced by the court only if damages are difficult to measure and the stipulated damages are a reasonable estimate of actual damages. *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 431 (Tex. 2005) (Medina, J.). See Section XXVII.H of this Article.

XXXV. DECLARATORY JUDGMENT ACTIONS. The Uniform Declaratory Judgments Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 1922, and was approved by the American Bar Association in 1923. In 1943, the Texas Legislature enacted the Uniform Declaratory Judgments Act, now set out as Chapter 36 of the Texas Civil Practice & Remedies Code. Section 37.004 of the Act set out the right of a person interested in a deed or contract to have determined "any question of construction or validity arising under the instrument . . . [or] contract . . . ." It is a necessary consequence of the separation of powers in the Texas constitution that courts are empowered to decide genuine disputes only, and not to render advisory opinions. In *Cobb v. Harrington*, 144 Tex. 360, 367, 190 S.W.2d 709, 713 (Tex. 1945) (Smedley, J.), the Court considered the place of declaratory judgment actions in our types of actions and decided it was neither at law or in equity but rather was "sui generis" and filled the gap between law and equity. The Court followed the lead of the Austin Court of Civil Appeals in the view that the declaratory judgment "is intended as a speedy and effective remedy for the determination of the rights of the parties when a real controversy has arisen and even before the wrong has actually been committed." *Id.* at 367, 713. The Court held that declaratory relief was available without regard to whether other kinds of relief were available. *Id.* at 369, 714. In *Board of Water Engineers of State v. City of San Antonio*, 155 Tex. 111, 115, 283 S.W.2d 722, 724 (Tex. 1955) (Garwood, J.), the Court reiterated that, for there to be a justiciable controversy so that the declaratory judgment would not be an advisory opinion, the Court required that "(a) there shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." In *California Products, Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 591, 334 S.W.2d 780, 782 (Tex. 1960 (Griffin, J.), the plaintiff secured a declaratory judgment that newly-designed bottles would not violate an injunction prohibiting the marketing of products in bottles similar to those of a competitor. The court of civil appeals reversed, and the Supreme Court agreed, that the plaintiff had sought an impermissible advisory opinion.

XXXVI. IMPLIED CONTRACTS. An implied contract, like an express contract, arises by the consent of the parties. For an implied contract, the consent of at least one party is inferred from action or inaction or from the circumstances. In *Haws & Garrett General Contractors, Inc. v. Gorbett*, 480 S.W.2d 607,609 (Tex. 1972) (Steakley, J.), the Court said:

> Our courts have recognized that the real difference between express contracts and those implied in fact is in the character and manner of proof required to establish them. . . . In each instance there must be shown the element of mutual agreement which, in the case of an implied contract, is inferred from the circumstances. . . . The conception is that of a meeting of the minds of the parties as implied from and evidenced by their conduct and course of dealing, . . the essence of which is consent to be bound . . . . [Citations omitted.]

The Court cited 1 A. Corbin, Contracts §§ 17, 18 (1963), saying: "Professor Corbin in his treatise points out, however, that contractual duty is imposed by reason of a promissory expression; and that as to this, all contracts are express contracts, the difference being in the modes of expressing assent. So he concludes that the distinction between an express and an implied contract is of little importance, if it can be said to exist at all; and that the matter that is of importance is the degree of effectiveness of the expression used."S o it is said that "[t]he elements of a contract, express or implied, are identical." *Univ. Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex. App.--San Antonio 1989, no writ). If there is a valid express contract, there can be no implied contract. *Woodard v. Southwest States, Inc.,* 384 S.W.2d 674, 675 (Tex. 1964) (Culver, J.). "There can be no agreement, express or implied, when both parties have not intention to make it, or where one has, but the other has not." *Gulf, C. & S.F. Ry. Co. v. Gordon*, 70 Tex. 80, 7 S.W. 695, 697 (1888) (Stayton, J.).

XXXVII. QUASI-CONTRACTS AND UNJUST ENRICHMENT.

A. QUASI-CONTRACTS. In *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683 (Tex. 2000) (Owen, J.), the Supreme Court said: "[a] quasi-contract 'is not a peculiar brand of contract.'. . . It 'is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended.'" The Court borrowed the quoted language from Calamari et al., The Law of Contracts, §

1–12 (3d ed. 1987). The Court also quoted Williston's treatise: ""The principal function of quasi contract is generally said to be that of prevention of unjust enrichment. . . . Quasi contractual obligations are imposed by the courts for the purpose of bringing about a just result without reference to the intention of the parties." 1 Williston, A Treatise on the Law of Contracts, § 1:6 (R. Lord ed., 4th ed. 1990). The Court went on to note that "[g]enerally speaking, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory . . . ." 52 S.W.3d at 684. This is because the parties are bound by the express agreement, if there is one. *Id.*

B. UNJUST ENRICHMENT AND RESTITUTION. The equitable doctrine of unjust enrichment permits a person to recover money "when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (Gonzalez, J.). Although the first use of the term "unjust enrichment" in Texas appellate case law occurred in *City of Dublin v. H.B. Thornton & Co.*, 60 S.W.2d 302, 306 (Tex. Civ. App.–Eastland 1933, writ ref'd), citing a federal district court in Kentucky, the roots of the concept of unjust enrichment and restitution trace back to Lord Mansfield's opinion in *Moses v. Macfarlin*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 680-81 (K.B. 1760), involving a mistaken transfer of money from the plaintiff to the defendant. Lord Mansfield wrote that "the gist of this kind of action is, that the defendant, upon the circumstance of the case, is obliged by the ties of natural justice and equity to refund the money." The cause of action referred to by Lord Mansfield was "money had and received to the plaintiff's use." *Id*. 2 Burr. at 1001, 97 Eng. Rep. at 680. The remedy became known as "restitution," whereby the court restores to the plaintiff the money that the defendant received but should not keep. The concept of restitution emerged in America with William Keener's A Treatise on the Law of Quasi- Contracts (1893). However, there was little interest among American law writers or the courts, so restitution as a separate doctrine developed around the world while it failed to develop much at all in the United States.[612] Meanwhile, the American Law Institute has recently issued a Restatement on Restitution and Unjust Enrichment. The Restatement (Third) of Restitution and Unjust Enrichment (2011), Section 1, says simply:

> § 1. Restitution And Unjust Enrichment
>
> A person who is unjustly enriched at the expense of another is subject to liability in restitution.

The principle of unjust enrichment has long been in Texas law. In *Merryfield v. Willson*, 14 Tex. 224, 225 (1855) (Wheeler, J.), the Court said that where one person has received money from another in payment for a performance he did not have the legal capacity to perform, the payor was entitled to have his money back, as in assumpsit for money had and received. In *Boze v. Daris's Adm'rs*, 14 Tex. 331 (1855) (Hemphill, C.J.), the Court refused to require specific performance of a promise to convey title to real estate which was unsupported by consideration from the promisee, even though the grantee detrimentally relied on the promise. However, the promisee could recover compensation for the improvements made to the land, as equity would not allow the promissor to be enriched at the promisee's expense.

A claim of unjust enrichment exists for money not only money paid by mistake, by fraud, by duress, or by undue advantage, or as consideration for an act that the defendant was unable to perform. *HECI Exploration Co. v. Neal*, 982 SW2d 881, 891 (Tex. 1998).

In *Grooms v. Rust*, 27 Tex. 231 (1863) (Moore, J.), the Court appeared to base a claim for unjust enrichment in contract, saying that the law implies an assumpsit by party using personal property in favor of owner. The association of the equitable claim of unjust enrichment with the law-based claim of implied contract is confusing. The Restatement (Third) of Restitution and Unjust Enrichment (2011) says: "The status of restitution as belonging to law or to equity has been ambiguous from the outset. The answer is that restitution may be either or both."[613]

An unjust enrichment claim for the return of money is sometimes called a claim for "money had and received." *Amoco Production Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.--El Paso 1997, no pet.). All that must be proved for money had and received is that "the defendant holds money which in equity and good conscience belongs to [the plaintiff]." *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951).

The Restatement (Third) of Restitution and Unjust Enrichment says that "[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." The Comment explains the restitution is subsidiary to a contract "so long as the contract is valid and enforceable . . . ."

Additional reading:

Joseph M. Perillo, *Restitution in a Contractual Context and the Restatement (Third) of Restitution and Unjust Enrichment*, 68 Wash. & Lee. L. Rev. 1007 (2011).

C. QUANTUM MERUIT. "Quantum meruit is an equitable theory of recovery which is based on an implied agreement to pay for benefits received." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (Gonzalez, J.). "To recover under the doctrine of quantum meruit, a plaintiff must establish that: 1) valuable services and/or materials were furnished, 2) to the party sought to be charged, 3) which were accepted by the party sought to be charged, and 4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient." *Id.* at 42. "Quantum meruit is an equitable remedy which does not arise out of a

contract, but is independent of it." *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990) (Hightower, J.). "It is based upon the promises implied by law to pay for beneficial services rendered and knowingly accepted." *Davidson v. Clearman*, 391 S.W.2d 48, 50 (Tex. 1965); *accord*, *Black Lake Pipe Line Company v. Union Construction Company, Inc.*, 538 S.W.2d 80 (Tex. 1976) (Johnson, J.). "Quantum meruit is a principle of equity based on the theory that if one performs work for another and such work is accepted by the other, non payment for such work would result in an unjust enrichment to the party benefited by the work." *City of Ingleside v. Stewart*, 554 S.W.2d 939, 943 (Tex. Civ. App.–Corpus Christi 1977, writ ref'd n.r.e.). In *In re Kellog Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (Jefferson, J.). In *Bashara v. Baptist Memorial Hospital System*, 685 S.W.2d 307, 310 (Tex. 1985), the Court outlined the following elements of proof: "1) valuable services were rendered or materials furnished; 2) for the person sought to be charged; 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged." In *O'Connor v. Van Homme*, Dallam 429, 1841 WL 3103 (1841) (Terrell, J.) A homebuilder, who did not complete constructing a house by the deadline in the contract, could not recover on the contract but could recover in quantum meruit for the value of the house constructed. Older Texas cases for services generally considered such services to be apportionable, so that a provider who was unable to complete the job for any reason, including non-compliance with the opposite contract party, was entitled only to the value of the services rendered and not the full amount of the contract price as if the job had been completed. This was the import of Justice Wheeler's Concurring Opinion in *Dorr v. Stewart*, 3 Tex. 479, 1848 WL 3932, *5 (Tex. 1848) (Wheeler, J.) (Concurring), where Justice Wheeler cited four New York cases in support of his view.

It is confusing to say that quantum meruit is not based on contract, when some cases say that quantum meruit is based on an implied contract to pay for services rendered. Other cases say that quantum meruit is an equitable remedy to avoid an unjust enrichment. Quantum meruit is not available if there is an express contract regarding payment for labor. This makes it look like an equity claims not a law claim. At any rate, it would be simpler to identify quantum meruit as an equitable claim to avoid unjust enrichment, and not under the legal principle of implied contract.

XXXVIII. TORTIOUS INTERFERENCE WITH CONTRACT. In *Wal-Mart Stores, Inc. v. Sturge*, 52 S.W.3d 711 (Tex. 2001) (Hecht, J.), the Court gave a history of the development of the tort of wrongful interference with contractual or business relations. The claim was originally recognized for driving away customers or a church's donors, but required proof of violence, fraud, defamation, or other tortious behavior. *Id*. at 716. In 1853, the claim was extended to wrongful and malicious behavior. *Id*. The Court goes on to recount how the First and Second Restatements of Contracts did little to help differentiate legitimate competitive behavior from tortuous interference. The Court recounts that the tort was first recognized in Texas in *Delz v. Winfree*, 80 Tex. 400, 16 S.W. 111 (1891) (Henry, J.) (proscribing "malicious and wanton" interference). The Court listed three other cases where it had recognized the tort, without stating the elements of the claim. The Court then stated the basis for the claim under Texas law: "We therefore hold that to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort." *Id*. at 726.

"The basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed." *American Nat. Petroleum Co. v. Transcontinental Gas*, 798 S.W.2d 274, 278 (Tex. 1990) (Gonzalez, J.).

XXXIX. OPPORTUNISTIC BREACH OF CONTRACT. Theodore Sedgwick, author of Sedgwick on the Measure of Damages (1847), said this:

> . . . I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent or malicious breach of contract as well as for any other wilful wrong.

This particular passage was cited by Justice Stayton in *Gulf, C. & S.F. Ry. Co. v. Levy*, 59 Tex. 542, 1883 WL 9225, * 4 (Tex. 1883) (Stayton, A.J.), in allowing a widower to recover mental anguish damages and exemplary damages from a telegraph company that failed to timely deliver a telegram that the man's wife and child had died.

An "opportunistic" breach of contract occurs when a party to a contract breaches the contract because the cost savings or future benefits resulting from the breach exceed the damages that will have to be paid to the other contracting party. Economics and the law theorists would laud such a decision as being efficient, but those who see contract law as a vindication of promises made and relied upon see a gap in the enforcement structure occasioned by the limited nature of damages for breach of contract.

When someone intentionally commits a tortious wrong, they are subject to exemplary damages. This serves as a disincentive to committing intentional wrongs. The rule in Texas is that exemplary damages cannot be recovered for a breach of contract, "[e]ven if the breach

is malicious, intentional or capricious, exemplary damages may not be recovered unless a distinct tort is alleged and proved. " *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (Campbell, J.). This has always been the law of Texas. See Section XXVII.H of this Article. Inroads on this clear doctrine have occurred with tort claims involving "bad faith" breach of contract. The Uniform Commercial Code Section 1.203 says: "Every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement." The Restatement (Second) of Contracts Section 205 (1981) says: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Does the breach of this duty of good faith and fair dealing give rise to damages that are different from an ordinary breach of contract?

The recently-released Restatement (Third) of Restitution and Unjust Enrichment (2011), Section 39, provides for the disgorgement of profits resulting from an opportunistic breach of contract:

> § 39. Profit From Opportunistic Breach
>
> (1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.
>
> (2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.
>
> (3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§51(5)).

The Restatement offers restitution as a remedy where a promisee cannot recover, as compensatory damages, "a full equivalent of performance for which the promissee has bargained. . . . Such an outcome results in unjust enrichment as between the parties. The mere possibility of such an outcome undermines the stability of any contractual exchange in which one party's performance may be neither easily compelled nor easily valued." *Id.* at Section 39, cmt. b. This approach suggested in the Restatement addresses what Lon Fuller identified as the restitution interest. **See Section XXVII.D, A&C of this Article.**

XXXX. ARBITRATION AGREEMENTS. Arbitration as a practical solution to immediate problems dates back to before the rise of organized court systems. Commercial arbitration existed throughout the ages, where commercial disputes were typically resolved by arbitrators familiar with prevailing commercial practices, who reached a business solution more than a legal solution. In British courts, however, there was hostility toward arbitration as an alternative to the court system, and this hostility continued in much of America until the U.S. Congress adopted the Federal Arbitration Act ("FAA") in 1925. After that, arbitration became prevalent in labor disputes and certain industries. On the commercial side, since arbitration can only exist by agreement, arbitration arose mostly out of contractual disputes between businesses. One key feature shared by these users of arbitration was the intention of the parties to have a continuing relationship after the dispute was resolved. This made the less formal, quicker, and cheaper arbitration process more attractive than litigation. See Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1 (2006).

The right to arbitrate has always existed under Texas common law, and it has been recognized by statute since 1846. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 348 (Tex. 1977).

> The origins of Texas arbitration laws have been attributed to Roman law and to Spanish and Mexican law. [FN57] Nonetheless, it is established that the legal right to arbitration is originally found in the 1827 Constitution of the Mexican State of Coahuila and Texas under the Mexican Federacy. [FN58] The Republic of Texas Constitution of 1836 makes no specific mention of the 1827 arbitration provision, but it specifically adopted the common law of England, which includes arbitration. [FN59] Every constitution of the State of Texas, however, has had a provision that requires the legislature to pass the laws necessary to settle disputes by arbitration. [FN60] In 1846, the first statutory arbitration provision enacted enabled parties to arbitrate a dispute in any manner they elected. [FN61] This statute remained in effect until 1965, when Texas adopted its first modern arbitration statute. [FN62] [Footnotes omitted]

Peter F. Gazda, *Comment, Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas*, 16 St. Mary's L.J. 409, 422-23 (1985). *See Cox v. Giddings*, 9 Tex. 44 (1852) (interpreting arbitration statute); *Carpenter v. North River Insurance Company*, 436 S.W.2d 549, 551 (Tex. Civ. App.-- Houston [14th Dist.] 1969, writ ref'd n. r. e.) (discussing Texas' first arbitration statute).

The Texas Supreme Court has become increasingly busy with arbitration disputes in recent years. Issues of who must arbitrate, when they must arbitrate, what they

must arbitrate, and trial court and appellate court review of arbitration awards have all been repeatedly litigated.

The earliest reported Supreme Court case on arbitration was *Green v. Franklin*, 1 Tex. 497, 1846 WL 3645 (Tex. 1846) (Wheeler, J.), a dispute over whether the arbitrators unfairly deprived a party of the right to present evidence. Justice Wheeler made comments that seem pertinent to arbitration awards to this day:

> The awards of arbitrators have always been looked upon with peculiar favor, as it is a conciliatory mode of adjusting disputes by persons specially chosen for that purpose. If the proceedings before them have the appearance of fairness to both parties, mere technical objections will receive no countenance from the court."
>
> But, although much is conceded to their discretion, irregularities calculated to injure either party will not be tolerated. When they have been selected and the matters and things in controversy between the parties have been submitted, the parties have a right to expect at their hands that due regard will be paid to their mutual rights. As to the time, place and mode of conducting the investigation of the matter submitted, neither party is supposed to waive a just regard and observance on the part of the referees of these essentials to a faithful discharge of the trust reposed; hence an abuse of those rights will always be considered such an irregularity as to justify the court in setting aside their award.

Id. at *3. Justice Wheeler rejected the complaints leveled against the arbitrators in this particular case.

In *Edrington v. League*, 1 Tex. 64, 1846 WL 3589 (Tex. 1846) (Hemphill, C.J.), the Court rejected a complaint that arbitrators had awarded a recovery for interest in excess of the usury statute. Chief Justice Hemphill quoted a treatise on arbitration, and made the following broad comments:

> In another author of high authority we find the following, viz.: "Where arbitrators knowing what the law is, or leaving it entirely out of their consideration, make what they conceive under the circumstances of the case to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law." Kyd on Awards, 351. From the above authorities it would seem that arbitrators may disregard the defense of usury and decide according to the justice of the case, and their award will be sustained. The object of the reference here was (without regarding legal or technical objections) to attain a decision according to the principles of honor and justice.

Id. at 4.

On April 25, 1846, the first Legislature of the Texas adopted a statute providing for arbitration, to take effect on June 22, 1846. The Act required an arbitration agreement in writing, but it was held not to invalidate oral agreements to arbitrate made before the Act. In *Offeciers v. Dirks*, 2 Tex. 468, 1847 WL 3591 (Tex. 1847) (Lipscomb, J.), the Court cited the statute for providing for trial de novo in district court of the arbitrator's award, but only if that right was reserved in the arbitration agreement.

XXXXI. SLAVERY. "American slavery was preeminently an economic institution--a system of unfree labor used to produce cash crops for profit."[614] This description leaves untold the many personal and societal misfortunes and injustices of slavery, but it does capture the economic essence of the institution of slavery. Apart from minimal requirements of physical well-being required by law, in Texas slaves were considered to be personal property of their owners, subject to being traded, sold and loaned like other personalty. Pre-Civil War cases involving slaves were decided under the law of sales, of chattels, of bailment, and the general law of contracts.

In *Clapp v. Walters*, 2 Tex 130, 1847 WL 3515, *5 (1847) (Lipscomb, J.), it was determined that the owner of a slave could sue for the return of the slave or else recovery of a money judgment for the value of the slave plus the value of the slave's hire from the date of demand for return through the date judgment was rendered. If no demand was made, the period of hire to be compensated began on the date the writ was served. *Accord*, *Caluit v. Cloud*, 14 Tes. 53, 1855 WL 4845, *2 (1855) (Wheeler, J.).

The case of *Edwards v. Peoples*, Dallam 359 (1840) (Mills, J.), applying Spanish law, no recovery would lie in the sale of a diseased slave if the vendor pointed out the defect or if the defect was apparent to the vendee. The remedy under Spanish law was (i) rescission if the sale was fraudulent, or (ii) a reduction in sales price if the vendor was not aware of the defect. In *Mims v. Mitchell*, 1 Tex. 443, 1846 WL 3635, *7 (1846) (Wheeler, J.) the court said that a person who borrows a slave must treat that slave with "due care," and must "observe toward that slave, the same humane and careful treatment which a discreet, humane and prudent master would observe in the treatment of his own slaves, and to restore her to the plaintiff in as good a condition as he had received her, unless the condition had become deteriorated without his default or negligence." In *McGee v. Currie*, 4 Tex. 217, 1849 WL 3996 (1849) (Lipscomb, J.), the Court held that, where a slave was hired out by its owner to a third party, the third party was required to pay for medical care incurred during the period of hire.

In *Young v. Lewis*, 9 Tex. 73, 1852 WL 4026 (1852) (Lipscomb, J.), the plaintiff sued claiming that he had hired out a slave girl on a month-to-month basis. But he had demanded her return in order to remove her from San Antonio, which was suffering a cholera epidemic. The defendant refused to return the slave, and the girl died of cholera. The plaintiff sued for the value of the slave. The Court held that the contract hiring out the

slave girl was a bailment, and that during the period of the bailment (in this case month-by-month), the bailee was regarded as owner of the slave. No legal wrong was committed when the bailee refused to return the slave to the bailor upon a demand made mid-month. The Court commented that the bailee was responsible to take reasonable and prudent care of the slave, and upon failing to do so he could be liable for negligence. However, negligence was not pled, and the relief sought by plaintiff was denied. The slave owner lost his investment; the slave girl lost her life. That was the law of bailment.

In *Robinson v. Varnell*, 16 Tex. 382 (1856) (Wheeler, J.), the Court held that a slave-owner who had hired out the slave's labor for one year could recover the full value of the slave plus the value of his hire, despite the fact that he had run away and been killed in connection with his recapture.

In *Townsend v. Hill*, 18 Tex. 422, 1857 WL 4982 (Tex. 1857) (Wheeler, J.), the Court addressed the question of whether the owner of a slave, hired out for a term, can recover the full contract price, when the slave died during the period of hire through no fault of the hirer. Justice Wheeler noted a conflict between the common law and civil law on the point, and decided that the civil law rule was better, that the hirer is entitled to abatement of the contract price. Justice Wheeler noted that this principle was in accord with Texas' law that contracts are apportionable, citing *Mead v. Rutledge*, 11 Tex. 44 (1853) (Hemphill, J.); and *Hassell v. Nutt*, 14 Tex. 260 (1855) (Wheeler, J.); *Baird v. Ratcliff*, 10 Tex. 81 (1853) (Hemphill, C. J.). *Id.* at *4. It is worth noting, that Justice Wheeler weighed the public policy consideration which rule of law would be more likely to improve the treatment of slaves.

Contract issues arose with emancipation of slaves. Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 Chi.-Kent L. Rev. 493 (1994). In *Hall v. Keese*, 31 Tex. 504, 1868 WL 4745 (1868) (Morrill, C.J.), a divided Court held that promissory notes given for the sale or hire of slaves were not invalidated by the freeing of the slaves. In *Algier v. Black*, 32 Tex. 168, 1869 WL 4791 (1869), the Court announced its decision that the slaves in Texas were freed upon the declaration of General Granger, on June 19, 1865.

Additional reading:

• *Guess v. Lubbock*, 5 Tex. 535 (1851) (Lipscomb, J.) (discussing the law of slavery under Spanish law, then Mexican law, and finally under the Texas Constitution of 1836).

• Mark Davidson, *One Woman's Fight for Freedom: Gess v. Lubbock*, 45 Houston Lawyer 10 (2008) (the story of a lawsuit in which a freed slave secured a ruling confirming her freedom).

• Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 Yale L.J. 1473 (2003) (regarding various definitions of what makes a person of African descent for purpose of Jim Crow (discriminatory) laws).

XXXXII. EMPLOYMENT AGREEMENTS. Employment agreements in Texas have a unique set of rules that at times differ from ordinary contract rules.

A. EMPLOYMENT AT WILL VS. FOR A TERM. In *East Line & R. R. R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (Stayton, J.), the Supreme Court held that employment for an indefinite term may be terminated by either the employer or the employee at will and without cause. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (Wallace, J.), the Court recognized an exception that an employer cannot discharge an at-will employee for the sole reason that the employee refused to perform an illegal act. In *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 659-60 (Tex. 2012) (Lehrmann, J.), the Court held that a cause of action for violation of the *Sabine Pilot* rule sounds in tort, not contract, because there was no enforceable employment agreement in at-will employment. Being a tort claim, exemplary damages are available. *Id.* 660-61. Parties can contract for employment for a specific term if they wish to, in which case a claim can be brought for breach of contract. However, "employment is presumed to be at-will in Texas absent an unequivocal agreement to be bound for that term." *Midland Judicial District Community Supervision v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002) (per curiam).

1. Lack of Mutuality in Contracts Between Employer and Employee. Because an employment-at-will relationship can be terminated by employer or employee at any time, there is no mutuality of obligation to support appending other promises to the employment agreement. In *Missouri, K.&T., Ry. Co. of Texas v. Smith*, 98 Tex. 47, 81 S.W. 22 (1904) (Williams, J.), the employer's agreement to allow the employee to return to work after an injury was not a sufficient basis to support the employee's release of the railroad from liability for his injury. Because the employment was at-will, there was no obligation assumed by the employer, and thus no mutuality of obligation.

2. At-Will Employment is an Illusory Promise. In *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 650 (Tex. 2006) (Willett, J.), the Court called a promise of continued employment, in an at-will employment arrangement, "illusory" because the employer could fire the employee at any time.

B. NON-COMPETITION AGREEMENTS. Some employment agreements contain a promise from the employee not to compete with the business after employment ends. This is a practical reflection of the motives that underlay the law of apprenticeship. The bargain, in its essence, is a quid pro quo: the employer teaches a trade; in exchange the employee permits the employer to profit from her labor for a period of time, and then the employee is free to go into business on their own. Covenants not to compete are typically

enforced by injuction, which is an equitable remedy. Consequently, Texas courts have felt free to deviate from the express terms of the non-compete agreement in granting relief. In *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (Gammage, J.), the Court said: "We hold that provisions clearly intended to restrict the right to render personal services are in restraint of trade and must be analyzed for the same standards of reasonableness as covenants not to compete to be enforceable"). In *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 769 (Tex. 2011) (Wainwright, J.), the Court sketched the history of covenants not to compete in Texas. *Id.* at 771-73.

In *DeSantis v. Wackenhut,* 793 S.W.2d 670 (Tex. 1990) (Hecht, J.) (originally decided in July of 1988, before rehearing was granted), the Supreme Court held that a covenant not to compete "is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection," such as the purchase or sale of a business, or employment relationships. The restraint must not be greater than necessary to protect the promisee's legitimate interest, which include "business goodwill, trade secrets, and other confidential or proprietary information." The extent of the restriction must be "limited appropriately as to time, territory, and type of activity." Id. at 682. The Court also spoke to the remedy: " An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law." Id. at 682. The Court also announced that it was abandoning the rule that covenants not to compete could not be enforced for jobs that were a "common calling." Instead, the general standards set out in the opinion would determine when such restraints were allowed. Id. at 683. In 1989 the Legislature passed the Covenants Not to Compete Act, now found at Tex. Bus. & Com. Code § 15.50-ff. The statute says that covenants not to compete are enforceable if they are "ancillary to or part of an otherwise enforceable agreement." They must also be reasonable as to "time, geographical area, and scope of activity to be restrained. Section 15.50(b) contains exceptions to protect the interests of patients of medical doctors. The statute purported to apply to agreements signed prior to its effective date, and the statute was applied to a pre-existing contract, in *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994) (Cornyn), but the issue of constitutionality was not raised. *Id.* at 644 n. 3.

C. ATTORNEY-CLIENT EMPLOYMENT AGREEMENTS. In *Baird v. Ratcliff*, 10 Tex. 81, 1853 WL 4279, *1 (1853) (Hemphill, C.J.), the Court considered a case where a lawyer sued to recover a fee where he had to withdraw from representing a client upon being elected judge. The Supreme Court held that the lawyer was legally disabled from continuing representation once he took the bench, so there was no voluntary abandonment of the contract, and that the contract was "severable," so that the lawyer was entitled to recover for the value of the services he rendered before withdrawing from employment. *Baird v. Ratcliff* was later cited for the proposition that certain types of contractual obligations are severable, in *Hollis v. Chapman*, 36 Tex. 1, 1872 WL 7486, *3-4 (Tex. 1871) (Ogden, J.).

In *Myers v. Crockett*, 14 Tex. 257, 1855 WL 4877, *1 (Tex. 1855), Justice Wheeler affirmed a judgment in favor of a lawyer who was discharged by client without fault on the part of the lawyer. In that case, the lawyer sought recovery of the promised fee, but the jury returned a verdict for only the value of the services rendered. The client appealed but the lawyer did not. The Court upheld the verdict. Justice Wheeler went on to say that the lawyer would have been entitled to recover for the full amount of the promised fee. Justice Wheeler distinguished an attorney-client employment agreement from the ordinary contract, where the readiness to perform an agreement was sufficient to uphold the agreement but did not permit recovery for more than the value of the services rendered. *Id.* at *1. Justice Wheeler explained that ""[t]he relation of attorney and client is a peculiar and confidential relation." *Id.* at *1. He pointed out that the lawyer was precluded from later accepting employment by the opposing party, and that this feature of the attorney-client employment agreements "afforded good reason" to treat them differently from other contracts.

Myers v. Crockett was relied upon in *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969) (McGee, J.), where the Supreme Court said: "We reject respondent's contention that Mandell & Wright's recovery should be limited to one of quantum meruit for the value of work performed between the date of employment and date of discharge. Her refusal to cooperate in their prosecution of the claim made it impossible for them to proceed further. In Texas, when the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation." The Court also cited three court of civil appeals cases.

In *Stewart v. Houston & T.C. Ry. Co.,* 62 Tex. 246, 248 (1884) (Watts, J. Com. App.), the Court said that "the right of attorneys at law to contract for a contingent interest in the subject-matter of the litigation, by way of compensation for professional services, where it is done in good faith, has at all times been recognized in this state."

In *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 559 (Tex. 2006) (Jefferson, C.J.), the Court had to determine "whether an attorney hired on a contingent-fee basis may include in the fee agreement a provision stating that, in the event the attorney is discharged before completing the representation, the client must immediately pay a fee equal to the present value of the attorney's interest in the client's claim." The Court said that evaluating an attorney-client employment agreement a contract is not just a contract; that "'[t]here are ethical considerations overlaying the contractual relationship.'" The Court determined that

the provision was contrary to public policy and unenforceable.

The fee collected under the an attorney-client agreement is governed by professional ethics rules, and must not be unconscionable. *Walton*, 206 S.W.3d 557 at 561. In *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d. 445 (Tex. 2011) (Hecht, J.), the Supreme Court said that a lawyer has a fiduciary duty to the client, and that therefore the employment agreement between the lawyer and client should be construed as a reasonable person in the client's circumstances would have understood it.

XXXXIII. THE RIGHT OF WIVES TO MANAGE PROPERTY AND CONTRACT. Under the Common Law of England, when a woman married she ceased to exist, as a legal entity.[615] All property owned by a woman when she married, and all property that came to her during marriage, became the property of her husband. *Hawkins v. Lee*, 22 Tex. 544, 1858 WL 5673, *3 (Tex. 1858) (Wheeler, C.J.). The Spanish law that prevailed in Texas was different, as is explained below.

A. THE ADOPTION OF SPANISH MARITAL PROPERTY LAW. In 1840, the Texas Congress elected to continue the Spanish law of marital property and marital rights in preference to adopting the Common Law of England as to married persons.[616] According to S.M.U. School of Law Professor Joseph W. McKnight, the community and separate property regime dated back to the Fuero Real III.3.1-3 (1255) of Spain, carried forward in the Nueva Recopilación of 1567 and the Novisíma Recopilación of 1805. This regime gave each spouse half ownership of the community estate, and gave to the community estate all of the income during marriage, including personal earnings and earnings on separate property, but left property owned prior to marriage, and gifts and inheritances received during marriage, as the spouse's separate property.[617] In adopting the Spanish law, the Texas Congress gave wives a half interest in the community estate, but carried forward the exclusive power of the husband to manage all property of the parties. Under Texas law, a married woman suffered what were called "the disabilities of coverture." These disabilities continued, subject to a various exceptions, until 1963, when the married women in Texas were at last freed to contract and convey the same as their husbands.

The Act of January 20, 1840, did not give a wife the power to enter into contracts, even with the joinder of the husband. So the wife's disability to contract under English Common Law carried forward into Texas law. *Kavenaugh v. Brown*, 1 Tex. 481, 1846 WL 3641, *2-3 (1846) (Lipscomb, J.).

The disabilities of coverture carried with it protections of the wife's property. In *U.S. v. Yazell*, 382 U.S. 341 (1966) (Fortas, J.), the U.S. Supreme Court held that the Texas law on the disabilities of coverture were binding on the Federal government, prohibiting the taking of the wife's separate property to pay a SBA loan signed by the wife.

Additional reading:

- James W. Paulsen, *Community Property and the Early American Women's Rights Movement: The Texas Connection*, 32 Idaho L. Rev. 641 (1996).

B. THE WIFE'S SEPARATE PROPERTY IN TEXAS. In *Howard v. North*, 5 Tex. 290, 1849 WL 4087, *7 (1849) (Hemphill, C.J.), the Court wrote:

> The right of the wife to hold all her property in her separate right is recognized by the law of the State. Her goods and chattels are not vested by marriage in the husband, nor is he entitled to a freehold estate in her reality; and all the rules of law founded upon such title in her property are inoperative under a system by which such rights are wholly repudiated. He has by law the management of the estate of the wife, and the incidents essential to the due exercise of such authority, not for his own benefit, but for that of the community or of the estate which he controls.

The wife was given management power over her separate property by statute adopted in 1913.[618] It was possible for a third party to convey property to a wife that would be her separate property and also be free from her husband's management authority. However, it was necessary to go beyond reciting in the conveyance that the property was for her "use and benefit." *Nimmo v. Davis*, 7 Tex. 26, 1851 WL 4032, *3 (Tex. 1851) (Wheeler, J.) (applying Alabama law).

C. MANAGEMENT OF COMMUNITY PROPERTY IN TEXAS. As noted above, under early Texas law, the husband had exclusive management rights over community property. Casenote, *Husband and Wife - Wife May Dispose of Her Interest in the Community Property After Abandonment by the Husband*, 1 Tex L. Rev. 236 (1923). An exception existed for the homestead, which the husband could not convey without the joinder of the wife. *Id*. The wife acquired full management powers, however, if she was deserted by the husband, or the husband was imprisoned. *Id*. In *Morris v. Geisecki*, 60 Tex. 633, 1884 WL 8692 (1884) (Stayton, A.J.), the Court held that a husband could not transfer a community property homestead to a third party, without the wife's joinder or over her objection, with an intent to defraud her. If the husband became mentally incompetent, the wife had to secure appointment as a guardian in order to transfer community property. When so empowered, the wife could sell an entire community asset, but not just her half. Casenote, 1 Tex. L. Rev. at 236. In 1913, the Legislature adopted a statute giving wives management rights over their personal earnings and the income from their separate property.[619] The statute required the husband's joinder for disposing of community property lands or securities managed by the wife. The property managed by the wife was protected from the husband's creditors. Id. Then in 1925, the Legislature passed a law

making the husband sole manager of all community property.[620] However, the wife's income was exempt from the claims of her husband's creditors.[621] The Texas Supreme Court, in 1932, ruled that the wife continued to have management rights ove the income produced by her separate property.[622]

D. STATUTES GIVING MARRIED WOMEN THE RIGHT TO CONTRACT.

1. Privy Examination. On April 30, 1846, the Legislature adopted an act specifying the mode for conveying property in which the wife had an interest. The law required that a wife, who had signed and sealed a deed or other document of conveyance, be taken outside the presence of her husband and before a judge of the Supreme Court or a district court, or a notary public, where she was to be "privily examined," and she had to declare that she had signed the document freely and willingly, then the document had to be shown and explained to her, and she had to state that she did not wish to retract it, and she must then acknowledge the instrument, which would then be certified by the judge or notary public to verify that she was making the conveyance of her own free will, realized what she was doing, and was not being pressured by her husband.[623] *See Callahan v. Patterson & Patterson*, 4 Tex. 61 (1849) (Lipscomb, J.) (quoting the statute). Chief Justice Hemphill issued a separate opinion in *Callahan*, saying that he would require not only compliance with the statute, but also that the conveyance of the wife's interest in property be supported by consideration actually received by her, which the statute did not require. In *Wallace & Co. v. Hudson*, 37 Tex. 456, 1872 WL 7640, *11 (Tex. 1872) (Walker, J.), the Court held that a wife could guarantee a previously-existing debt of her husband only if the guaranty is supported by consideration. The roots of the privy examination stretch back into English history, where a pretextual lawsuit to recover title would be brought, and the wife and husband would allow judgment to be taken in exchange for a payment. The wife was required to testify at the court proceeding, leading to the procedure of the privy examination.[624]

In *Buvens v. Brown*, 118 Tex. 551, 18 S.W.2d 1057 (Tex. 1929) (Pierson, J.), the Court held that strangers to the wife's transaction could not, 75-years after the fact, raise the lack of a privy examination certification. The effect of a failure to conduct a privy examination was discussed in *Note*, 8 Tex. L. Rev. 415 (1930).

In *Rice v. Peacock*, 37 Tex. 392, 1872 WL 7638, *2 (1872) (Walker, J.), the members of the Supreme Court who were present for the decision were unable to agree on wether "a married woman [is] bound by deed of trust executed during coverture, so as to authorize a forced sale of the homestead." The Court did agree and disposed of the case on the ground that the acknowledgment on the deed of trust--which said "and, being examined and apart from her husband, acknowledged that she signed, sealed, and delivered the same"–was legally insufficient to support execution. The Court explained: "This certificate does not aver that the wife was examined separate and apart from her husband, or by whom she was examined; but simply that she was examined, and that, apart from her husband, she acknowledged that she signed, sealed, etc. All this she might have done, and yet not have admitted her willingness to sign the deed, to the officer whose duty it was to ascertain the state of her mind touching this matter, by an examination separate and apart from her husband. (Article 1003, Paschal's Digest.)"

In *Jones v. Goff*, 63 Tex. 248 (1885) (Watts, J., Comm'n App.), the Court said that the statute made no provision for the wife to enter into "agreements or executory contracts" to convey the homestead in the future, and that such a contract to convey land was not one of the methods provided by statute for a married woman to divest herself of the homestead right. In *Blakely v. Kanaman*, 107 Tex. 206, 175 S.W. 674 (1915) (Phillips, J.), the Court extended its rationale to all separate property of the wife, saying "neither this statute nor any other in force at the time with which we are dealing in any wise purported to invest a married woman with authority to contract to convey her separate real estate, or to make such a contract binding upon her." In *Pickens v. Bacle*, 129 Tex. 610, 104 S.W.2d 482 (1937) (German, Comm'r), the Court applied the rule to options, and said the wife could not be bound by an option to sell real estate.

It should be noted that in *Leffin v. Jeffers*, 52 S.W.2d 81 (Tex. Comm. App. 1932), the Supreme Court determined that the Legislature, when it gave the wife management power over her separate estate in 1913, also gave her the right to contract with regard to their separate estate, as if they were unmarried.[625]

2. Special Legislation. On March 1, 1848, the Legislature passed an act that authorized a specific person, Sarah Ann Kelton, to sell property in her own right, since her husband was a "lunatic" and could not manage the community estate.[626]

3. Removing Disabilities for Mercantile Purposes. On March 13, 1911, the Legislature enacted a law providing that a wife could, with the joinder of her husband, apply to the district court of the county where she lived, to have the court partially remove her disabilities of coverture, "declaring her feme sole for mercantile and trading purposes." If the declaration was granted, the wife was able to in her own name contract and be contracted with, sue and be sued, and all her non-exempt separate property would thereafter be subject to her debts. However, the community estate was not subject to the wife's creditors' claims.[627]

4. Repeal of Disabilities of Coverture. According to Professor McKnight, the 1913 act giving women management rights over their community property income originally would have given women full contract rights, but opposition from Governor Colquitt caused that part of the statute to be removed.[628] The disabilities of coverture were repealed by the 58th Legislature in 1963. However, the need for a privy examination of the wife was not repealed until 1967.[629]

XXXXIV. PLEADING CONTRACT CLAIMS AND DEFENSES.

1. The Legislatively-Prescribed Pleading Procedures. The Texas Legislature adopted the Common Law of England as the rule of decision in Texas courts on January 20, 1840. On February 5, 1840, the Legislature adopted another statute saying, in part: "the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer . . . ." Act of February 5, 1840, § 1. That same statute provided that:

> In every civil suit in which sufficient matter of substance may appear upon the petition, to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form; the court shall, in the first instance, endeavor to try each cause by the rules and principles of law; should the cause more properly belong to equity jurisdiction, the court shall, without delay, proceed to try the same according to the principles of equity.

Id. § 12. The statute went on to say:

> If any action be brought on a bond or other writing filed in any suit brought thereupon in any other court of this Republic, it shall be sufficient for the plaintiff to file with his petition, a copy of such bond or other writing, attested by the clerk of the court in which the original may be filed, and the defendant or defendants shall be obliged to plead thereto in like manner as if the original bond or writing was filed, and such copy shall be admitted as evidence on the trial; If however, the defendant or defendants shall plead and file an affidavit under oath, that the original bond or writing is not his, her or their deed, the clerk of the court having such original papers in his custody, shall on being summoned as a witness, attend with the same on trial of the issue, for the inspection of the jury.

Id. § 20.

2. Early Cases on Pleading Contract Claims. In *Mims v. Mitchell*, 1 Tex. 443, 1846 WL 3635 (Tex. 1846) (Wheeler, J.), the Court wrote:

> The object of pleading is to apprise the court and the opposite party of the facts on which the pleader intends to rely, as constituting his cause of action or grounds of defense. And the averments should set forth the facts relied on with such precision, clearness and certainty, as to apprise the opposite party of what he will be called upon to answer, and what is intended to be proved, so that the evidence introduced may not take him by surprise.

Id. at *3. In *Pitts v. Ennis & Reynolds*, 1 Tex. 604, 1846 WL 3664, *2 (Tex. 1846) (Wheeler, J.), the Supreme Court said that, in pleading a contract claim, facts must be "averred and set forth with such certainty and precision as to disclose any definite rights upon which a good cause of action may be seen to have arisen; and the court may certainly know what judgment to pronounce." In *Towner v. Sayre*, 4 Tex. 28, 1849 WL 3962, *2 (1849) (Lipscomb, J.), the Court said that the contract does not need to be set out in haec verbae, and that attaching a copy of the contract to the petition was good notice. In *Mason v. Kleberg & Burleson*, 4 Tex. 85, 1849 WL 3972, *2 (1849) (Wheeler, J.), the Court said that "if any part of the contract proved should vary materially from that which is stated in the pleadings, the variance will be fatal; for a contract is an entire thing, and inadmissible." Justice Wheeler went on to say that it is not necessary to state the legal effect of the contract; it is sufficient to state that the defendant became bound, for consideration, to do an act, "including time, manner, and other circumstances of its performance." To this allegation, the proof must agree. *Id.* at *2.

The contract sued upon, if written, can be attached to the pleadings. In *Warren v. La Salle Co.*, 262 S.W. 527, 530 (Tex. Civ. App.–Austin 1924, writ dism'd w.o.j.), the court said: "The rule is also established that the allegations of a pleading are controlled by the statements of the written instrument on which it is founded."

3. Proof Must Match the Allegations. Early on, Texas courts followed a strict rule that the "allegata must match the probata." In *Mason v. Kleberg*, 4 Tex. 85, 1849 WL 3972, *2 (Tex. 1849) (Wheeler, J.), the Court said:

> The rule in actions upon contracts is that if any part of the contract proved should vary materially from that which is stated in the pleadings, the variance will be fatal; for a contract is an entire thing, and indivisible. (1 Greenl. Ev., 75.)

The Court found that an allegation that promissory notes were "payable to Burleson," when in fact they said "payable to Burleson or bearer," was not a material variance because adding "or bearer" was surplusage and the legal import of the note was not misstated in the pleading. *Id.* at 2-3. In the earlier case of *McClelland v. Smith*, 3 Tex. 210, 1848 WL 3894 (1848) (Lipscomb, J.), the Court held that a variance between the pleading and the promissory note, "McClelland" versus "McLelland," was not material and thus not fatal to the plaintiff's claim. *Id*. at 82. Justice Lipscomb examined and disapproved English cases that were stricter on variances. Justice Lipscomb notes that the description in the pleading "was correct as to date, the mode of payment, and the parties." *Id*. at *3. The case of *Hunt v. Wright*, 13 Tex. 549, 1857 WL 5124 (1855) (Wheeler, J.), involved a pleading that alleged that a promissory note was "for the payment by the defendant of the sum specified, 'when thereunto afterwards requested;'" but the promissory note admitted into evidence was for payment "in two years from this date." The Court held that the variance between allegations and proof was

fatal to the plaintiff's claim. In *Gammage v. Alexander*, 14 Tex. 418 *4 (1855) (Hemphill, C. J.), the Court said: "This action purports to be founded on a contract, and it is a rule of pleading as old as the science itself that a contract, when sued upon, must be correctly stated, and if the evidence differ from the statement the variance is fatal to the action; in other words, the facts constituting the cause of action must be set forth fully and distinctly, and if not proved as laid the foundation of the action fails and the plaintiff cannot recover." The Court held that where the only ground alleged for recovery was a specific contract, a claim for the value of the goods would not lie.. In *Brown v. Martin*, 19 Tex. 343, 1857 WL 5124 (1857) (Roberts, J), the Court said: "The rule in actions upon contracts is, that if any part of the contract proved should vary materially from that which is stated in the pleadings, the variance will be fatal." The plaintiff had alleged a promissory note for $356.00. The body of the note said "Three Hundred Fifty Six" but the "Six" was crossed out and the word "Five" inserted. In the margin of the promissory note, the number "$355" was written. The jury returned a verdict for $355.00. The Court reversed the judgment that awarded the plaintiff $355.00, because the allegation was $356.00 but the proof was $355.00. In *Shipman v. Fulcrod*, 42 Tex. 248 (1874) (Reeves, J.), the Court found a variance to be fatal, where the pleading said that the promissory note was signed by "S. W. Walker and E. M. Shipman" while the note itself was signed by S. P. Walker and E. M. Shipman.

In *Morris v. Kasling*, 79 Tex. 141, 144, 15 S.W. 226, (1890) (Stayton, C. J.), the Court said that "[i]t is elementary that one suing on a contract must recover on the contract alleged, or not at all. If he proves a contract essentially different from that alleged, he must fail."

In *Western Union Tel. Co. v. Smith*, 88 Tex. 9, 30 S.W. 549 (1895) (Brown, J.), the plaintiff sued for negligent failure to timely deliver a telegram informing the plaintiff of his father's illness in time for the plaintiff to visit his father one last time before he died. The duty arose out of contract, and in his pleading the plaintiff alleged that the plaintiff's brother had contracted with Western Union to deliver the telegram in a timely way. In actuality, the brother had contracted with Central Texas and North Western Telegraph Company in Waxahachie, which had an agreement with Western Union to deliver the telegraphed message once it reached Dallas. The Supreme Court held that liability did not arise out of the contract, but rather out of "an implied promise arising out of the facts of the case." Id. at 41, 551. Since suit was brought on an express contract with one company, but the facts showed an implied contract with another, case was reversed.

In *Abraham & Company, Inc. v. Smith*, 2004 WL 210570, *2 (Tex. App.--Houston [14th Dist.] 2004, no pet.) (memo. opinion), the defendant complained that the plaintiff recovered judgment for breach of an oral modification of a written contract, while he had pled a breach of a written contract and did not mention the word "oral" and did not specifically say that he was suing for breach of a modified contract. The court of appeals noted that "the Facts section [of the pleading] closely matches the evidence adduced at trial concerning the parties' dealings." The court found the pleadings sufficient.

The case of *Ward v. Ladner*, 322 S.W.3d 692 (Tex. App.–Tyler 2010, pet. denied), involved an alleged variance between an oral contract alleged and the oral contract proven. The court of appeals noted that Rules of Civil Procedure 66, 67 and 90 "are designed to prevent a variance between pleading and proof from having the effect of precluding any recovery." *Id*. at 696. The court also noted that not every variance is fatal, and that a variance between the facts alleged to establish an oral contract and the facts proved is not fatal unless the pleading "tends to mislead or surprise the opposing party." *Id*. at 697.

4. Pleading Defenses to Contract Claims. In Texas, originally, a defense of lack of consideration did not have to be sworn. *Harris v. Cato*, 26 Tex. 338, 1862 WL 2866, *2 (Tex. 1862) (Moore, J.). That law changed. In *Williams v. Bailes*, 9 Tex. 61, 1852 WL 4023, *3 (Tex. 1852) (Hemphill, C.J.), the Supreme Court held that the statutory requirement, that pleas asserting failure of consideration be sworn, was waived if the defect in pleading was not raised prior to trial. Texas Rule of Civil Procedure 93 currently requires that several defenses pled against enforcement of a contract must be supported by affidavit. These include: denial of execution of a written instrument sued upon, Tex. R. Civ. P. 93.7; denial of the indorsement or assignment of a written instrument sued upon by an indorsee or assignee, Tex. R. Civ. P. 93.8; a plea of lack of consideration or failure of consideration, Tex. R. Civ. P. 93.9; usury, Tex. R. Civ. P. 93.11. A plea of payment must be particularly described in the pleading or evidence of payment is barred. Tex. R. Civ. P. 95. A party seeking contract relief can plead that "all conditions precedent have been performed or have occurred," in which event the assertion will be taken as true unless the opposite party specifically denies the assertion. Tex. R. Civ. P. 54.

[The End]

1. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 555 (1933).

2. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933).

3. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision) (4th ed. 2000).

4. *See* Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit* 19 YALE L. J. 221 (1910) <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3933&context=fss_papers> [3-12-2013].

5. John F. Sowa and Ann K. Majumdar, *Analogical Reasoning*, p. 406 <http://www.jfsowa.com/pubs/analog.htm> [3-2-2013].

6. Richard R. Orsinger, *The Role of Reasoning in Constructing a Persuasive Argument* 17-18 (2011) <http://www.orsinger.com/PDFFiles/constructing-a-persuasive-argument.pdf> [2-13-2013].

7. JOHN STUART MILL, A SYSTEM OF LOGIC, Book 3, ch. 2, § 1 <http://oll.libertyfund.org/title/246/39835> [2-7-2013].

8. "The axiomatic principles of the common law, according to the Langdellians, were to be initially discovered by reasoning inductively upward from the cases, but the correctness or incorrectness of the cases was to be determined by reasoning deductively downward from the principles." Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1444 (1997).

9. Richard R. Orsinger, *The Role of Reasoning and Persuasion in the Legal Process* 76 (2010) <http://www.orsinger.com/PDFFiles/role-of-reasoning-in-persuasion.pdf> [2-13-2013].

10. Richard R. Orsinger, *The Role of Reasoning and Persuasion in the Legal Process* 73-74 (2010) <http://www.orsinger.com/PDFFiles/role-of-reasoning-in-persuasion.pdf> [2-13-2013].

11. Richard R. Orsinger, *The Role of Reasoning and Persuasion in the Legal Process* 76 (2010) <http://www.orsinger.com/PDFFiles/role-of-reasoning-in-persuasion.pdf> [2-13-2013].

12. *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 706 (Tex. 1996) (Hecht, J.), quoting OLIVER WENDELL HOLMES, JR. THE COMMON LAW 340-409 (1881), that common law rights were "that is, determined by the identity of the particular individuals involved and their transaction or circumstances."

13. David M. Rabban, *Melville M. Bigelow: Boston University's Neglected Pioneer of Historical Legal Scholarship in America*, 91 B.U. L. REV. 1, 13 (2011), quoting Bigelow as saying "The legal results produced by the Norman Conquest . . . touch mainly on the subject of procedure."

14. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Vol. I, Book I, Section III ["COMMENTARIES"]

15. WILLIAM BLACKSTONE, COMMENTARIES, Vol. I, Book I, Section III.

16. WILLIAM BLACKSTONE, COMMENTARIES, Vol. I, Book I, Section III.

17. William Blackstone, A Discourse on the Study of the Law 16 (1758), <http://www.lonang.com/exlibris/blackstone/bla-001.htm> [6-19-2010].

18. POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 138 (1895).

19. Edward Rubin, *What's Wrong with Langdell's Method and What to do About It*, 60 VAND. L. REV. 609, 628-29 (2007).

20. *See* Ehrlich, *The Sociology of the Law*, 36 HARV. L. REV. 130 (1922), which describes the development of law from blood feuds to a pricing-system for wrongs, to judicial decrees that resolve individual cases, to the development of general legal principles, to statutes.

21. William Blackstone, An Analysis of the Laws of England, Preface p. v. <http://www.constitution.org/cmt/blackstone/ale1762.htm> [6-20-2010].

22. William Blackstone, An Analysis of the Laws of England, Preface p. v. <http://www.constitution.org/cmt/blackstone/ale1762.htm> [6-20-2010]. Ranulf de Glanville (d. 1190) served as Chief Justiciar (i.e., prime minister) for Henry II of England. He is reputed to have authored the Treatise on the Laws and Customs of the Kingdom of England in 1188–the first treatise on English law. The Treatise detailed the complicated practice of writs, which were used to remove legal disputes from a local court (dominated by the local noble) to one of the King's courts.

23. William Blackstone, An Analysis of the Laws of England, Preface p. v <http://www.constitution.org/cmt/blackstone/ale1762.htm> [6-20-2010]. *See The De legibus et consuetudinibus Angliae attributed to Henry of Bratton* <http://amesfoundation.law.harvard.edu/digital/Bracton/bracton.html> [2-11-2013].

24. See Nichols, *Britton* (1865) <http://www.archive.org/details/brittonenglishtr00nichiala> [6-19-2010].

25. "Law-French was an Anglo-Norman dialect used in the English Courts beginning around 1066 and continuing in more or less increasingly degraded forms through 1500. Although by the mid-fourteenth century Parliament was conducted in English, most English lawyers wrote all their reports and professional notes in Law-French until the reign of Charles II. Bowing to pressure to reform, in 1650 Parliament finally issued an order that only English was to be used in law books, but during the Restoration there was a widespread reversion to Law-French. The last publication in Law-French was roughly 1690. Most legal literature was written in Law-French or Latin until the seventeenth century. The main use of Law-French was in case reports, textbooks, and academic debates "officially" ended in 1731." <http://tarlton.law.utexas.edu/exhibits/dictionaries/common_law/kelham.html> [1-13-2013].

26. Ebook and Texts Archive, California Digital Library, Britton; an English translation and notes <www.archive.org/details/brittonenglishtr00nichiala> [2-7-13].

27. Littleton's The Tenures was one of the first books published in London and was the first legal treatise published on English law. The three volume set was an effort to achieve a comprehensive classification of rights in land. Littleton's approach was to state a definition and description of the rights in question, followed by hypothetical illustrations and in some instances references to some of the court decisions that had been assiduously recorded in "year books" for some years prior.

28. Christopher W. Brooks, *The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought* <http://oll.libertyfund.org/index.php?Itemid=284&id=1311&option=com_content&task=view#c_lfSandoz_footnote_nt187> [1-13-2013].

29. Tarlton Law Library, Rare Books & Special Collections; Law Dictionary Collection, John Rastell (c. 1475-1536). <http://tarlton.law.utexas.edu/exhibits/dictionaries/common_law/rastell.html> [1-13-2013].

30. Christopher W. Brooks, *The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought* <http://oll.libertyfund.org/index.php?Itemid=284&id=1311&option=com_content&task=view#c_lfSandoz_footnote_nt187> [1-13-2013].

31. Tarlton Law Library, Rare Books & Special Collections; Law Dictionary Collection, John Cowell, (c. 1554 - 1611). <http://tarlton.law.utexas.edu/exhibits/dictionaries/common_law/cowell.html> [1-13-2013].

32.Tarlton Law Library, Rare Books & Special Collections; Law Dictionary Collection, Henry Spelman (c. 1564-1641). <http://tarlton.law.utexas.edu/exhibits/dictionaries/common_law/spelman.html> [1-13-2013].

33. The first part is at <http://www.archive.org/details/firstpartinstit03nottgoog> [6-19-2010]. The second part is at <http://www.archive.org/details/secondpartinsti02cokegoog.> [6-20-2010]: The third part is at <http://www.archive.org/details/thirdpartinstit01cokegoog> [8-16-2010].

34. Jamail Center for Legal Research; Tarlton Law Library The University of Texas School of Law; Legal History <http://tarltonguides.law.utexas.edu/content.php?pid=102972&sid=1012786> [1-13-2013].

35. Jamail Center for Legal Research; Tarlton Law Library The University of Texas School of Law; Legal History<http://tarltonguides.law.utexas.edu/content.php?pid=102972&sid=1012786> [1-13-2013].

36. Jamail Center for Legal Research; Tarlton Law Library The University of Texas School of Law; Legal History <http://tarltonguides.law.utexas.edu/content.php?pid=102972&sid=1012786> [1-13-2013].

37. Jamail Center for Legal Research; Tarlton Law Library The University of Texas School of Law; Legal History<http://tarltonguides.law.utexas.edu/content.php?pid=102972&sid=1012786> [1-13-2013].

38.Jamail Center for Legal Research; Tarlton Law Library The University of Texas School of Law; Legal History <http://tarltonguides.law.utexas.edu/content.php?pid=102972&sid=1012786> [1-13-2013].

39. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1819 (2000).

40. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 Cal. L. Rev. 1815, 1819 (2000).

41. WILLIAM BLACKSTONE, COMMENTARIES, Book III, Chapter 8.

42. WILLIAM BLACKSTONE, COMMENTARIES, Book III, Chapter 8.

43. FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW Preface vi (2d ed. 1910) ("MAITLAND").

44. MAITLAND, p. 3.

45. MAITLAND, p. 3.

46. OLIVER WENDELL HOLMES, JR., THE COMMON LAW p. 115 (1881).

47. OLIVER WENDELL HOLMES, JR., THE COMMON LAW p. 115 (1881).

48. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW Lecture IV --1189-1271 (1909) ("Men have been obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although these cases fall within admitted principles."). There was a parallel system for the issuance of "plaints" of bills that were presented directly to the King's judges. *See* George L. Haskins, *Select Cases of Procedure Without Writ Under Henry III*, 58 HARV. L. REV. 149, 149-152 (1944). The plaints appear not to touch upon claims that might be considered contract claims.

49. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW Lecture III, Section IV --1212-1307 (1909). The full quotation from Maitland is: "'Et quotienscumque de cetero evenerit in Cancellaria quod in uno casu reperitur breve et in consimili casu cadente sub eodem jure et simili indigente remedio, concordent clerici de Cancellaria in brevi faciendo vel atterminent querentes in proximo parliamento et scribant casus in quibus concordare non possunt et referant eos ad proximum parliamentum et de consensu jurisperitorum fiat breve ne contingat de cetero quod curia diu deficiat querentibus in justicia perquirenda.' And whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and let the cases be written in which they cannot agree, and let them refer them until the next Parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants."

50. MAITLAND (2d ed. 1910) p. 18.

51. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1819 (2000).

52. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1828 (2000).

53. Richard R. Orsinger, *The Role of Reasoning in Constructing a Persuasive Argument* p. 8 (2011) <http://www.orsinger.com/PDFFiles/constructing-a-persuasive-argument.pdf> [1-31-2013].

54. Richard R. Orsinger, *The Role of Reasoning in Constructing a Persuasive Argument* p. 17 (2011) <http://www.orsinger.com/PDFFiles/constructing-a-persuasive-argument.pdf> [1-31-2013].

55. MAITLAND, *supra*.

56. An early Texas Supreme Court opinion noted that detinue and debt could be joined at common law, although the pleas were different. *Chevalier v. Rusk*, Dallam 611 (1844) (Jones, J.).

57. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909).

58. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 321 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

59. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 321 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

60. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909).

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

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

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

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

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

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

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

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

69. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 322 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

70. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 326 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

71. Arthur Corbin's tale of this case is reacounted in Donald Bostwick & M.H. Hoeflich, *Arthur Corbin and the University of Kansas School of Law: Four Letters*, 54 KAN. L. REV. 1115, 1126 (2006).

72. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909).

73. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 2-4 (Oxford Univ. Press 1999).

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

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

76. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909).

77. 1 WILLISTON ON CONTRACTS § 2:14 (4th ed. Richard A Lord) ("Since the law of covenants preceded the law requiring consideration for the formation of contracts, it necessarily follows that, in the early law, no consideration in the modern sense was required to support a covenant.").

78. E. J. K., Jr., *Contracts—Effect of Written Promise—Burden of Proof,* 18 TEX. L. REV. 83, 83-84 (1939).

79. F.W. MAITLAND: THE FORMS OF ACTION AT COMMON LAW, Lecture IV, Section III, 1189-1271 (1909).

80. George F. Deiser, the *Development of Principle in Trespass*, 27 YALE L.J. 220 (1917); Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 800 (1924); George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343, 357 (1925) (trespass developed out of the assize of novel disseisin); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 366-72 (5th ed. 1956) (trespass developed from the common law appeal of felony); 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64A.01[1] (Michael Allen Wolf ed., 2000) (Trespass resulted from a reorientation away from criminal fines into civil damages). A fourth view is that Trespass was a refinement of a broad claim for money damages. See Anderson, *Subsurface "Trespass": A Man's Subsurface Is Not His Castle*, 49 WASHBURN L.J. 247, 251 n. 21 (2010). H. G. Richardson and G.O. Sayles argued that Roman Law, and particularly the actio iniuriarum, is the source of what became Trespass. See George L. Haskins, *Select Cases of Procedure Without Writ Under Henry III*, 58 HARV. L. REV. 149, 151-52 (1944).

81. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS p. 43 (Oxford Univ. Press 1999).

82. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS p. 44 (Oxford Univ. Press 1999).

83. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS pp. 44-46 (Oxford Univ. Press 1999).

84. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS pp. 46-47 (Oxford Univ. Press 1999).

85. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 331 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

86. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 331 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

87. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 331 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

88. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 331 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

89. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 332 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

90. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 332 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

91. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 331 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

92. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 332 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

93. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 333 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

94. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 336 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

95. *Contra*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 61-62 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch4.pdf> [2-27-2013]. Baker says that use of the writ *vi et armis* was not abandoned until the 1350s, and that the passage of 70 years between the enactment of the statute and the discontinuation of the practice suggests that there was no connection. Baker suggests instead that policy changed in the wake of the Black Death.

96. *Record Detail* <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=16039> [1-12-2013].

97. *Record Detail* <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=14060> [1-12-2013].

98. THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW ch. 3, *Assumpsit for Non-Feasance* (1956); see Year Book entry at <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=16039> [3-2-2013]. The Court acknowledged that if the carpenter had build a house poorly, the owner would have an action in tort for negligence. But no action would lie on the covenant unless the promise was in writing.

99. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed. 2002) 334 <http://moglen.law.columbia.edu/ELH/baker/Ch19.pdf> [2-27-2013].

100. In *Reynolds v. Clarke*, (1725) B. & M. 354, Justice Fortescue indicated that where a person threw a long on a highway and hit someone, the remedy was in trespass, but where he left the log on the highway and someone tripped over it, the remedy was in case. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed. 2002) 64. <http://moglen.law.columbia.edu/ELH/baker/Ch4.pdf> [2-27-2013]

101. OLIVER WENDELL HOLMES, JR., THE COMMON LAW p. 115 (1881).

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

103. OLIVER WENDELL HOLMES, JR., THE COMMON LAW p. 115 (1881).

104. James Barr Ames was a graduate of Harvard Law School who was hired as an assistant professor immediately after he graduated, pursuant to a new policy implement by C.C. Langdell as Dean of Harvard Law School. Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School*, 1895-1915, 61 J. OF LEGAL EDUC. 31, 43 (2011). Ames became Dean when Langdell retired. Ames' tenure as dean ran from 1895 to 1909. *Id.* at 31-32 (2011).

105. OLIVER WENDELL HOLMES, JR., THE COMMON LAW p. 115 (1881). The case referred to is *Bukton v Tounesende* (1348), the so-called Humber Ferry case. <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11790> [1-12-2013]. The case is known as the first instance where a claim of trespass was recognized for the faulty performance of a contractual obligation. The case is also important in that the wrongful behavior would, in modern terms, be considered negligent performance and not an intentional wrong, so that the case may be the origin of the tort of negligence.

106. *Dalton v. Mareschal*, (1369) Palmer BD, p. 343, sub. nom *Waldon v. Mareschal* <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=14060> [3-13-2013].

107. JAMES BARR AMES, THE HISTORY OF ASSUMPSIT 3 (1909).

108. JAMES BARR AMES, THE HISTORY OF ASSUMPSIT 3 (1909).

109. J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

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

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

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

113. Peter L. Reich, *Siete Partidas in My Saddlebags: the Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 TULANE EUROPEAN AND CIVIL LAW FORUM 79, 81 (2007).

114. *McMullen v. Hodge*, 5 Tex. 34, 1849 WL 4062, *24 (1849) (Lipscomb, J.), holding that the new government of Texas had the power to negate Spanish and American land titles, but did not do so except where explicitly declared).

115. *Gautier v. Franklin*, 1 Tex. 732 (1847) (Hemphill, C.J) (describing various Spanish statutes of limitation and eventually adopting the Louisiana Supreme Court's conclusion that a 10-year statute of limitation applied to private contracts).

116. *Pleasants v. Dunkin*, 47 Tex. 343, 1877 WL 8615 *7-8 (1877) (Gould, A. J.).

117. The source for this discussion of "Siete Partidas" is <http://en.wikipedia.org/wiki/Siete_Partidas> [12-21-2012].

118. *McMullen v. Hodge*, 5 Tex. 34, 1849 WL 4062, *25 (1849) (Lipscomb, J.) ("The old laws continued to be administered through the instrumentality of the old officers until the establishment of a new system, and until changed were supposed to exert the same binding influence in the protection of persons and property that had been claimed for them before the relations between Texas and the other parts of Mexico had been changed. In fact the body of our jurisprudence remained the same until the introduction of the common law by the act of Congress in 1840."); *See* Wittall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 808 (1950).

119. Peter L. Reich, *Siete Partida in My Saddlebags: The Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 TULANE EUROPEAN AND CIVIL LAW FORUM 79, 82 (2007).

120. Chief Justice Hemphill did not have the Novisima Recopilacion to decide *Garrett v. Nash*, Dallam 497 (1843) (Hemphill, C.J.).

121. <http://tarlton.law.utexas.edu/constitutions/text/1827index.html> [12-31-2012]; *Chambers v. Fisk*, 22 Tex. 504, 1856 WL 5671, *12 (1858) (Roberts, J.).

122. art. VI <http://tarlton.law.utexas.edu/constitutions/text/image/C06.html> [12-31-2012].

123. Tex. Const. art. IV, § 7 (1836) <http://tarlton.law.utexas.edu/constitutions/text/ccA4.html> [12-31-2012].

124. GAMMELL, 1 LAWS OF THE REPUBLIC OF TEXAS 157 (1838).

125. Tex. Laws 1840, An Act to adopt the Common Law of England § I, at 3, 2 GAMMEL, LAWS OF TEXAS 177 (1898), now Tex. Rev. Civ. Stat. Ann. art. I.

126. *See* Edward Lee Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward That Reception, 1840 - 1859*, 29 TEX. L. REV. 904,909 (1951).

127. *Perry v. Rice*, 10 Tex. 367 (1853) (Wheeler, J.).

128. Ilustracion Del Derecho Real De España, Ordenada Por Don Juan Sala (Méjico: 1833).

129. Richard A. Danner, *The ABA, the AALL, the AALS, and the "Duplication of Legal Publications*, 104 LAW LIB'Y J. 485, 488 (2012).

130. Richard A. Danner, *The ABA, the AALL, the AALS, and the "Duplication of Legal Publications*, 104 LAW LIB'Y J. 485, 489 (2012), citing GRANT GILMORE, THE AGES OF AMERICAN LAW 59 (1977).

131. *A Biography of George Wythe 1726-1806* <http://www.let.rug.nl/usa/biographies/george-wythe> [2-2-2013].

132. *John Rutledge* <http://teachingamericanhistory.org/convention/delegates/rutledge.html> [1-27-2013].

133. *Bio.True Story*, James Monroe <http://www.biography.com/people/james-monroe-9412098>

134. *Edmund Pendleton*, <http://www.ushistory.org/declaration/related/pendleton.htm>. [3-5-13]

135. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 77 (Salem Press 1999).

136. *James Wilson*, <http://www.ushistory.org/declaration//signers/wilson.htm> [3-6-13].

137. *James Wilson*, <http://www.ushistory.org/declaration//signers/wilson.htm> [3-5-13].

138. *James Wilson*, < http://www.ushistory.org/declaration//signers/wilson.htm> [3-5-13]; *Wilson, James, (1742 - 1798)* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000591> [3-9-2013].

139. *A Biography of Charles Cotesworth Pinckney 1746-1825* <http://www.let.rug.nl/usa/biographies/charles-cotesworth-pinckney/> [3-9-2013].

140. *John Marshall (1755 - 1835)* <http://www.let.rug.nl/usa/biographies/john-marshall/> [2-2-2013].

141. *John Marshall (1755 - 1835)* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000157> [2-2-2013].

142. *William Wirt*, http://en.wikipedia.org/wiki/William_Wirt_(Attorney_General).

143. *William Wirt*, http://en.wikipedia.org/wiki/William_Wirt_(Attorney_General).

144. *Henry Clay*, http://en.wikipedia.org/wiki/Henry_Clay.

145. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story>.[3-6-13]

146. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story>.[3-6-13]

147. *Daniel Webster*, <http://en.wikipedia.org/wiki/Daniel_Webster>. [3-5-13]

148. *Daniel Webster*, <http://en.wikipedia.org/wiki/Daniel_Webster>. [3-5-13]

149. *Daniel Webster*, <http://en.wikipedia.org/wiki/Daniel_Webster>. [3-5-13]

150. *Travis, William Barret*, <http://www.tshaonline.org/handbook/online/articles/ftr03> [1-19-2013].

151. *Sumner, Charles, (1811 - 1874)* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001068> [3-9-2013].

152. *Lincoln's Advice to Lawyers* <http://www.abrahamlincolnonline.org/lincoln/speeches/law.htm> [3-10-2013]. In another letter Lincoln wrote that he had studied "Blackstone's Commentaries, Chitty's Pleadings's -- Greenleaf's Evidence, Story's Equity, and Story's Equity Pleading's . . . ." *Id.*

153. *Abraham Lincoln at the Bar of Illinois* <http://lcweb2.loc.gov/service/lawlib/law0001/2009/200900119332771/200900119332771.pdf> [3-9-2013].

154. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908), p. 2.

155. SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 969 (Salem Press 1999).

156. Michael T. Sansbury, *When Was The Yale Law School Really Founded?* (2001), Student Legal History Papers. Paper 5, <http://digitalcommons.law.yale.edu/student_legal_history_papers/5> ("Sansbury").

157. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908), p. 291. This was the Royall Professorship of Law, held by Isaac Parker. *See* Sansbury, at 14.

158. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908), p. 304. Sansbury at 15.

159. *History of Yale Law School* <http://www.law.yale.edu/about/historyofyls.htm> [12-31-2012].

160. *History of Yale Law School* <http://www.law.yale.edu/about/historyofyls.htm> [12-31-2012].

161. Sansbury at 21.

162. *Law Schools* <http://www.tshaonline.org/handbook/online/articles/khl01> [1-19-2013].

163. *Law Schools* <http://www.tshaonline.org/handbook/online/articles/khl01> [1-19-2013].

164. *Law Schools* <http://www.tshaonline.org/handbook/online/articles/khl01> [1-19-2013].

165. *Law Schools* <http://www.tshaonline.org/handbook/online/articles/khl01> [1-19-2013].

166. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *1 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

167. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *4 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

168. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *4 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

169. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *4 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

170. *Law Schools* <http://www.tshaonline.org/handbook/online/articles/khl01> [1-19-2013].

171. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *5 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

172. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *6 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

173. Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. OF AMERICAN CULTURE 25, *6 (1992) <http://www.michaelariens.com/legalethics/modernlegaltimes.htm> [1-13-2013].

174. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 981 (Salem Press 1999).

175. Dawn Clark Netsch & Harold D. Shapiro, *100 Years and Counting*, 100 NORTHWESTERN UNIV. L. REV. 1, 1 (2006).

176. *Editorial Notes and Comments*, 1 Tex. L. Rev. 76 (1922).

177. Tex. Const. art. IV, § 7 (1836) <http://tarlton.law.utexas.edu/constitutions/text/ccA4.html> [12-31-2012].

178. *Texas Supreme Court Election History, 1851-2010*, <http://www.supreme.courts.state.tx.us/court/SC-ElectionHistory.pdf> [1-8-2013].

179. Tex. Const. art. IV, § 9 (1836) <http://tarlton.law.utexas.edu/constitutions/text/ccA4.html> [12-31-2012].

180. Tex. Const. art. IV, § 5 (1845). <http://tarlton.law.utexas.edu/constitutions/text/image/D08.html> [12-31-2012].

181. Tex. Const. art. IV, § 5 (1861). <http://tarlton.law.utexas.edu/constitutions/text/image/E10.html> [12-31-2012].

182. Tex. Const. art. IV, § 2 (1866). <http://tarlton.law.utexas.edu/constitutions/text/image/F11.html> [12-31-2012].

183. Tex. Const. art. V, § 2 (1869) <http://tarlton.law.utexas.edu/constitutions/text/image/G22.html> [12-31-2012].

184. Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 ST. MARY'S L. J. 17, 23 (2008).

185. Tex. Const. art. V, §§ 1 & 2 (1876) <http://tarlton.law.utexas.edu/constitutions/text/image/I09.html> [12-31-2012].

186. *Encyclopedia of Texas* p. 234 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/294/?q=anthony b. shelby> [1-19-2013].

187. *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

188. *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

189. *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013];*Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

190. *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

191. *Thomas Jefferson Rusk - The Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013].

192. *Thomas Jefferson Rusk - The Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013]. Houston's injury was described as "shattered to that twenty pieces of bone were taken out." Noah Smithwick, THE EVOLUTION OF A STATE OR RECOLLECTIONS OF OLD TEXAS DAYS <http://www.lsjunction.com/olbooks/smithwic/otd19.htm> [2-6-2013].

193. *Army of the Republic of Texas* <http://www.tshaonline.org/handbook/online/articles/qja03> [1-19-2013]; *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library*<http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

194. *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

195. *Cherokee War* <http://www.tshaonline.org/handbook/online/articles/qdc01> [1-19-2013].

196. *Rusk, Thomas Jefferson* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013]; *Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

197.*Thomas Jefferson Rusk (1803 - 1857) Tarlton Law Library* <http://tarlton.law.utexas.edu/justices/profile/view/91> [1-19-2013].

198. *Thomas Jefferson Rusk - The Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013].

199. *Convention of 1845* <http://www.tshaonline.org/handbook/online/articles/mjc13> [1-19-2013].

200. *Thomas Jefferson Rusk - The Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013]; see *Senators* <http://www.tshaonline.org/handbook/online/articles/ncs02> [1-19-2013].

201. *Thomas Jefferson Rusk - The Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fru16> [1-19-2013].

202. *John Hemphill*, <http://www.tshaonline.org/handbook/online/articles/fhe13> [02-01-13]

203. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION 106 (1999).

204. David A. Furlow*, The Legendary Life and Tumultuous Times of Chief Justice John Hemphill,* Journal of the Texas Supreme Court Historical Society, Fall 2011, <http://www.texascourthistory.org/documents/TSCHS_JournalFall2011.pdf> [12-31-2012].

205. *Richardson A. Scurr*y, <http://www.tshaonline.org/handbook/online/articles/fsc36> [1-31-13]

206. Hobart Huson, "HUTICHINSON, ANDERSON," *Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fhu52> [3/4/13]

207. Hobart Huson, "HUTICHINSON, ANDERSON," *Handbook of Texas Online* <http://www.tshaonline.org/handbook/online/articles/fhu52> [3/4/13]

208. *Richard Morris*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/74> [1-31-2013].

209. *Robert Emmett Bledsoe Baylor*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986 <http://tarlton.law.utexas.edu/justices/profile/view/4> [1-19-2013].

210. *Abner Smith Lipscomb*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/66> [1-8-2013].

211. *Texas Supreme Court Election History, 1851-2010,* <http://www.supreme.courts.state.tx.us/court/SC-ElectionHistory.pdf> [1-8-2013].

212. Biographical Encyclopedia of Texas, Book, 1880, <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/95> [1-19-2013].

213. Biographical Encyclopedia of Texas, Book, 1880, <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/95> [1-19-2013]; also see <http://www.tshaonline.org/handbook/online/articles/fwh09> [1-19-2013].

214. *Texas Supreme Court Election History, 1851-2010* <http://www.supreme.courts.state.tx.us/court/SC-ElectionHistory.pdf> [1-8-2013].

215. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION (1999), p. 106.

216. *Texas Supreme Court Election History, 1851-2010* <http://www.supreme.courts.state.tx.us/court/SC-ElectionHistory.pdf> [1-8-2013]. *See* <http://tarlton.law.utexas.edu/justices/profile/view/114> [1-8-2013].

217. *Encyclopedia* p. 31 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/35> [1-19-2013]. <http://www.supreme.courts.state.tx.us/court/SC-ElectionHistory.pdf> [1-8-2013].

218. *The Texas Ordinance of Secession (February 2, 1861)* <http://www.lsjunction.com/docs/secesson.htm> [2-6-2013].

219. 25 Texas Reports 7.

220. *Clark v. State*, 31 Tex. 574 (Lindsay, J.).

221. This is the day that the fiscal department of the State of Texas ceased to maintain a financial ledger for the state. EDMUND THORNTON MILLER, A FINANCIAL HISTORY OF TEXAS ch. 5 (1916). The state treasury was broken into and looted on June 11, 1865. *Id.*

222. Governor Hamilton did not reconstitute the Supreme Court.

223. *Hargrove v. De Lisle*, 32 Tex. 170, 1869 WL 4792, * 4 (1869) (Morrill, C.J.).

224. Biographical Encyclopedia of Texas, Book, 1880, p. 237 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/297> [1-19-2013].

225. "MOORE, GEORGE FLEMING," Handbook of Texas Online <http://www.tshaonline.org/handbook/online/articles/fmo28> [3-5-13]

226. Biographical Encyclopedia of Texas, Book, 1880, p. 238 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/297> [1-19-2013].

227. Biographical Encyclopedia of Texas, Book, 1880, p. 238 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/297> [1-19-2013].

228. Biographical Encyclopedia of Texas, Book, 1880, p. 238 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/298> [1-19-2013].

229. Biographical Encyclopedia of Texas, Book, 1880, p. 238 <http://texashistory.unt.edu/ark:/67531/metapth5827/m1/298> [1-19-2013].

230. *George Fleming Moore*, <http://tarlton.law.utexas.edu/justices/profile/view/71> [1-31-13]

231. EDMUND THORNTON MILLER, A FINANCIAL HISTORY OF TEXAS p. 156 (1916).

232. Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 ST. MARY'S L. J. 17, 36 (2008).

233. *James W. Throckmorton*, <http://en.wikipedia.org/wiki/James_W._Throckmorton> [1-29-13].

234. *Semicolon Court* <http://www.tshaonline.org/handbook/online/articles/jps01> [1-26-2013].

235. Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 ST. MARY'S L. J. 17, 37 (2008).

236. *Richard Coke*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/15> [1-31-13].

237. *Asa Hoxie Willie*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/117> [3-5-13].

238. *Asa Hoxie Willie*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/117> [3-5-13].

239. JEWETTE HARBERT DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS: WITH BIOGRAPHIES OF THE CHIEF AND ASSOCIATE JUSTICES 86 (1917).

240. *Asa Hoxie Willie*, <http://tarlton.law.utexas.edu/justices/profile/view/117> [3-5-13].

241. *Asa Hoxie Willie*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/117> [3-5-13].

242. *Livingston Lindsay*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/65> [1-29-13].

243. Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 ST. MARY'S L. J. 17, 50 (2008).

244. *Albert Hamilton Latimer*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/64> [1-19-2013].

245. *Colbert Coldwell*, Tarlton Law Library Digital Collections, Justices of Texas 1836-1986, <http://tarlton.law.utexas.edu/justices/profile/view/16> [1-19-2013].

246. Evans, Lemuel Dale - The Handbook of Texas Online <http://www.tshaonline.org/handbook/online/articles/fev07> [1-26-2013].

247. Hans Wolfgang Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)*, 40 ST. MARY'S L. J. 17, 53 (2008).

248. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1819 (2000). Gordley suggests that Blackstone attempted to organize court decisions "systematically into rules or doctrines or to find justifications for them." *Id.* at 1819.

249. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, <http://openlibrary.org/books/OL7025510M/Commentaries_on_the_laws_of_England.> [(6-19-2010].

250. Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW AND HISTORY REV. 59, 77 n. 61 (2000).

251. The following is a letter from Abraham Lincoln to James T. Thornton on December 2, 1858:

> Dear Sir
>
> Yours of the 29th, written in behalf of Mr. John W. Widmer, is received. I am absent altogether too much to be a suitable instructor for a law student. When a man has reached the age that Mr. Widner has, and has already been doing for himself, my judgment is, that he reads the books for himself without an instructor. That is precisely the way I came to the law. Let Mr. Widner read Blackstone's Commentaries, Chitty's Pleadings's -- Greenleaf's Evidence, Story's Equity, and Story's Equity Pleading's, get a license, and go to the practice, and still keep reading. That is my judgment of the cheapest, quickest, and best way for Mr. Widner to make a lawyer of himself. Yours truly
> A. Lincoln

Abraham Lincoln Online, Speeches and Writing, <http://www.abrahamlincolnonline.org/lincoln/speeches/law.htm> [3-7-13].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

267. Judah Best, *Judah P. Benjamin: Part II: The Queen's Counsel*, p. 5 <http://www.supremecourthistory.org/wp-content/themes/supremecourthistory/inc/37_Judah_P_Benjamin_Pt2wfootnotes.pdf> [1-1-2013].

268. Charles Pollack was the son of the Chief Baron of the Exchequer, Sir Frederick Pollack, who "suggested" to his son that Benjamin study under him. [Judah P. Benjamin: Part II: The Queen's Counsel By Judah Best]

269. Pollock died in London in 1937.

270. Sanford H.E. Freund, *Book Review of Pollock's Principles of Contracts* (3d Am. ed.), 40 AMERICAN LAW REVIEW 639-640 (1906).

271. *The Indian Contract Act, 1872* <http://www.vakilno1.com/bareacts/indiancontractact/indiancontractact.html> [3-6-2013].

272. Frederic William Maitland - Wikipedia <http://en.wikipedia.org/wiki/Frederic_William_Maitland>. [3-14-2013]

273. GEOFFREY RUDOLPH ELTON, F.W. MAITLAND p. 13 (1985).

274. The full name is PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS AND OF AGENCY IN ITS RELATION TO CONTRACTS.

275. NEIL ANDREWS, CONTRACT LAW, Appendix, p. 674 (2011).

276. THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS p. 11 (1900)

277. THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS p. 11 (1900)

278. Anson is referring to the two factors, either of which made a contract enforceable, under English law that being (i) a seal and (ii) consideration.

279. SIR WILLIAM REYNELL ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT p. 10 (1879).

280. SIR WILLIAM REYNELL ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT p. 2 (1879).

281. SIR WILLIAM REYNELL ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT p. xxxi (1879).

282. H. C. G. Matthew, 'Anson, Sir William Reynell, Third Baronet (1843–1914)', Oxford Dictionary of National Biography. (Oxford University Press, 2004) <http://www.oxforddnb.com/view/article/30423/2004-09>; H.H. HENSON, A MEMOIR OF TH E RIGHT HONOURABLE SIR WILLIAM ANSON (1920).

283. See William P. LaPiana, *Victorian From Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship,* 90 COLUM. L. REV 809, 817 (1990).

284. Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1401-ff. (1997).

285. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (Boston: Little, Brown, 1911), 187, quoted in Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HISTORY REV. 389, 404 n. 89 (2010) <http://journals.cambridge.org/download.php?file=%2FLHR%2FLHR28_02%2FS0738248010000052a.pdf&code=8cce664b9dea67815d1724b76fbc7feb> [2-18-2013].

286. *New York State Court of Chancery* <http://www.courts.state.ny.us/history/legal-history-new-york/history-legal-bench-court-chancery.html> [3-14-2013].

287. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 572 (1993).

288. Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290, 1317 n. 2 (1961).

289. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908), p. 286, ("Charles Warren").

290. Charles Warren, p. 267.

291. *Joseph Story* <http://www.oyez.org/justices/joseph_story> [3-6-2013].

292. Charles Warren, p. 269.

293. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story> [3-5-13].

294. Charles Warren, p. 270.

295. Charles Warren, p. 272.

296. Charles Warren, p. 274.

297. *Joseph Story*, <http://en.wikipedia.org/wiki/Joseph_Story> [3-5-13].

298. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 969 (Salem Press 1999).

299. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 969 (Salem Press 1999).

300. Story also dedicated his first edition of Commentaries on Equity Jurisprudence to William Prescott.

301. University of Virginia, Special Collections, Biographical Article on Theophilus Parsons, Jr. <http://lib.law.virginia.edu/specialcollections/zoom/2156>. [3-14-2013].

302. Roscoe Pound, *The Role of Will in the Law* 68 HARV L. REV. 1, 5 (1954).

303. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906, 5 (2009); Christopher Tomlins, *Book Review on Bruce A. Kimball, The Inception of Modern Professional Education: C.C. Langdell, 1826–1906*, 59 SOUTHWESTERN L. SCHOOL J OF LEGAL EDUCATION 657, 660 (2010).

304. *Harvard Law School, Deans Throughout History*, <http://oasis.lib.harvard.edu/oasis/deliver/findingAidDisplay?_collection=oasis&inoid=4926>. [3-14-2013].

305. Letter from Oliver Wendell Holmes, Jr., to John Lanthrop Motley (Dec. 22, 1871), quoted in CHARLES WARREN, 1 HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA, 357 (1908).

306. Bruce A. Kimball & Brian S. Shull, *The Ironical Exclusion of Women from Harvard Law School 1870-1900*, 58 J. OF LEGAL EDUC. 3, 7 (2008), where the authors wrote that "access to education depended on the personal relationships developed among gentlemen."

307. *C.C. Langell Contracts Examinations* <http://pds.lib.harvard.edu/pds/view/17936031?n=9&imagesize=1200&jp2Res=.25&printThumbnails=no> [-3-14-2013].

308. Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895-1915*, 61 J. OF LEGAL EDUC. 31, 31 (2011).

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

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

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

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

313. See Luke Nottage, *Tracing Trajectories in Contract Law Theory: Form in Anglo-New Zealand Law, Substance in Japan and the US*, Sydney Law School Research Paper, at 7 n. 10 (2007b, forthcoming) ("Nottage"), available on-line at:

<http://law.anu.edu.au/anjel/documents/ResearchPublications/ComparativeContractLawTheoryDevelopment.pdf>.

314. A copy of C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (1880) is at <http://archive.org/stream/summaryoflawofco00lang#page/n15/mode/2up> [3-12-2013].

315. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 973 & 1052 (Salem Press 1999).

316. STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 969 (Salem Press 1999). Although Holmes was brought in to assist James Bradley Thayer to assist in the task of editing the twelfth edition at the instigation of Kent's grandson, Holmes took the project over and ended up rewriting much of the work between 1869 and 1873, and it was Holmes's name and not Thayer's on the title page and preface. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993) 125. Holmes apparently thought poorly of the original work, saying in correspondence to Thayer that Kent had "no general ideas, except wrong ones." *Id.* at 125.

317. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 150 (1993).

318. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 274 (1993), citing *Hawkins v. Graham,* 149 Mass. 287 (1889) (Holmes, J.).

319. Professor Grant Gilmore called Holmes's "bargain theory" of consideration a "tool for narrowing the range of contractual liability." GRANT GILMORE, THE DEATH OF CONTRACT 21-22 (1974).

320. "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference." Oliver Wendell Holmes, Jr., *the Path of the Law*, 10 HARV. L.REV. 457, 462 (1897).

321. Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

322. Note, *Holmes, Peirce & Legal Pragmatism*, 84 YALE L. J. 1123 (1975).

323. Roscoe Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 812 (1938), where he characterized contemporary law as having five qualities different from 50 years before: (i) a new functional attitude asking not what the law is but how it operates; (ii) openness to the insights of other social sciences; (iii) studying law as part of the "whole process of social control"; (iv) considering the role of individual judgment and intuition in the judicial and administrative process; and (v) concern with the values that can be used to measure they way that legal principles are and should be applied.

324. *See Lochner v. New York*, 198 U.S. 45, 52 (1905) ("The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

325. COURTS AND LAWYERS OF INDIANA 268, (Leander J. Monks, ed.; 1916).

326. Page 114 <http://www.keithbobbitt.com/ourbobbittfamily/Pages_from_Bobbitt_book82.pdf>. [3-13-2013].

327. List of Indiana Supreme Court Justices, Wikipedia, <http://en.wikipedia.org/wiki/List_of_Indiana_Supreme_Court_Justices``>. [3-14-2013].

328. *See* Proceedings of the Seventeenth Annual Meeting of the State Bar Association of Indiana 207-211 (1913).

329. This is also the rule stated in Section 2 of the Uniform Sales Act. <http://www.drbilllong.com/HistSales/USAI.html> [1-1-2013].

330. *Samuel Williston Explained* <http://everything.explained.at/Samuel_Williston> [2-7-2013].

331. Harvard Law School Deans Throughout History, <http://www.law.harvard.edu/news/spotlight/classroom/related/hls-deans.html>.

332. *Samuel Williston Explained* <http://everything.explained.at/Samuel_Williston> [2-7-2013].

333. THE CONTINUOUS LAW BOOK CATALOGUE: A COMPLETE INDEXED CATALOGUE OF LAW BOOKS p. 283 (1900).

334. A copy of the first edition of SAMUEL WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1903) is at <http://archive.org/stream/cu31924018805568#page/n5/mode/2up> [3-12-2013].

335. A copy of the first edition of SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT is at <http://archive.org/stream/cu31924018845218#page/n9/mode/2up> [3-12-2013].

336. *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 112 (Tex. 2004) (Jefferson, C.J.) (concurring).

337. See Mark Movsesian, *Rediscovering Williston*, 62 WASHINGTON & LEE L. REV. 207 (2005).

338. Jules F. Landry, Frances L. Landry, SAMUEL WILLISTON, LIFE AND LAW 209 (1941), quoted in Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994).

339. There are many sources that say that Corbin was born in Cripple Creek, Colorado. This is mistaken. See Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 183 (1964). His son, Arthur Linton Corbin, Jr. was born in Cripple Creek.

340. Donald Bostwick & M.H. Hoeflich, *Arthur Corbin and the University of Kansas School of Law: Four Letters*, 54 KAN. L. REV. 1115, 1117 (2006).

341. Some details of Corbin's life as a student at Yale Law School are set out in Friedrich Kessler, *Arthur Linton Corbin*, 78 YALE L. J. 517 (1969).

342. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 184 (1964).

343. The two prizes were the Betts Prize and the Jewel Prize. Jerry E. Stephens, *Arthur Linton Corbin: A Giant in the Law With Tenth Circuit Roots*, p. 2 <http://www.10thcircuithistory.org/pdfs/general_interest/corbin_article.pdf> [3-16-2013].

344. Roger K. Newman, *The Yale Biographical Dictionary of American Law* (2009) p. 128.

345. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 185 (1964).

346. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 313 (1964).

347. Later editions of Corbin's 1921 case book were published in 1933 and 1947, and a supplement was published in 1953. Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595, 626 (2003).

348. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 184 (1964).

349. Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755 (1993).

350. *Yale Law School: Early Years, 1869-1916* <http://www.law.yale.edu/cbl/3075.htm> [1-26-2012].

351. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 320 (1964).

352. Arthur L. Corbin, *In Memoriam: Samuel Williston*, 76 HARV. L. REV. 1327 (1963).

353. *Yale Law School: Early Years, 1869-1916* <http://www.law.yale.edu/cbl/3075.htm> [1-26-2012].

354. Professor Corbin's original treatise was published with the title "A Comprehensive Treatise on the Rules of Contract Law." In a letter dated October 3, 1964, Corbin wrote: ". . . [P]lease insert the word 'Working' before *Rules of Contract Law.* It was on the Title Page of my original manuscript, but was deleted without my consent by the Publisher. No doubt, he thought that a Rule is a Rule is a Rule. Later, the Publisher added the word 'Working' to the Title Page at my request; and now the Company calls special attention in its advertising to the fact that my Rules are 'Working Rules.' The truth is that all rule of law [in] human society are no more than tentative working rules, based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life." *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 YALE L.J. 311, 311 n. 1 (1964).

355. GRANT GILMORE, THE DEATH OF CONTRACT 63-64 (Ronald K.L. Collins ed., rev. ed. 1995).

356. Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L. J. 426 (1939).

357. *Yale Law School: Early Years, 1869-1916* <http://www.law.yale.edu/cbl/3075.htm> [1-26-2012].

358. Llewellyn, Karl Nickerson, West's Encyclopedia of American Law, 2005 <http://www.encyclopedia.com/doc/1G2-3437702748.html>. [3-14-2013].

359. Knapp, Crystal & Prince, PROBLEMS IN CONTRACT LAW – CASES AND MATERIALS 11 (Aspen 2003).

360. Luke Nottage, Tracing Trajectories in Contract Law Theory: Form in Anglo-New Zealand Law, Substance in Japan and the US, Sydney Law School Research Paper, at 9 n. 10 (2007),

361. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 587 (2000) ("Maggs").

362. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 587 (2000) ("Maggs").

363. ROBERT S. SUMMERS, LON L. FULLER 3 (Stanford University Press 1984).

364. ROBERT S. SUMMERS, LON L. FULLER 5 (Stanford University Press 1984).

365. ROBERT S. SUMMERS, LON L. FULLER 7 (Stanford University Press 1984).

366. ROBERT S. SUMMERS, LON L. FULLER 7 (Stanford University Press 1984).

367. Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595, 624-25 (2003).

368. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012) <http://www.michiganlawreview.org/assets/pdfs/110/8/Shapiro_and_Pearse.pdf> [1-1-2013].

369. Grant Gilmore, The Ages of American Law 138 n. 28 (1977).

370. *See* Robert W. Gordon,, *The Death of Contract*, 1974 WISC. L. REV. 1216 (1974) <http://digitalcommons.law.yale.edu/fss_papers/1376> [2-24-2013].

371. *Writings of Grant Gilmore*, 92 YALE L. J. 12 (1982).

372. Gilmore described C.C. Langdell as "an industrious researcher of no distinction whatever either of mind or . . . of style." GRANT GILMORE, THE DEATH OF CONTRACT 9 (1974).

373. James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, 10 Lingua Features (2000) <http://linguafranca.mirror.theinfo.org/0005/posner.html> [2-18-2013].

374. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 300-02 (1881); Oliver W. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 462 (1897).

375. Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. AND MARY L. REV. 1379, 1379-80 (1995).

376. Thomas D. Russell, Keep the Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at The University of Texas, 1899-1999 (2010). <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583606> [3-11-2013].

377. *Why the Ku Klux*, <http://houseofrussell.com/legalhistory/alh/docs/simkins.html> [3-14-2013] .

378. IN MEMORIAM IRA POLK HILDEBRAND <http://www.utexas.edu/faculty/council/2000-2001/memorials/SCANNED/hildebrand.pdf> [1-8-2013].

379. THE LAW QUARTERLY REVIEW (1885) p. 2 <http://archive.org/stream/lawquarterlyrev00lldgoog#page/n18/mode/2up> [3-6-2013].

380. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 545 (2000).

381. Peter A. Alces & Marion W. Benfield, Jr., *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405, 1405 n. 2 (1994).

382. ANNUAL REPORTS OF THE MASSACHUSETTS BOARD OF COMMISSIONERS FOR THE PROMOTION OF UNIFORMITY OF LEGISLATION IN THE UNITED STATES 6 (1909).

383. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 545 (2000).

384. ANNUAL REPORTS OF THE MASSACHUSETTS BOARD OF COMMISSIONERS FOR THE PROMOTION OF UNIFORMITY OF LEGISLATION IN THE UNITED STATES 81 (1937).

385. A Federal Bill of Lading Act was adopted in 1916.

386. *See generally*, Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996), which answers a criticism that the process of developing a uniform law is inferior to the legislative process.

387. *See* Carlyle C. Ring, Jr., *The UCC Process–Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 307 (1994).

388. Professor Corbin called them "learned doctors." Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 187 (1964).

389. *ALI Overview* <http://www.ali.org/index.cfm?fuseaction=about.overview> [2-13-2012].

390. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998) <http://docs.law.gwu.edu/facweb/gmaggs/pubs/ipse.htm> [3-14-2013].

391. Lawrence M. Friedman wrote that Restatements "took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones.… The restatements were almost virgin of any notion that rules had social or economic consequences . . . ." LAWRENCE M. FRIENDMAN, CONTRACT LAW IN AMERICA 582 (1965), quoted in Tucker, *Book Review*, 86 HARV. L. REV. 1625, 1631 (1973).

392. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341, 1342 (1948).

393. Professor Llewellyn criticized the use of title as a determiner of rights, because in many transactions title could not be determined with certainty. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 160 (1938). He said that the concept of title fit the economy of three hundred years ago, where the whole transaction was accomplished in one stroke, as where a buyer paid cash and walked off with a worn overcoat. Title was inadequate to address a sale on credit, the transport of goods to market by a factor, the shipment of goods on approval, etc. *Id.* at 171. The Official Comment to U.C.C. § 2.101 said that "[t]he legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character."

394. Arthur L. Corbin, *To Professor George Jarvis Thompson*, 21 CORNELL L. Q. 4 (1955).

395. The seven statues were the Uniform Negotiable Instruments Law of 1896; the Uniform Sales Act of 1906; The Uniform Warehouse Receipts Act of 1906; The Uniform Bill of Lading Act of 1909; the Uniform Stock Transfer Act of 1909; the Uniform Conditional Sales Act of 1918; and the Uniform Trust Receipts Act of 1933. Paul D. Carrington, *A Foreword to the Study of the Uniform Commercial Code*, 14 WYO. L.J. 17, 18 (1959).

396. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 357 n. 91 (1988) ("Gedid").

397. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 358 (1988).

398. Grant Gilmore suggested that, by the time codification of commercial law occurs, even a new act is out-of-date. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341, 1342 (1948).

399. Professor Llewellyn later said that "[m]uch of the law, whether embodied in the original Uniform Commercial Acts or not, has become outmoded as the nature of business, of technology, and of financing has changed. Such law need to be brought up to date." Memorandum of Karl N. Llewellyn to the New York Law Revision Commission (1954), *reprinted in* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973), cited in Gedid, at 357 n.

91.

400. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 239 (2009).

401. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 239 (2009).

402. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

403. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

404. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

405. William A. Schnader, Wikipedia, <http://en.wikipedia.org/wiki/William_A._Schnader> [2-26-13].

406. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

407. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

408. U.C.C. - Article 1, Official Comments <http://www.law.cornell.edu/ucc/1/general_comment.bak> [1-6-2013].

409. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 239 (2009).

410. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 n. 24 (2009); Krahmer & Gabriel, *Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*, 2 DEPAUL BUS. & COMMERCIAL L. J. 691 (2004).

411. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 547 (2000).

412. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 (2009).

413. The New York Commission published a report in 1956, concluding that "the Uniform Commercial Code is not satisfactory in its present form and cannot be made satisfactory without comprehensive re-examination and revision." Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 547 n. 48. (2000).

414. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. L. REV. 235, 240 (2009).

415. John Krahmer & Henry Gabriel, *Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*, 2 DEPAUL BUS. & COMMERCIAL L. J. 691, 691 (2004).

416. Atty Gen Opinion M-55 <https://www.oag.state.tx.us/opinions/opinions/44martin/op/1967/pdf/cm0055.pdf> [1-1-2013].

417. Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n. 3 (1964) ("Despite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling").

418. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 355 (1988), citing 1 STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 37 (1955).

419. *Id.*

420. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 344 (1988).

421. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 361 (1988).

422. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 361 (1988).

423. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 362 (1988).

424. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 362 (1988).

425. John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 363 (1988). Llewellyn wrote, in another context, "[P]olicy and principle must fit the facts, and must be rebuilt to fit the changing facts." Llewellyn, *On Warranty of Quality and Society*, 37 COLUM. L. REV. 341, 409 (1937), quoted in Gedid at 363, n. 122.

426. Karl Llewellyn, *The Modern Approach to Counselling and Advocacy–Especially in Commercial Transactions*, 46 COLUM. L. REV. 167 (1946).

427. Karl Llewellyn, *A Realistic Jurisprudence–The Next Step*, 30 COLUM. L. REV. 437, 457 (1930).

428. Gregory E. Maggs, *Karl Llewellyn's Fading Impact on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 560 (2000).

429. According to Professor Maggs, rules generally "define the permitted and prohibited conduct with precision, leaving the courts to determine only what happened." Standards require courts to determine not only what happened but also what the law should allow in the situation. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 553 (2000).

430. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 542-43 (2000).

431. See Section XV.C.8 for a discussion of the "battle of the forms."

432. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 554 (2000).

433. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 555-56 (2000).

434. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 559 (2000).

435. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 561 (2000).

436. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 561 (2000).

437. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 587 (2000).

438. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 566 & 568 (2000).

439. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 567 (2000).

440. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 573 (2000), citing 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d prac. ed. 1988).

441. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 573 (2000), citing Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966).

442. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 574 (2000).

443. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 574 (2000).

444. *See*, Peter A. Alces, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, (1996).

445. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 579 (2000).

446. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 583-84 (2000), where he discusses the considerations in drafting revisions to the U.C.C., such as wire transfers and letters of credit.

447. Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597, 600 (1966).

448. Professor Ruud was a Commissioner to the National Conference of Commissioners on Uniform State Laws under Governors Connally, Smith, Briscoe, White and Clements. *In Memoriam: Millard Harrington Ruud* <http://www.utexas.edu/faculty/council/1998-1999/memorials/Ruud/ruud.html> [2-9-2013).

449. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. TECH L. REV. 235, 241 (2009).

450. Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597, 601-602 (1966).

451. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 558 (2000).

452. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 558 (2000).

453. A description of the revision process by a participant is contained in William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993). Specifics on the creation of Article 4A are contained in Carlyle C. Ring Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994).

454. 71 UNIV. OF COLO. L. REV. 541 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033090> [3-14-013].

455. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 556 (2000). Maggs cites to new Article 4A on funds transfers, where the official comment says: "A deliberate decision was . . . made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles."

456. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 529 (2000).

457. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 569-70 (2000).

458.Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. OF COLO. L. REV. 541, 570 (2000).

459. "Significantly, Article 4A does not allow the customer making a payment by funds transfer to recover consequential damages from the bank if the transaction is miscarried, unless the customer and bank have entered into a written agreement allowing for this remedy.28 The prohibition against the recovery of damages for aborted funds transfers is based upon policy grounds. Article 4A takes the position that to hold the bank liable for millions of dollars in damages for a transaction that costs a few dollars is unreasonable. Placing liability on the bank for consequential damages would increase the cost and decrease the speed of the transaction. Additionally, the Code presumes that the customer is in the best position to avoid the loss." NEW JERSEY LAW REVISION COMMISSION, REPORT AND RECOMMENDATIONS RELATING TO ARTICLE 4A OF THE UNIFORM COMMERCIAL CODE p. 7. <http://www.lawrev.state.nj.us/rpts/ucc4a.pdf> [3-14-2013].

460. Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. of Colo. L. Rev. 541, 571 (2000).

461. Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595, 625 (2003).

462. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 517 (1998).

463. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 517 (1998).

464. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 521 (1998).

465. On-line access to relevant information is available at <http://cisgw3.law.pace.edu> [2-25-2013].

466. Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 610 MIAMI L. REV. 509 (2007) ("McQuillen").

467. CISG, Art. (2)a.

468. CISG Art. 2.

469. CISG, Arts. 3 & 4.

470. http://cisgw3.law.pace.edu/cisg/CISG-AC-op3.html#1 [3-21-2013].

471. *Northwest Ordinance; July 13, 1787* <http://avalon.law.yale.edu/18th_century/nworder.asp> [1-27-2013].

472. *Northwest Ordinance; July 13, 1787* <http://avalon.law.yale.edu/18th_century/nworder.asp> [1-27-2013].

473. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 596 (Legal Classics Library 1989).

474. Define bill of attainder.

475. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 596 (Legal Classics Library 1989).

476. Oliver Ellsworth, Delegates to the Constitutional Convention. Oliver Ellsworth was appointed Chief Justice of the United States in 1796. <http://teachingamericanhistory.org/convention/delegates/ellsworth.html> [1-27-2013].

477. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 596 (Legal Classics Library 1989).

478. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 596-97 (Legal Classics Library 1989).

479. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

480. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

481. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

482. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

483. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

484. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

485. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

486. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 597 (Legal Classics Library 1989).

487. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

488. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

489. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

490. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

491. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

492. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

493. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 629 (Legal Classics Library 1989).

494. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

495. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

496. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 628 (Legal Classics Library 1989).

497. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 633 (Legal Classics Library 1989).

498. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 702 (Legal Classics Library 1989).

499. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 707 (Legal Classics Library 1989).

500. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 726 (Legal Classics Library 1989).

501. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 726 (Legal Classics Library 1989).

502. Records of the Debates in the Federal Convention of 1787 as Reported by James Madison, p. 726 (Legal Classics Library 1989).

503. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

504. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

505. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

506. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

507. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

508. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

509. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

510. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1338 (1833).

511. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1339 (1833); *Sutherland v. De Leon*, 1 Tex. 250, 1846 WL 3617, * 34 (1846) (Lipscomb, J.) ("An ex post facto law has been usually held to apply to criminal proceedings only, and its judicial interpretation is, the making an act, not against law at the time it was done, punishable").

512. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

513. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 20 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

514. FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 313 (1979).

515. *The Dartmouth College Case: Oral Arguments of Daniel Webster* <http://www.constitution.org/dwebster/dartmouth_oral.htm> [3-6-2013].

516. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 9 n. 53 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013], citing Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV.1135, 1144 (declaring that Marshall "enlarged upon the Founders' intent to confine impairment to private contracts"), and CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996), 73 ("The prevailing view of Marshall's contract clause jurisprudence is that he substantially enlarged the meaning of the clause beyond the intention of the framers.")

517. *Id*.

518. "The American abandonment of natural law occurred around the time of the Civil War for a variety of reasons. One factor contributing to this change was a growing disjunction between science and religion, spurred greatly by the publication of Darwin's Origin of Species in 1859." Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1418 (1997). Another factor, according to Professor Feldman, was the American view that the people were sovereign. *Id.* And a third factor was the popularity of John Austin's book, The Province of Jurisprudence Determined, in the 1860s, which promoted "analytical jurisprudence," and the view that the law did not derive from a divine or eternal source, but instead was nothing more than a command from a source capable of enforcing it. *Id.* at 1420-21.

519. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, p. 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

520. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, pp. 1-2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013].

521. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, pp. 2-3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013], citing *Hepburn v. Griswold*, 75 U.S. 603 (1870) (Chase, C.J.).

522. James W. Ely, Jr., *Origins and Development of the Contract Clause*, Vanderbilt Public Law Research Paper No. 05-36, pp. 2-3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839904> [1-27-2013], citing *Murray v. Charleston*, 96 U.S. 423, 448 (1877) (Strong, J.).

523. *Supreme Court and Contract Law*, Historical Encyclopedia of American Business <http://salempress.com/store/samples/american_business/american_business_supreme.htm> [2-2-2013].

524. See the discussion of Federal contract law in *Supreme Court and Contract Law*, Historical Encyclopedia of American Business <http://salempress.com/store/samples/american_business/american_business_supreme.htm> [2-2-2013].

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

526. Code de Napoleon, § 1101 (promulgated February 17, 1804).

527. *The Dartmouth College Case: Oral Arguments of Daniel Webster* <http://www.constitution.org/dwebster/dartmouth_oral.htm> [3-6-2013].

528. RUDOLF HÜBNER, SIR PAUL VINOGRADOFF, WILLIAM EMANUEL WALZ, A HISTORY OF GERMANIC PRIVATE LAW (1918), p. 465-468.

529. *Merritt v. Merritt* <http://www.bailii.org/ew/cases/EWCA/Civ/1970/6.html> [2-26-2013].

530. ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 124 (2000), quoting Holmes; *see* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 277 (1993).

531. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. TECH L. REV. 235, 284 (2009).

532. George E. Henderson, *A New Chapter 2 for Texas: Well-Suited or Ill-Fitting*, 41 TEX. TECH L. REV. 235, 282 (2009).

533. V. Susanne Cook, *CISG: From the Perspective of the Practitione*r, 17 J. OF LAW & COMMERCE (1998) 343, 346-48 (1998).

534. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

535. Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?* 112 YALE L.J. 829, 850 (2003), available at <http://www.law.uchicago.edu/files/files/146.EAP_.ContractLaw.pdf> [2-18-2013].

536. *Receiver for Citizen's Nat'l Assurance Co. v. Hatley*, 852 S.W.2d 68, 71 (Tex. App.--Austin 1993, no writ).

537. *Buddy "L", Inc. v. General Trailer Co.*, 672 S.W.2d 541, 547 (Tex. App.–Dallas 1984, writ ref'd n.r.e.).

538. *Lassiter v. Boxwell Bros., Inc.*, 362 S.W.2d 884 (Tex. Civ. App.--Amarillo 1962, no writ).

539. 13 Tex.Jur.2d § 46, p. 178, and cases there cited therein.

540. Tex. Family Code § 4.002.

541. RESTATEMENT (SECOND) OF CONTRACTS § 1, rptrs. note on cmt. f (1981).

542. Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L. J. 73, 101-02 (1999).

543. 11 WILLISTON ON CONTRACTS § 33:16 (4th ed.).

544. *D. L. Godbey & Sons Const. Co. v. Deane*, 39 Cal.2d 429, 435, 246 P.2d 946, 950 (1952) (Traynor, J.).

545. James Thayer, *The "Parol Evidence" Rule*, 6 HARV. L. REV. 325, 325 (1893).

546. *Thompson v. M'Clenachan*, 17 S. & R. 110, 113 (Pa. 1827), cited in Comment, *The Parol Evidence Rule and Third Parties*, 41 FORDHAM L. REV. 945 (1973).

547. 11 S. WILLISTON ON CONTRACTS § 33:5 (4th ed.), cited in Martin Ågren, *Demystifying the Parol Evidence Rule*, 36 n. 269 (Lund University 2009) (master's thesis) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1563212&fileOId=1566211> [2-25-2013].

548. Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 NEV. L.J. 112, 117-121 (2001).

549. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183, 192 (1964).

550. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152-53 (Thomson West 2012), <http://lawnlinguistics.com/2012/07/13/three-syntactic-canons> [12/31/2012].

551. Neil Goldfarb, *Three syntactic canons*, <http://lawnlinguistics.com/2012/07/13/three-syntactic-canons> [12/31/2012].

552. John Krahmer, *Commercial Transactions*, 60 SMU L. REV. 797, 799 (2007).

553. Ruling Case Law was the forerunner to American Jurisprudence. <http://mainelaw.maine.edu/library/HandoutLegalEncyc.pdf> 2-25-2013].

554. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 195 (1909).

555. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 195 (1909).

556. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 182 & 195 (1909).

557. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 196 (1909).

558. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 197 (1909).

559. Tex. Bus. & Com. Code § 2.313, cmt. 4.

560. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 198 (1909).

561. Uniform Sales Act § 12, quoted at SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT Appendix. p. 1160 (1909). The Uniform Sales Act's definition did not include services, although from the present perspective it is accurate to do so. Section 12 went on to say that an affirmation of the value of goods cannot be an express warranty, and a statement of the seller's opinion only cannot be an express warranty. *Id.*

562. Tex. Bus. & Com. Code § 2.313(b).

563. Tex. Bus. & Com. Code § 2.313, cmt. 3 says: "No specific intention to make a warranty is necessary if any of these factors [i.e., affirmations of fact, descriptions of goods, or exhibitions of samples] is made part of the basis of the bargain."

564. Tex. Bus. & Com. Code § 2.313(a)(1).

565. Tex. Bus. & Com. Code § 2.313(a)(2).

566. Tex. Bus. & Com. Code § 2.313(b).

567. Tex. Bus. & Com. Code § 2.313(a)(3).

568. 1 WILLISTON THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909), §§ 216-218, pp. 286-9.

569. Uniform Sales Act § 13(1), quoted at SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT Appendix. p. 1161 (1909).

570. Uniform Sales Act § 13(2), quoted at SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT Appendix. p. 1161 (1909).

571. Uniform Sales Act § 13(3), quoted at SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT Appendix. p. 1161 (1909).

572. Tex. Bus. & Com. Code § 2.312(a).

573. Tex. Bus. & Com. Code § 2.312, cmt. 1.

574. 1 WILLISTON THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909), §§ 249-50, pp. 337-38.

575. Tex. Bus. & Com. Code § 2.313(a)(3).

576. S. J. ROBERT I. BURNS (ED.), LAS SIETE PARTIDAS, VOLUME 4: FAMILY, COMMERCE, AND THE SEA, p. 1042, n. 1. Law XXXIX, however, deals with express warranties by the seller, and holds the seller to an implied warranty only upon proof that the seller knew the goods were damages and kept quiet.

577. 1 WILLISTON THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909), § 235, pp. 312-13.

578. *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 615, 618 164 S.W.2d 828, 831 (Tex. 1942).

579. The Uniform Sales Act of 1906 (II), <http://www.drbilllong.com/HistSales/USAII.html> [1-1-2013].

580. The Uniform Sales Act of 1906 (II), <http://www.drbilllong.com/HistSales/USAII.html> [1-1-2013].

581. Tex. Bus. & Com. Code § 2.312-313.

582. Tex. Bus. & Com. Code § 2.314-315.

583. United Nations Convention on Contracts for the International Sale of Goods <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [3-8-2013].

584. Tex. Bus. & Com. Code § 2.316(c).

585. Tex. Bus. & Com. Code § 2.316(c).

586. Tex. Bus. & Com. Code § 2.316(c)(3).

587. 1 WILLISTON THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909), § 608, pp. 1009-111.

588. 1 WILLISTON THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909), § 608, pp. 1009-111.

589. It has been reported that Story filled in authorities to support Marshall's opinions.

590. United Nations Convention on Contracts for the International Sale of Goods <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [3-8-2013].

591. Joseph M. Perillo, *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1007, 1008 n. 2 (2011) <http://law.wlu.edu/deptimages/law%20review/68-3n.8Perillo.pdf> [2-13-2013].

592. Patrick Henry accurately anticipated the U.S. Supreme Court's action in *Fletcher v. Peck* and the Dartmouth College case, of applying the Contract Clause to public contracts (i.e., contracts between a state and a person.)

593. *Robinson v. Varnell*, 16 Tex. 382 (1856); *The Cincinnati and Chicago Air Line Railroad Company v. Rogers*, 24 Ind. 103 (1865); and *Jones v. Van Patten*, 3 Ind. 107 (1851).

594. GARY CARTWRIGHT, GALVESTON: A HISTORY OF THE ISLAND 149-50 (1991). A photograph marked to indicate the damage is located at <http://www.birdseyeviews.org/feature_about.php?category=history&feature_number=12> [2-13-2013]. The event is described at <http://www.progressgalveston.com/sites/default/files/documents/12_0118_GALV_Pres_Plan_webres.pdf> [2-13-2013]. The Reuters Telegram contemporaneous with the fire is at <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=FS18851117.2.20&e=-------10--1----0-all-> [2-13-2013].

595. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 324 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

596. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 325 (4th ed. 2002) <http://moglen.law.columbia.edu/ELH/baker/Ch18.pdf> [2-27-2013].

597. RESTATEMENT (SECOND) OF CONTRACTS § 346 (1982), cmt. b.

598. RESTATEMENT (SECOND) OF CONTRACTS § 346 (1982), cmt. b.

599. Tex. Bus. & Comm. Code § 2.716.

600. *See* Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970).

601. Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597, 601 (1966).

602. Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597, 601 (1966).

603. Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 37 YALE L. REV. 1008, 1024 (1918).

604. Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 37 YALE L. REV. 1008, 1023-24 (1918).

605. Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 37 YALE L. REV. 1008, 1024 (1918).

606. The author believes this case involves the uncle of Justice Asa H. Willie, Asa Hoxie, although we have no authority on it.

607. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1256 (1997) <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3053&context=mlr> [2-13-2013].

608. Tex. Bus. & Com. Code § 2.210(a).

609. Tex. Bus. & Com. Code § 2.210(b).

610. Tex. Bus. & Com. Code § 2.403(a).

611. Act approved Jan. 25, 1840, 4th Cong., R.S., §§ 1–4, 1840 Republic of Texas Laws 144, 144–146, reprinted in 2 H.P.N. Gammel, Laws of Texas 318, 318–320 (1898), discussed in *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 706-07 (Tex. 1996) (Hecht, J.).

612. Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join in the Global Restitution Party*, Villanova University School of Law Working Paper Series, Paper No. 76 (2007) <http://law.bepress.com/cgi/viewcontent.cgi?article=1081&context=villanovalwps> [3-12-2013].

613. Restatement (Third) of Restitution and Unjust Enrichment (2011), §4, cmt. a.

614. Randolph B. Campbell, "Slavery," Handbook of Texas Online <http://www.tshaonline.org/handbook/online/articles/yps01> [2-12-2013].

615. D. Edward Greer, *A Legal Anachronism: The Married Woman's Separate Acknowledgment to Deeds*, 1 TEX. L. REV. 407, 409 & 413 (1923).

616. According to Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW AND CONTEMPORARY PROBLEMS 71, 73 (1993) ("McKnight, Reluctant Change"), the martial property law adopted in Texas was patterned after the Louisiana Civil Code of 1825. See copy of the article at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4185&context=lcp> [3-1-2013]

617. McKnight, Reluctant Change, p. 74 n. 18.

618. *Note*, 11 TEX. L. REV. 81 (1932).

619. McKnight, Reluctant Change, p. 82, n. 73.

620. McKnight, Reluctant Change, p. 83 n. 85.

621. McKnight, Reluctant Change, p. 84.

622. McKnight, Reluctant Change, p. 83.

623. JEAN A. STUNTZ, HERS, HIS, AND THEIRS: COMMUNITY PROPERTY LAW IN SPAIN AND EARLY TEXAS 157 (2005).

624. D. Edward Greer, *A Legal Anachronism: The Married Woman's Separate Acknowledgment to Deeds*, 1 TEX. L. REV. 413 (1923).

625. The case is discussed in *Note*, 11 TEX. L. REV. 81 (1932).

626. JEAN A. STUNTZ, HERS, HIS, AND THEIRS: COMMUNITY PROPERTY LAW IN SPAIN AND EARLY TEXAS 159 (2005).

627. McKnight, Reluctant Change, p. 83 n. 76.

628. McKnight, Reluctant Change, p. 83.

629. McKnight, Reluctant Change, p. 86 n. 100.