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Selected Poems on the Law of Contracts

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ESSAY

SELECTED POEMS ON THE LAW
OF CONTRACTS

RAINTREE COUNTY MEMORIAL LIBRARY OCCASIONAL PAPER NO. 1

Edited by DOUGLASS G. BSHKOFF*

PREFACE

Late in 1989, the Raintree County Memorial Library conducted an inventory of its holdings, the first such review to occur in more than thirty years. The twenty-nine poems selected for Occasional Paper No. 1 were discovered during the inventory process in an uncatalogued, unsigned, handwritten manuscript. This document, along with several others, was folded inside a copy of *Life and Law*, the autobiography of Samuel Williston, and fell to the floor as the autobiography was being moved from one shelf to another. *Life and Law*, in turn, was part of a collection of books, more than ten thousand in number, assembled by a Raintree County resident who died on April 1, 1975. He bequeathed this collection, along with a modest endowment, to the Trustees of Raintree County who requested that I edit these poems for publication.

We can only speculate concerning their authorship. The testator, of course, is a prime candidate. The manuscript handwriting is very similar to the handwriting in his holographic will. It also should be noted that the testator, although usually very reluctant to speak of his past, proudly claimed an acquaintance with Williston. Possibly, an early and positive association with this great law teacher sparked an interest in legal affairs that later led to the preparation of the manuscript.

Because of their ubiquity, the cases chosen as subjects for these poems provide few clues as to the author's age, identity, or training. Most of the cases have been, and remain, staples in the first-year curriculum. However, since *Harvey v. Facey*¹ is no longer found in many casebooks,² the author may have received some law training in the period following World War II when this case was popular. The generous

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¹ 69 L.T.R. 504 (1893).

² Today it appears in only two casebooks and is not a principal case in either. See A. Farnsworth & W. Young, *Cases and Materials on Contracts* 140 (4th ed. 1988); J. Murray, *Cases and Materials on Contracts* 77 (4th ed. 1991).

number of damages cases suggests that the author was familiar with the first three editions of Fuller³ or the Dawson, Harvey, and (now) Henderson casebooks,⁴ each of which begins with a section on remedies. These facts support the hypothesis of the testator's authorship.

In editing these poems, I have made every effort to be faithful to the original text. Quite a few punctuation changes were necessary, but the subject matter headings and arrangement conform to the manuscript. A few minor textual changes have been made to clarify meaning, and in one instance a single line is my own.⁵ Unfortunately, severe damage to the manuscript has prevented inclusion of several poems. Among the most notable omissions are comments on *Drennan v. Star Paving*,⁶ *Taylor v. Caldwell*⁷ (a second version), and *British Wagon Co. v. Lea & Co.*⁸ The last is an especially grievous loss since the law governing assignments is not represented in this collection.

In all of this effort, I have been aided greatly by the wise advice of Ellen Boshkoff, Keith Buckley, Lynn Henderson, Perry Hodges, Bruce Markell, Van Zimmerman, and, most of all, Ruth Boshkoff. Each person will recognize his or her contribution to the text.

Bloomington, Indiana

July 1, 1991

I

CONTRACT FORMATION

1. *Adams v. Lindsell*⁹

The mail box was hardly invented¹⁰

When Adams's reply was presented.

A delay of two days¹¹

Was no cause for malaise,

For the word from King's Bench was—"assented."

³ L. Fuller, *Basic Contract Law* (1946); L. Fuller & R. Braucher, *Basic Contract Law* (2d ed. 1964); L. Fuller & M. Eisenberg, *Basic Contract Law* (3d ed. 1972).

⁴ There have been five editions. J. Dawson, W. Harvey & S. Henderson, *Cases and Comment on Contracts* (5th ed. 1987) is the most recent version.

⁵ See note 28 *infra*.

⁶ 51 Cal. 2d 409, 333 P.2d 757 (1958).

⁷ 122 Eng. Rep. 309 (1863).

⁸ 5 Q.B.D. 149 (Div'l Ct. 1880).

⁹ 106 Eng. Rep. 250 (1818) (holding acceptance valid upon dispatch—mailbox rule).

¹⁰ Twenty years after the *Adams v. Lindsell* decision, a select committee of the House of Commons commented critically on the limited number of general post receiving houses in metropolitan London. See Select Committee on Postage, Third Report, 1838, No. 708, at ix.

¹¹ The offeror stipulated for a reply "in course of post." See *Adams*, 106 Eng. Rep. at 250. Adams's response, expected on Sunday, arrived on Tuesday. The defendant's failure to send the offer to the correct address caused the delay. *Id.*

2. *Raffles v. Wichelhaus*¹²

The name "Peerless" was found on two ships,¹³
 That made strikingly similar trips.
 While each sailed with great ease
 At the first eastern breeze,
 On arrival—a mental ellipse.¹⁴

3. *Harvey v. Facey*¹⁵

Here's a toast to Sir Facey of Bumper Hall Pen.
 Who, responding obliquely, drove Harvey to Zen.¹⁶
 When a bidder asks two
 And one answer came through,
 There's no contract in bridge¹⁷ or the minds of six men.¹⁸

¹² 159 Eng. Rep. 375 (Ex. Ch. 1864). In *Raffles*, both the buyer and seller of cotton stipulated for arrival at Liverpool from Bombay "ex Peerless." One ship of this name sailed in October, the other in December. The court found no binding contract since the parties had not agreed on the same ship.

¹³ Actually, there were reports of at least 11 ships of that name. See Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 *Cardozo L. Rev.* 287, 295 (1989).

¹⁴ Ellipse, somewhat rare, is the equivalent of ellipsis. In grammar, an ellipse is defined as "[t]he omission of one or more words in a sentence, which would be needed to complete the grammatical construction or fully to express the sense." 5 *The Oxford English Dictionary* 144 (2d ed. 1989).

¹⁵ 69 L.T.R. 504 (1893). *Harvey* is one of the silliest decisions ever to appear in a casebook. A prospective buyer asked the owner two questions: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid," and the owner replied, "Lowest price for Bumper Hall Pen £900." The court held that the seller had not extended an offer, since the buyer had answered only one question. See *id.* ("Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."). Farnsworth offers a very half-hearted justification for this decision. See A. Farnsworth, *Contracts* 138 (2d ed. 1990) ("Courts have reason for caution [in characterizing a proposal as an offer], since to hold the maker of a proposal to a contract exposes the maker to liability based on the recipient's expectation interest, even in absence of any reliance.").

¹⁶ The poet refers to Zen Buddhism, "A school of Mahayana Buddhism that emphasizes meditation and personal awareness and became influential in Japanese life from the 13th century after being introduced from China." 20 *The Oxford English Dictionary* 799 (2d ed. 1989).

¹⁷ In contract bridge, when a player has bid two of any suit, a response of one by his partner is insufficient and cannot result in a contract. See *Laws of Contract Bridge*, Rule 18, in *The Official Encyclopedia of Bridge* 213 (4th ed. 1984).

¹⁸ "Six men" presumably refers to the six Law Lords who joined in the *Harvey* opinion.

4. *Lucy v. Zehmer*¹⁹

Land contracts are serious stuff,
So Lucy's attorney got tough.

"We don't know the truth.

Was it due to vermouth?"

Well, the court quickly called Zehmer's bluff.

5. *Dickinson v. Dodds*²⁰

Dodds's offer to sell, though in writing,
Was instantly made uninviting,²¹

By a third party's tale

Of the property's sale—

This slighting inviting much²² citing.²³

6. *Carlill v. Carbolic Smoke Ball Co.*²⁴

Fair notice is normally due²⁵

When the bargained-for action is through.

With the marvelous ball,

There's no notice at all,

'Til its purchaser catches the flu.²⁶

¹⁹ 196 Va. 493, 84 S.E.2d 516 (1954) (granting specific performance over owner's objection that offer to sell land was joke made while drunk).

²⁰ 2 Ch. D. 463 (1876). Dodds sold the land in question without formally revoking his offer to Dickinson, the first prospective buyer. The court rejected Dickinson's subsequent attempt to accept since, prior to this attempt, a third party had notified him of the sale.

²¹ An offer "invites" an acceptance. See Restatement (Second) of Contracts §§ 24, 30, 32, 45, 52-54, 62-63 (1981).

²² Perhaps too much. See A. Farnsworth, *supra* note 15, at 162 (suggesting that decision "has achieved a notoriety somewhat exceeding its practical importance").

²³ The most significant citation came from the American Law Institute. Restatement of Contracts § 42 (1932) provides: "Where an offer is for the sale of an interest in land or in other things, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, the offer is revoked." Section 42 "is based on the English case of *Dickinson v. Dodds*." American Law Institute, Restatement of the Law of Contracts, Official Draft, chs. 1-7, 230-31 (Sept. 15, 1928); see also Restatement (Second) of Contracts § 43 (1981) ("An offeree's power of acceptance is terminated when an offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.").

²⁴ 1 Q.B. 256 (1893) (holding that offer of reward, to be paid if person using smoke ball catches flu, is accepted by purchase; separate notice of purchase not required).

²⁵ See Restatement (Second) of Contracts § 54 comment a (1981).

²⁶ See *id.* § 54 illustration 2 (referring to "disease" generally).

7. *Ode to the Brooklyn Bridge*²⁷

A bridge never meant to be crossed.

If it were, then all would be lost:

Those hypos inane,

Law students in pain,

And debates until Hades's first frost.²⁸

II

CONSIDERATION

8. *Wood v. Lucy, Lady Duff-Gordon*²⁹

For dresses, no other was finer

Than Duff-Gordon, the lady's designer.

But Cardozo was short

With her counsel in court,

Thinking D-G was merely a whiner.

9. *Hoffman v. Red Owl Stores*³⁰

Since the Hoffmans were most migratory

While seeking fame, fortune, and glory,

Their substantial reliance

Nixed Red Owl's defiance.

Thus happily ending this story.

10. *Kirksey v. Kirksey*³¹

There once was a widow from 'Bama

Who longed for a new panorama.

So she heeded a call

Which brought her downfall

With reliance and notable drama.

²⁷ This is one of two poems not based on an actual decision. The other poem is "Ode to Williston's Tramp." See note 37 *infra*. Generations of law teachers have used a hypothetical walk across the Brooklyn Bridge to illustrate the application of Restatement (Second) of Contracts § 45. The original hypothetical appears in Wormser, *The True Conception of Unilateral Contracts*, 26 *Yale L.J.* 136, 136-39 (1916). Farnsworth characterizes it as "the most durable and influential hypothetical in American legal education" and credits its popularity "to the absence of more practical illustrations." A. Farnsworth, *supra* note 15, at 191, 195.

²⁸ This last line is mine. Water damage obliterated the original.

²⁹ 222 N.Y. 88, 118 N.E. 214 (1917) (implied promise to use "reasonable efforts" provides consideration for grant of exclusive agency).

³⁰ 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (applying doctrine of promissory estoppel to protect franchisee's reliance interest when negotiation for franchise broke down).

³¹ 8 Ala. 131 (1845). *Kirksey* is famous for refusing to protect a woman's unbargained-for reliance on her brother-in-law's promise to provide a place for her family to live.

11. *Webb v. McGowin*³²

Poor Webb made no other proof
 Than the fact of a fall from the roof.
 "That's enough," said the court
 "You WERE³³ the escort
 Of a block for McGowin's behoof."³⁴

12. *Foakes v. Beer*³⁵

If Ms. Beer were suing today
 Doctor Foakes might well shout "Hooray,"
 Since a shrewd debtor can,
 Through a well-crafted plan,
 Be relieved of the duty to pay.³⁶

13. *Ode to Williston's Tramp*³⁷

There's a sad end that none can ignore
 For the tramp with his tedious chore.
 Now his mind shows the cost
 Of not once getting lost
 During decades³⁸ of seeking the store.

³² 27 Ala. App. 82, 168 So. 2d 196 (1935) (holding moral obligation of promisor sufficient consideration for subsequent promise to pay lifetime annuity to promisee who suffered serious injury while deflecting 75-pound block which otherwise would have struck promisor), cert. denied, 232 Ala. 374, 168 So. 2d 199 (1936).

³³ Capitalization, indicating stress, appears in the original.

³⁴ Behoof is the equivalent of benefit. 2 The Oxford English Dictionary 78 (2d ed. 1989).

³⁵ 9 App. Cas. 605 (1884). Doctor Foakes agreed to pay Julia Beer an amount already due in return for her agreement to forgive interest on the debt. The court held that the promise to forgive the interest was not supported by consideration, since Doctor Foakes was promising to do only what he already was obligated to do.

³⁶ The performance-of-duty rule is not popular. See J. Calamari & J. Perillo, *Contracts* 212 (3d ed. 1987) ("Even in jurisdictions that follow the rule of *Foakes v. Beer*, dissatisfactions with the rule have made the courts eager to ferret out some kind of detriment in the fact pattern."). The Restatement, while recognizing this rule, indicates that its application easily may be avoided by careful planning. See Restatement (Second) of Contracts § 73 (1981) ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.").

³⁷ See 1 Williston on Contracts § 112 (3d ed. 1957) ("If a benevolent man says to a tramp, 'If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,' no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift." (footnote omitted)).

³⁸ The tramp hypothetical appeared in 1920 in the first edition of Williston's treatise, see Williston on Contracts § 112 (1920); thus, 1991 is the 71st year that the tramp has pounded the pavement in search of the elusive overcoat.

14. *Hamer v. Sidway*³⁹
 Consider an uncle named Story
 Who's linked to his nephew in glory.
 The promise he flaunted
 Brought a judgment unwanted.
 And now, both have fame a priori.

III

MUTUAL MISTAKE, IMPOSSIBILITY, AND FRUSTRATION

15. *Sherwood v. Walker*⁴⁰
 We've all heard the story of Rose
 Whose failure to bear was a pose.
 "For the stew pot, I'm not,"⁴¹
 Said Rose, like a shot.
 And the court held the deal couldn't close.⁴²

16. *Taylor v. Caldwell*⁴³
 The music hall turned into ash.
 Then the renter demanded some cash.
 The court, with a snort,
 Had a snappy retort.
 "Mr. Taylor, you're overly brash."

³⁹ 124 N.Y. 538, 27 N.E. 256 (1891) (holding nephew's forbearance to drink, swear, or play cards or billiards for money is consideration for his uncle's promise to pay him \$5000 when he reached 21 years).

⁴⁰ 66 Mich. 568, 33 N.W. 919 (1887) (holding that mistaken assumption that cow named "Rose 2d of Aberlone" was barren was adequate basis for rescission of contract of sale since discovery of her fertility resulted in tenfold increase in value).

⁴¹ The eventual victor, whether buyer or seller, would not be interested in turning Rose into stew since she was worth much more as breeding stock. See *id.* at 571, 33 N.W. at 920.

⁴² The deal could not close until the issues of mutual mistake were submitted to the jury. There is no further report of proceedings in this case. If the seller won, there never was a closing.

⁴³ 122 Eng. Rep. 309 (K.B. 1863) (holding destruction of building by fire discharges owner from liability for breach of contract, and lessee cannot recover lost profits).

17. *Krell v. Henry*⁴⁴

King Edward the Seventh's disease⁴⁵
Quickly led to Paul Krell's unease.

The result, a lawsuit,
Sadly failed to recruit
Support for enforcing the lease.⁴⁶

IV

DURESS AND UNCONSCIONABILITY

18. *Austin Instrument Inc. v. Loral Corp.*⁴⁷

Hats off to the law of duress!
It curbs those inclined to excess.
Austin, tempted by greed
And Loral Corp.'s need,
Found its pressure produced no success.

19. *Henningsen v. Bloomfield Motors*⁴⁸

A seller of automobiles,
Sued for one of its standardized deals,
Was told: "For a change,
Although it seems strange,
You must ask how the customer feels."

⁴⁴ 2 K.B. 740 (1903) (cancellation of coronation procession amounts to frustration of purpose thereby discharging renter from liability for rent due after date of cancellation).

⁴⁵ Actually, the problem was appendicitis. See A. Farnsworth, *supra* note 15, at 720.

⁴⁶ "Leeze" appeared in the original.

⁴⁷ 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (economic duress relieves buyer of obligation to pay increased price for goods).

⁴⁸ 32 N.J. 358, 161 A.2d 69 (1960). One of the most notable consumer-protection decisions of the twentieth century, *Henningsen* refused to apply a contractual disclaimer of warranty to bar recovery a buyer and his wife sought for personal injuries suffered in an automobile accident. The court offered a number of explanations for this result, but prominent in the opinion is the idea that the auto dealer's use of a standardized form contract deprived the customer of any meaningful opportunity to bargain over the terms of the deal. See *id.* at 375-76, 161 A.2d at 78-79.

V

CONDITIONS

20. *Gray v. Gardner*⁴⁹

The lamps fueled by sperm oil went out
As petroleum started to spout.

Still, Gardner and Gray

Remind us today

There are rules which no pleader can flout.⁵⁰

21. *Jacob & Youngs, Inc. v. Kent*⁵¹

Though Reading's the pipe of the day,
Cardozo has shown us the way

That a trivial breach

Can never impeach

A homeowner's duty to pay.

VI

THE RIGHTS OF THIRD PARTIES

22. *Lawrence v. Fox*⁵²

When Holly met Fox in the street,
His loan terms were simple and neat.

"This money must go

To the fellow I owe

Or Larry⁵³ will sue [you]⁵⁴ *tout de suite*."

⁴⁹ 17 Mass. 188 (1821). *Gray* involved a note given in connection with the purchase of sperm oil which would be void if more than a certain amount of oil arrived in port. Because the language of the note created a condition subsequent, the court held that the maker of the note had the burden of proving the actual amount of oil in port at the specific time. See *id.* at 189.

⁵⁰ To flout means "to express contempt either by action or speech." 5 *The Oxford English Dictionary* 1089 (2d ed. 1989).

⁵¹ 230 N.Y. 239, 129 N.E. 889 (1921) (inadvertent substitution of another brand of pipe does not prevent contractor from recovering contract price, but homeowner entitled to offset for diminished value of house caused by failure to use Reading pipe).

⁵² 20 N.Y. 268 (1859) (holding Lawrence had standing as third-party beneficiary to enforce Fox's promise to discharge Holly's obligation to Lawrence).

⁵³ "Larry" appears in the original text but is incorrect. The familiar form is appropriate only when Lawrence is used as a given name.

⁵⁴ A bracketed question mark follows "you" in the original. It is likely that the author was uncertain as to whether "de" was to be pronounced. "You" should be included whenever "de" is silent.

VII
DAMAGES

23. *Hadley v. Baxendale*⁵⁵

There once was a young man named Hadley
Whose contract of transport went badly.

“My mill shaft is gone,
All my goods are in pawn,
And my business is closed,” he said sadly.

24. *Britton v. Turner*⁵⁶

The plaintiff in *Britton v. Turner*⁵⁷
Was only a simple wage earner.

As the judge saved the day,
Those in court heard him say,
“I’m NOT⁵⁸ inclined to be sterner.”

25. *Hawkins v. McGee*⁵⁹

A terrible need for a fee
Brought great grief to Doctor McGee.

And his promises airy
Led a patient unwary
To a hand that no mortal should see.

26. *Groves v. John Wunder Co.*⁶⁰

A most obvious breecher was Wunder
Whose contract with Groves was a blunder.

In the view of the court,
The trial fell far short
For Groves’s topsoil was still six feet under.

⁵⁵ 156 Eng. Rep. 144 (Ex. Ch. 1854) (carrier not liable for lost profits of shipper when damage not reasonably foreseeable at time of contracting).

⁵⁶ 6 N.H. 481 (1834) (plaintiff in default entitled to restitution if breach not willful).

⁵⁷ Pronounced as written.

⁵⁸ Capitalization, indicating stress, appears in the original.

⁵⁹ 84 N.H. 114, 146 A. 641 (1929). Doctor McGee solicited the opportunity to operate on Hawkins’s hairy hand, promising that the patient would “go back to work with a perfect hand.” *Id.* at 115, 146 A. at 642-43. However, the operation was unsuccessful. The court ruled that the trial court had not erred in holding the doctor liable for breach of contract, see *id.* at 116, 146 A. at 643, and concluded that the value of the expectancy, not reliance, was the proper measure of damages. See *id.* at 117-18, 146 A. at 644.

⁶⁰ 205 Minn. 163, 286 N.W. 235 (1939) (holding defendant who failed to perform promise to restore land to original grade liable for reasonable cost of restoring land (more than \$60,000) rather than diminished value of land (\$12,160)).

27. *Parker v. Twentieth Century-Fox Film Corp.*⁶¹

There once was a lawsuit by Shirley⁶²

Who thought the defendant quite surly.

Re the movie she missed,

The defense was dismissed

And the judgment for Shirley came early.⁶³

28. *Rockingham County v. Luten Bridge Co.*⁶⁴

The Rockingham bridge was a beauty.

Still the court balked at finding a duty

To pay for the work

Which followed the shirk.⁶⁵

Did the county walk off with some booty?⁶⁶

⁶¹ 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970) (granting summary judgment for plaintiff since sole defense was that plaintiff acted unreasonably in rejecting defendant's substitute offer of employment).

⁶² Shirley MacLaine.

⁶³ Extraordinarily early since the defendant, which had repudiated its contract with Shirley for "Bloomer Girl," was denied the opportunity to present evidence that the plaintiff's refusal to accept employment in "Big Country" was unreasonable. See *Parker*, 3 Cal. 3d at 184, 474 P.2d at 694, 89 Cal. Rptr. at 742.

⁶⁴ 35 F.2d 301 (4th Cir. 1929) (plaintiff entitled to anticipated profit and compensation for cost of performance up to date of repudiation).

⁶⁵ Shirk is defined as "[a]n act or the practice of shirking. *Rare.*" 15 *The Oxford English Dictionary* 283 (2d ed. 1989). To shirk means "[t]o evade (one's duty . . . obligations, etc.)." *Id.*

⁶⁶ The county paid less than the full contract price for a useable, but unused, bridge. What if it later decided to use the structure?

VIII

THE PAROL EVIDENCE RULE

29. *Mitchell v. Lath*⁶⁷

The writing gave nary a clue
As to what the seller must do.
 So, like it or not,
 In that very same spot
Is the ice house, still blocking the view.⁶⁸

⁶⁷ 247 N.Y. 377, 160 N.E. 646 (1928) (parol evidence rule prevents testimony concerning oral promise by seller to remove ice house on adjacent lot).

⁶⁸ The original manuscript containing these poems is on file in the archives of the Raintree County Memorial Library. It is not, however, available for inspection. As Ross Lockridge once wrote:

Hard roads and wide will run through Raintree County. You will hunt it on the map, and it won't be there.

For Raintree County is not the country of the perishable fact. It is the country of the enduring fiction. The clock in the Court House Tower . . . is always fixed at nine o'clock, and it is summer and the days are long.

R. Lockridge, *Raintree County*, title page overleaf (1948).