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### More Selected Poems on the Law of Contracts: Raintree County Memorial Library Occasional Paper No. 2

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# VERSE

## More Selected Poems on the Law of Contracts: Raintree County Memorial Library Occasional Paper No. 2

*Edited by Douglass G. Boshkoff\**

### PREFACE

In 1989, a fortuitous set of events led to the discovery of twenty-nine poems related to the law of contracts in the Raintree County Memorial Library. Recognizing their importance, the library trustees soon authorized publication.<sup>1</sup> The identity of the author was then, and is today, a mystery.<sup>2</sup> There was no thought that more poems from the same pen might exist. Recently, however, we have learned otherwise. The poems included in *Occasional Paper #2* were discovered during a 1995 inventory of duplicate holdings in the Raintree County Memorial Library.<sup>3</sup> The trustees have once again requested that I edit them for publication.

These new poems supplement those already published in several ways. Most importantly, among the new discoveries are legible copies

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\* Robert H. McKinney Professor of Law, Indiana University-Bloomington. Once again, I have greatly benefitted from the wise advice of Ruth Boshkoff and Bruce Markell.

<sup>1</sup> Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U. L. REV. 1533 (1991).

<sup>2</sup> The most interesting hypothesis concerning authorship comes from Professor James W. Bowers of Louisiana State University. Professor Bowers observes,

[The discovery of these poems] may solve an age old mystery concerning the disappearance of Sean O'Mahoney, the favorite nephew of Edsel Murphy the famous philosopher. The family's last word from Sean was a postcard in 1959 from Raintree County. The family has always surmised that he decided to live his life incognito after the shame of failing out of Harvard Law School. The work you edited even appears to be a law student's case briefs and outline of his contracts course. . . indeed, probably the outline of a student who would have flunked it, (particularly if the final exam covered promissory estoppel of bidding sub-contractors, or the law of assignments.)

Letter from Professor James W. Bowers, Louisiana State University, to Douglass G. Boshkoff, Robert H. McKinney Professor of Law, Indiana University-Bloomington (Feb. 24, 1992) (on file with the author). Unfortunately, intensive investigation in the public records of Raintree County has failed to uncover evidence either supporting or refuting Professor Bowers' hypothesis.

<sup>3</sup> The manuscript for *Selected Poems #1* was discovered inside a copy of *Life and Law*, the autobiography of Samuel Williston. In what must be regarded as an extraordinary coincidence, the poems included in the current collection were concealed inside a duplicate copy of the same book.

of poems related to *Drennan v. Star Paving Co.*<sup>4</sup> and *Taylor v. Caldwell*.<sup>5</sup> These texts also appeared in the first manuscript, but in a portion of the document so badly damaged as to be unreadable.

Also prominent are several poems involving well known Cardozo opinions. Viewing the entire collection of fifty-one works, it is clear that the author was fascinated by decisions of this famous jurist. There are four poems in this group and six altogether. No other judge is represented by more than one. And often, the language in these poems expresses or implies a very positive view of his work. For example, in the *Allegheny College* case,<sup>6</sup> Judge Cardozo possesses "wisdom exceeding our ken." In *Jacob & Young's, Inc. v. Kent*,<sup>7</sup> "Cardozo has shown us the way." And in *DeCicco v. Schweizer*<sup>8</sup> "Judge Ben blessed [the] deal."<sup>9</sup>

This collection includes second versions of poems based upon three cases. Two are completely different. The third (*Sherwood v. Walker*<sup>10</sup>) only bears a different final line. Although the recently discovered version is, arguably, a less accurate statement of what occurred in that case, the new concluding language is crisper and stylistically superior. Presumably, the author returned to this topic because he was not satisfied with the original effort.

It is fitting that this paper concludes with a tribute to Lon L. Fuller and William R. Perdue, Jr., authors of one of the most famous law review articles written in the past 100 years.<sup>11</sup> Quite possibly the author of these poems attended law school at a time when the Fuller and Perdue study of reliance damages was receiving more attention than it does today.<sup>12</sup>

*Occasional Paper No. 1* was very well received.<sup>13</sup> It is my hope that members of the bar, the judiciary, and the academy will find equal merit in these pages.

Bloomington, Indiana  
February 29, 1996

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<sup>4</sup> 333 P.2d 757 (Cal. 1958).

<sup>5</sup> 122 Eng. Rep. 309 (K.B. 1863).

<sup>6</sup> *Allegheny College v. National Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927).

<sup>7</sup> 129 N.E. 889 (N.Y. 1921).

<sup>8</sup> 117 N.E. 807 (N.Y. 1917).

<sup>9</sup> The one exception is *H.R. Moch v. Rensselaer Water Co.* (Version 2). See *infra* Part IV.

<sup>10</sup> 33 N.W. 919 (Mich. 1887).

<sup>11</sup> See *infra* note 55.

<sup>12</sup> I have previously suggested that the unknown author received his law training shortly after the end of World War II. Boshkoff, *supra* note 1, at 1533.

<sup>13</sup> See Randall T. Shepard, *On Lawyers and Writing: Pass the Constitutional Mustard, Please*, 28 IND. L. REV. 811, 812-14 (1995).

## I. CONTRACT FORMATION

1. *Embry v. Hargadine, McKittrick Dry Goods Co.*<sup>14</sup>

Embry's boss had a very bad plan  
 When he made the decision to can,<sup>15</sup>  
     Since some words he had said  
     Became stuck in the head  
 Of the world's most reasonable man.

2. *Petterson v. Pattberg*<sup>16</sup>

'Tween promisee and promisor  
 Stood only one discrete front door.  
     A try to pay  
     Then went astray,  
 Thus adding to our contract lore.

3. *Davis v. Jacoby*<sup>17</sup>

Which is better: to promise or act?<sup>18</sup>  
 Which more likely will lead to a pact?  
     With the Whiteheads in need,  
     Frank chose word over deed.  
 His reward was a contract in fact.

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<sup>14</sup> 105 S.W. 777 (Mo. Ct. App. 1907). This is one of the leading decisions requiring a jury instruction based upon the objective theory of contract formation. The court held that a contract of employment existed if a reasonable man would so interpret the instruction, "Go ahead, you're all right. Get your men out and don't let that worry you." *Id.* at 779.

<sup>15</sup> To discharge or suspend from a situation. 2 THE OXFORD ENGLISH DICTIONARY 818 (2d ed. 1989).

<sup>16</sup> 161 N.E. 428 (N.Y. 1928) (holding that an offer for unilateral contract may be withdrawn anytime before performance occurs). This opinion is not well regarded. Farnsworth refers to this case as "a notorious example" of the general rule. E. ALLAN FARNSWORTH, CONTRACTS § 3.24 n.11 (2d ed. 1990).

<sup>17</sup> 34 P.2d 1026 (Cal. 1934) (construing language in offer as requesting promissory acceptance, which occurred before offeror died).

<sup>18</sup> RESTATEMENT OF CONTRACTS § 31 (1932) provided a presumption in favor of a promissory acceptance. RESTATEMENT (SECOND) OF CONTRACTS § 32 (1981) does not continue the presumption. Instead, in case of doubt the offeree may accept by either promise or act. The unilateral-bilateral distinction is less important today than it was when *Davis v. Jacoby* was decided. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 2-26 (3d ed. 1987).

4. *Day v. Caton*<sup>19</sup>

I once knew a plaintiff named Day  
 Whose attempt to collect went astray.  
     Though he built a fine wall,  
     He got nothing at all  
 'Til a judge said that Caton must pay.

5. *Morrison v. Thaelke*<sup>20</sup>

Remember those sellers of land  
 Whose deal failed to work out as planned.  
     When they tried to retract,  
     A court vetoed their act  
 In accordance with *Adams'* command.<sup>21</sup>

6. *Elegy for the "Mirror Image" Rule*

There once were grand battles of forms  
 And mirrors<sup>22</sup> provided the norms.  
     Then the Code<sup>23</sup> came in view  
     With a rule that was new  
 And provoked interpretive storms.<sup>24</sup>

<sup>19</sup> 119 Mass. 513 (1876). This case represents a leading decision supporting the proposition that assent to an agreement to pay may be inferred from silence accompanying the construction of a wall. The court approved the following instruction:

A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff.

*Id.* at 514. This instruction sounds reasonable. But it is difficult to imagine what facts would warrant a verdict in favor of the plaintiff. How does Caton learn of Day's expectation? If Day tells him about it and Caton remains silent, is Day's expectation of compensation reasonable? If Caton either expressly assents or objects, the acceptance by silence rule is neither necessary nor applicable.

<sup>20</sup> 155 So. 2d 889 (Fla. Dist. Ct. App. 1963) (holding that acceptance may not be revoked after dispatch if offeror objects).

<sup>21</sup> The court expressly adopted the "deposited acceptance rule" of *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818). *See* 155 So. 2d at 904.

<sup>22</sup> A reference to the mirror image rule which required that, to be effective, an acceptance must contain exactly the same terms as the offer. *See, e.g., Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619 (N.Y. 1915), *reh'g. denied*, 111 N.E. 1098 (N.Y. 1916).

<sup>23</sup> U.C.C. § 2-207.

<sup>24</sup> U.C.C. § 2-207 has not been well received. MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 57 (2d ed. 1993). As White and Summers observe, "[UCC 2-207] is like an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert . . . . It is unfortunate that the drafters did not more adequately design 2-207 for the terrain upon which it was ultimately to do battle." JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3 (4th ed. 1995).

## II. CONSIDERATION

7. *Schnell v. Nell*<sup>25</sup>

A penny, when transferred in jest,  
 Won't meet the bargained-for test.

When this happened in *Schnell*

The deal didn't jell.

A result, we all think, for the best.

8. *Mills v. Wyman*<sup>26</sup>

The anger of Mills was intense  
 When Pop failed to pay Son's expense.

"I did what I could,

As everyone should.

The need for a deal<sup>27</sup> makes no sense."

9. *Allegheny College v. National Chautauqua County Bank of Jamestown*<sup>28</sup>

In the words of a jurist named Ben  
 (With wisdom exceeding our ken,)

"'Twixt bargain and gift,

There's nary a rift

At least when I'm wielding the pen."

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<sup>25</sup> 17 Ind. 29 (1861) (finding that the payment of one cent was not adequate consideration). "The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so." *Id.* at 32.

<sup>26</sup> 20 Mass. (3 Pick.) 207 (1825) (finding a father's promise to pay for services previously rendered to his son not supported by consideration). In many casebooks, *Mills* is paired with *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935) (finding a moral obligation to be sufficient consideration to support a subsequent promise to pay), to show contrasting views on whether a moral obligation is sufficient consideration. See, e.g., LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* 177-83 (5th ed. 1990).

<sup>27</sup> "A deliberate promise, in writing, made freely and without any mistake . . . cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it." 20 Mass. (3 Pick.) at 211 (emphasis added).

<sup>28</sup> 159 N.E. 173 (N.Y. 1927). This is one of Cardozo's most notable private law decisions in which he found consideration in a charity's implied promise "to perpetuate the name of the founder of the memorial." *Id.* at 176.

10. *Drennan v. Star Paving Co.*<sup>29</sup>

When reliance caused bidders to brawl.

Section 90 was R. Traynor's call.<sup>30</sup>

And the wisdom of Hand,<sup>31</sup>

So oft in command

For once didn't matter at all.

11. *DeCicco v. Schweizer*<sup>32</sup>

The Count, while performing his duty,  
Had an eye on additional booty.

When Judge Ben blessed his deal,

The Count's pleasure was real.

"Adesso, pago io, i tutti."<sup>33</sup>

III. MUTUAL MISTAKE AND IMPOSSIBILITY

12. *Sherwood v. Walker (Version 2)*.<sup>34</sup>

We've all heard the story of Rose

Whose failure to bear was a pose.

"For the stew pot, I'm not,"

Said Rose, like a shot.

And she wasn't, as everyone knows.

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<sup>29</sup> 333 P.2d 757 (Cal. 1958) (holding that unbargained-for reliance of prime contractor prevented revocation of subcontractor's bid).

<sup>30</sup> *Id.* at 759 (indicating that Traynor was relying on § 90 of the Restatement of Contracts).

<sup>31</sup> A reference to Judge Learned Hand's famous opinion in *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). Hand had concluded that "There is no room in such a situation for the doctrine of 'promissory estoppel.'" *Id.* at 346. Traynor's opinion cites, but does not discuss, *James Baird*. 333 P.2d at 760. Ultimately, Traynor's view prevailed. See FARNSWORTH, *supra* note 16, § 3.25.

<sup>32</sup> 117 N.E. 807 (N.Y. 1917). This opinion has been characterized by Farnsworth as a "judicial *tour de force*." Cardozo's opinion finds consideration in a promise to induce both contracting parties not to rescind their contract. See FARNSWORTH, *supra* note 16, § 4.22 n.22.

<sup>33</sup> "Now, I can pay all my debts."

<sup>34</sup> 33 N.W. 919 (Mich. 1887) (finding that a mutual mistake as to a cow's fertility provided a basis for avoiding the contract). The original last line was "And the court held the deal couldn't close." Boshkoff, *supra* note 1, at 1539. An erasure of text at this point in the recently discovered manuscript suggests that the author was not satisfied with the original concluding line.

13. *Taylor v. Caldwell* (Version 2).<sup>35</sup>

Implied conditions<sup>36</sup> were the rage  
To shift the risks of war and age.

Restatement Two<sup>37</sup>

Has terms quite new  
To cope with Caldwell's blazing stage.

## IV. THE RIGHTS OF THIRD PARTIES

14. *Seaver v. Ransom*<sup>38</sup>

Beman, J. failed to honor his word  
To his wife for the good of a third.

When the court made him pay,  
The old judge had his say.

"But for Fox, this would not have occurred."<sup>39</sup>

15. *H. R. Moch Co. v. Rensselaer Water Co.* (Version 1)<sup>40</sup>

There once was a plaintiff named Moch  
Whose building was turned into smoke.

Though the damage was real,  
The court nixed his appeal

So that Rensselaer wouldn't go broke.<sup>41</sup>

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<sup>35</sup> 122 Eng. Rep. 309 (K.B. 1863) (excusing performance when music hall destroyed by fire).

<sup>36</sup> "[The contract is] subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." *Id.* at 312.

<sup>37</sup> The Restatement (Second) substitutes risk analysis for doctrines based upon implied terms. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 11 (1981).

<sup>38</sup> 120 N.E. 639 (N.Y. 1918) (leading decision recognizing the enforcement rights of a third party donee beneficiary).

<sup>39</sup> In reaching its conclusion, the *Seaver* court relied on several prior New York decisions including *Lawrence v. Fox*, 20 N.Y. 268 (1859). Perhaps Judge Beman was correct in attributing his loss to that famous case. It is, however, hard not to believe that American law, with or without *Lawrence*, would eventually have conferred enforcement rights on contract beneficiaries. *Seaver* was decided in 1918, the same year that Arthur Corbin began his fifty year campaign for full recognition of third party beneficiary rights. See Anthony J. Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1148-72 (1985).

<sup>40</sup> 159 N.E. 896 (N.Y. 1928) (stating that the owner of building destroyed by fire may not maintain action as third party beneficiary of contract between city and water company).

<sup>41</sup> In a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party . . . . The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability.

*Id.* at 897.



16. *H. R. Moch Co. v. Rensselaer Water Co.* (Version 2)

Water, water never there<sup>42</sup>  
 To quench the dreadful flare.  
     Some embers pop,  
     Still not a drop.  
 And Cardozo doesn't care!<sup>43</sup>

V. ANTICIPATORY REPUDIATION

17. *Hochster v. De la Tour*<sup>44</sup>

A breach before performance day  
 Just can't exist, so sages say.<sup>45</sup>  
     But, nonetheless,  
     Queen's Bench says yes  
 And De la Tour is made to pay.

VI. REMEDIES

18. *Chicago Coliseum Club v. Dempsey*<sup>46</sup>

Remember the promise by Jack  
 Where reliance in front and in back  
     Of the date of the deal  
     Seemed not equally real.  
 So, the court barely sanctioned<sup>47</sup> Jack's lack.<sup>48</sup>

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<sup>42</sup> These opening words echo the beginning of Coleridge's famous poem, "The Rime of the Ancient Mariner."

<sup>43</sup> This criticism of Cardozo is a bit unfair. The judge, as pointed out in Version 1, *supra*, was obviously concerned about the extensive liability that a contrary result would impose on the defendant. On the other hand, *Moch* is not one of Cardozo's most celebrated decisions. For an analysis of *Moch* in light of his other opinions, see RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 109-10, 113-15 (1990).

<sup>44</sup> 118 Eng. Rep. 922 (Q.B. 1853) (stating that an action is not premature when promisor repudiates before date set for performance and promisee immediately commences an action to recover damages).

<sup>45</sup> There have been many critics of the rule that the disappointed promisee has an immediate action for damages. The arguments on both sides are reviewed in FARNSWORTH, *supra* note 16, § 8.20.

<sup>46</sup> 265 Ill. App. 542 (1932) (denying recovery for precontract reliance expenses).

<sup>47</sup> The appellate court remanded the case for a new trial. Its opinion specifically denied recovery of any damages for lost profits (estimated at \$1,600,000) as too speculative. It also denied recovery of expenditures occurring before the contract was signed. The potentially recoverable postcontractual reliance damages were, in comparison, rather minimal. *Id.* at 552-54.

<sup>48</sup> A defect; failing; a moral delinquency. 8 *THE OXFORD ENGLISH DICTIONARY* 571 (2d ed. 1989).

19. *Lake River Corp. v. Carborundum Co.*<sup>49</sup>

The penalty paid was too great  
In view of Lake River's fate.

Though he questioned the laws  
Which avoided the clause<sup>50</sup>

Posner, J. soon set everything straight.

20. *Campbell Soup Co. v. Wentz*<sup>51</sup>

Oh so tasty, those carrots of Wentz,  
With a flavor both bold and intense!

Well, the terms of their sale  
Went beyond any pale,

Thus providing the perfect defense.

21. *Lumley v. Wagner*<sup>52</sup>

Indirection is Equity's thing<sup>53</sup>  
If a diva refuses to sing.

By restraint of an act  
It enforces her pact

To produce a Wagnerian ring.<sup>54</sup>

(continued)

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<sup>49</sup> 769 F.2d 1284 (7th Cir. 1985) (finding that Illinois law requires invalidation of liquidated damage clause when amount payable is not a reasonable estimate of probable damage).

<sup>50</sup> "[T]he refusal to enforce penalty clauses is (at best) paternalistic — and it seems odd that courts should display parental solicitude for large corporations." *Id.* at 1289.

<sup>51</sup> 172 F.2d 80, 83 (3d Cir. 1948) (denying specific performance to sell carrots when contract language favoring buyer amounted to "carrying a good joke too far").

<sup>52</sup> 42 Eng. Rep. 687 (Ch. 1852) (restraining opera singer from performing for competitor during term of her contract with plaintiff).

<sup>53</sup> In *Lumley*, the Lord Chancellor denied that he was indirectly enforcing the contract. "[T]he injunction may also, as I have said, tend to the fulfillment of her engagement; though, in continuing the injunction, I disclaim doing indirectly, what I cannot do directly." *Id.* at 693.

<sup>54</sup> A ringing tone or quality in the voice. 13 THE OXFORD ENGLISH DICTIONARY 955 (2d ed. 1989).

22. *An Ode to Lon Fuller and William Perdue*<sup>55</sup>

Reliance once earned no respect  
As an interest the law would protect.  
Then Lon and his friend  
Brought this time to an end  
With an essay of sweeping effect.<sup>56</sup>

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<sup>55</sup> Lon L. Fuller and William R. Perdue, Jr. were the authors of *The Reliance Interest in Contract Damages* (pts. 1-2), 46 *YALE L.J.* 52, 373 (1936-37), widely regarded as one of the most notable law review articles of the twentieth century.

<sup>56</sup> 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 perishable fact. It is the country of 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.

ROSS LOCKRIDGE, *RAINTREE COUNTY*, title page overleaf (1948).