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Edited by Douglass G. Boshkoff†

PREFACE

More than ten years ago, the legal community was awash with speculation as to the identity of the author of two manuscripts, one which came to light in 1991,¹ followed by a second in 1996.² Each contained poems focusing on and illuminating various aspects of contract law. The author’s identity was never ascertained even though it appeared that (s)he was a resident of Raintree County, a library user, and well versed in the content of a traditional contract law course.³ Three library patrons were suspected of being the author but none could be linked with the holographic manuscripts.⁴ It was hoped that further clues might be found if another manuscript surfaced, but none materialized. For a decade, the anonymous poet was silent. Then, this manuscript appeared under dramatic circumstances that, unfortunately, I am not at liberty to disclose. The Library Trustees granted me access to this collection on the condition that the circumstances surrounding the discovery remain confidential. I am authorized, however, to confirm that handwriting analysis supports a hypothesis of common authorship.

As for the poems themselves, the three line format has apparently been inspired by the pattern in a 5/7/5 haiku.⁵ But there most similarity ends. Very few in this collection conform to that model. And the traditional association with a season is often missing. Having said that, I should also note that, in some of the poems, the evocation of mood is as subtle and dramatic as any language in a more traditional work. The powerful imagery

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4. Id.
5. Actually, the 5/7/5 sequence is an English invention. WILLIAM J. HIGGINSON, THE HAIKU HANDBOOK: HOW TO WRITE, SHARE, AND TEACH 100 (1985).
in phrases such as “smile of restitution,” “lengthening shadows of sickness,” and “trapped in the silence of paper” is undeniable. The pleasure to be derived from these legal gems is great, even when they fail to conform to poetic norms.

In editing these haiku, I have organized them by subject matter and provided captions for the individual verses. Where the author’s meaning is unclear, I have suggested possible interpretations. The irregular spacing in some entries conforms to the spacing in the original manuscript.

Finally, a few words about the term “constructive haiku.” Lawyers are accustomed to the use of phrases such as “constructive trust,” “constructive possession,” and “constructive service.” All of these phrases are convenient legal fictions which help effect “an adjustment between new situations and an existing conceptual structure.”6 The relationship suggested by use of these terms is, at the same time, both significant and remote. And so it is with these poems which are simultaneously closely related to and far removed from traditional haiku. As one great haiku master is said to have observed, “distance both infinite and infinitesimal unites us for the moment.”7

Bloomington, Indiana
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I. CONTRACT FORMATION

*Restatement(Second) Section 45*8
on the Noble Span9
travelers seek a distant shore
many paths of disappointment10

6. Lon L. Fuller, Legal Fictions 71 (1967).
7. Attributed to author.
8. Restatement (Second) of Contracts § 45 (2001) (discussing an option contract created by part performance or tender).
10. The possibility of disappointment was present in the traditional unilateral contract model. The offeror remained free to revoke the offer until the bargained-for performance was completed. See I. Maurice Wormser, The True Conception of Unilateral Contracts, 26 Yale L.J. 136 (1916).
CONSTRUCTIVE HAIKU

Raffles v. Wichelhaus¹¹
twins without peer
each one transporting cotton
ambiguously

Carlill v. Carbolic Smoke Ball Co.¹²
Mrs. Carlill’s nostrum
a gentle puff of smoke
immortality beckons¹³

Petterson v. Pattberg¹⁴
behind the screen door¹⁵
an inchoate contract
nothingness

Embry v. Hargadine, McKittrick Dry Goods Co.¹⁶
reassurance in December
casually
February’s regret

¹¹ (1864) 159 Eng. Rep. 375 (Exch. Div.). A contract called for delivery of cotton “ex ‘Peerless’” from Bombay. Id. Unknown to the parties, there were two ships named “Peerless.” Id. The buyer and seller had different vessels in mind. The court held that there was no agreement. Id. at 376.

¹² (1892) 1 Q.B. 256 (Eng. C.A.). The ever popular “Smoke Ball” decision. For an excellent explanation of the circumstances surrounding this decision, see A.W.B. Simpson, Quackery and Contract Law: The Case of the Carbolic Smoke Ball, 14 J. LEGAL STUD. 345 (1985).

¹³ There are two ways to read the last phrase. (1) By putting her trust in this patent medicine, Mrs. Carlill was risking a case of the flu which might prove fatal. (2) Fame is a type of immortality. The decision was characterized as “a staple of law school curricula” and cited extensively in Leonard v. Pepsico Inc., 88 F. Supp. 2d 116, 125 (S.D.N.Y. 1999), aff’d, 210 F.3d 88 (2d Cir. 2000). Mrs. Carlill, in fact, lived for ninety-six years. See Simpson supra note 12, at 389.

¹⁴ 161 N.E. 428, 430 (N.Y. 1928) (holding that an offer for an unilateral contract can be revoked prior to the completion of acceptance).

¹⁵ This is possibly an oblique humorous reference to one of the most famous early adult videos. See BEHIND THE GREEN DOOR (Mitchell Bros. Film Group 1972).

¹⁶ 105 S.W. 777 (Mo. Ct. App. 1907). Embry is a leading decision used to introduce students to the objective theory of contract formation. See, e.g., JOHN P. DAWSON, WILLIAM BURNETT HARVEY & STANLEY D. HENDERSON, CONTRACTS: CASES AND COMMENT 323–29 (8th ed. 2003).
II. CONSIDERATION

Wood v. Lucy, Lady Duff-Gordon\textsuperscript{19}
implied promises
sticky strands of commitment
Ben’s web\textsuperscript{20}

Schnell v. Nell\textsuperscript{21}
nominal consideration
a clearly confusing
oxymoron\textsuperscript{22}

Hamer v. Sidway\textsuperscript{23}
hasty generosity
reconsidered
the same old Story\textsuperscript{24}

\textsuperscript{17} 84 S.E.2d 516 (Va. 1954).
\textsuperscript{18} "If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction . . . ." \textit{Id.} at 521.
\textsuperscript{19} 118 N.E. 214 (N.Y. 1917).
\textsuperscript{20} This case is one of Benjamin Cardozo’s most famous, and respected, opinions.
\textsuperscript{21} 17 Ind. 29 (1861).
\textsuperscript{22} Genuine consideration is never nominal. \textit{See} E. ALLAN FARNSWORTH, \textit{CONTRACTS} 71–72 (3d ed. 1999) ("Restatement Second, requires an actual bargain, not merely a pretense of bargain . . . .").
\textsuperscript{23} 27 N.E. 256 (N.Y. 1891).
\textsuperscript{24} The author seems to be suggesting that the uncle repeatedly repudiated his promises. There is no support for this assertion.
CONSTRUCTIVE HAiku

Restatement(Second) Section 90
Williston’s child
reliance triumphant
the tides of injustice recede

Batsakis v. Demotsis
unfairness in April
ignored
a Greek tragedy

Allegheny College v. National Chautauqua County Bank
the gift ungiven
a promise quickly inferred
constructive justice

III. POLICING THE BARGAIN

Krell v. Henry
a summer flat
Pall Mall in view
lengthening shadows of sickness

25. Restatement (Second) of Contracts § 90 (2001) (discussing a promise reasonably inducing action or forbearance).

26. Promissory estoppel made its debut in the original Restatement of Contracts. Samuel Williston was Reporter for that project. Restatement (Second) of Contracts (1932).

27. 226 S.W.2d 673 (Tex. Civ. App. 1949). This case is a casebook favorite used as an example of judicial reluctance to examine the adequacy of consideration. See, e.g., John D. Calamari, Joseph M. Perillo & Helen Hadjiyannakis Bender, Cases and Problems on Contracts 195 (4th ed. 2004).

28. Hardly. The imbalance in values exchanged was substantial, but far from a tragic occurrence.

29. 159 N.E. 173 (N.Y. 1927)

30. The anonymous poet appears to be critical of Cardozo’s opinion in this case. This is, indeed, a controversial decision. Andrew L. Kaufman, Cardozo 335 (1998). Also, it appears that the poet has had a change of mind. Cf. Boshkoff, supra note 2, at 296.

Taylor v. Caldwell\textsuperscript{32}
in Surrey Gardens
flames of misfortune
extinguished by wisdom

Sherwood v. Walker\textsuperscript{33}
herd\textsuperscript{34} in King’s Cattle Yard
“pass the ketchup
hold the mustard”\textsuperscript{35}

Odorizzi v. Bloomfield School District\textsuperscript{36}
Odorizzi’s fate
relentless waters of oppression
at flood stage\textsuperscript{37}

IV. THE PAROL EVIDENCE RULE AND STATUTE OF FRAUDS

Restatement (Second) Section 213(2)\textsuperscript{38}
promises past
trapped in the silence of paper
lost voices

Restatement(Second) Section 375\textsuperscript{39}
formality’s face
the smile of restitution
ever present

\textsuperscript{33.} 33 N.W. 919 (Mich. 1887).
\textsuperscript{34.} As in the original manuscript. Possibly a misspelling of “heard.”
\textsuperscript{35.} A cow was sold for five-and-one-half cents per pound, strongly suggesting that she
was purchased for her value as hamburger. Sherwood, 33 N.W. at 920.
\textsuperscript{36.} 54 Cal. Rptr. 533 (Cal. Ct. App. 1966).
\textsuperscript{37.} The imagery here seems to be directly related to language in the opinion: “The
difficulty, of course, lies in determining when the forces of persuasion have overflowed their
normal banks and become oppressive flood waters.” \textit{Id.} at 541.
\textsuperscript{38.} Restatement (Second) of Contracts § 213(2) (2001) (discussing the effect of an
integrated agreement on prior agreements (more commonly known as the parole evidence rule)).
\textsuperscript{39.} \textit{Id.} § 375 (discussing restitution when a contract is within the statute of frauds). “A
party who would otherwise have a claim in restitution under a contract is not barred from
restitution for the reason that the contract is unenforceable by him because of the Statute of
Frauds unless the Statute provides otherwise or its purpose would be frustrated by allowing
restitution.” \textit{Id.}
V. RIGHTS OF THIRD PARTIES

*Lawrence v. Fox*\(^{40}\)

- promissory strangers
- new plaintiffs
- pragmatically\(^{41}\)

VI. CONDITIONS

*Gray v. Gardner*\(^{42}\)

- The Lady Adams
- Nantucket Roads before her
- harbor of uncertainty\(^{43}\)

*Jacob & Youngs v. Kent*\(^{44}\)

- Kent’s demand
- “perfect performance”
- a real pipe dream

VII. REMEDIES

*Parker v. Twentieth Century-Fox Film Corp.*\(^{45}\)

- Bloomer Girl no more
- a new career awaits
- constructive service\(^{46}\)

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40. 20 N.Y. 268 (1859).
41. *Lawrence* was the seminal decision recognizing third party beneficiary enforcement rights, more pragmatic in tone than doctrinal. *See id.* As Justice Gray observed, “if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.” *Id.* at 275.
42. 17 Mass. 188 (16 Tyng) (1821) (noting a form of condition used to allocate burden of proof).
43. The time of her arrival in Nantucket Roads, uncertain, affected the contract price of a cargo of whale oil. *Id.* at 188.
44. 129 N.E. 889 (N.Y. 1921).
46. At one time, a wrongfully discharged employee was not required to look for or accept substitute employment. The employee was said to be in the “constructive service” of the employer. 11 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1095 (Matthew Bender & Company, Inc., ed. 2002). *Parker* suggests a return to that view since the plaintiff was granted
summary judgment on the issue of whether she reasonably rejected the defendant's offer of substitute employment. Parker, 474 P.2d at 692–94. As the dissent noted, It has never been the law that the mere existence of differences between two jobs in the same field is sufficient, as a matter of law, to excuse an employee wrongfully discharged from one from accepting the other in order to mitigate damages. Such an approach would effectively eliminate any obligation of an employee to attempt to minimize damage arising from a wrongful discharge. The only alternative job offer an employee would be required to accept would be an offer of his former job by his former employer.

Id. at 696.

47. (1854) 156 Eng. Rep. 145 (Exch. Div.)
48. Baxendale carried on business as “Pickford & Co.” Id. at 146.
49. 265 Ill. App. 542 (1932) (describing how Jack Dempsey failed to honor his contract for a prize fight promoted by the Chicago Coliseum Club). This case is often used to illustrate the recovery of reliance damages. See, e.g., Dawson, supra note 16, at 89.
50. 35 F.2d 301 (4th Cir. 1929).
51. A road was rerouted, making the bridge unnecessary. Id. at 307.
52. Many law professors and law students use this case when they discuss the mitigation principle. See, e.g., Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 266 (8th ed. 2006).
CONSTRUCTIVE HAIKU

Hawkins v. McGee
a hairy hand
wisdom
beyond its grasp

Lumley v. Wagner
a diva in default
specific performance refused
constructive freedom

Peevyhouse v. Garland Coal & Mining Co.
the Peevyhouse tract
protected by promise
sad landscape of loss

54. 146 A. 641 (N.H. 1929).
55. Hawkins is a good example of judicial unwillingness to protect the reliance interest.
56. (1852) 42 Eng. Rep. 687 (Ch.).
57. While the court was unwilling to grant specific performance, it did agree to restrain Johanna Wagner from performing for a competitor. Id. at 693. In defense of this ruling, the court observed:
   It was objected that the operation of the injunction in the present case was mischievous, excluding the Defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she had bound herself not to do, and thus possibly cause her to fulfil [sic] her engagement . . . [T]he injunction may also, as I have said, tend to the fulfilment [sic] of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.
   Id. (emphasis added).