

CONTRACTS

MALCOLM P. SHARP†

BEGINNING with lectures V and VI, on The Bailee and on Possession, and continuing through the next three lectures, on Contract—History and Contract—Elements and Contract—Void and Voidable, the author of *The Common Law* becomes increasingly remote from the themes of the first lectures. In lectures X and XI, on Successions, he deals with a special group of problems which are of some interest to a student of contracts who is interested in assignments and servitudes.

The bailments section, which is primarily concerned with commercial bailments, suggests a transition from the theme of tort to the theme of contract. In the lectures on crime the leading interest is in disassociating the criminal law from the vindictive hostility which is a common feature of retributive theory. There are other elements in retributive theory, as a return to Plato's *Gorgias* will remind us; and indeed, the concern with morality which is another characteristic of retributive theory will lead one finally, it seems to me, to the theory which is today popular at least in academic circles, the theory of rehabilitation and education.

Mr. Howe's treatment of *The Common Law* in the second volume of his biography of Holmes,¹ is pervaded with hostility toward the German metaphysicians and their interest in what seem to be the quite sensible American ideas of freedom, equality and the will. Holmes, on the other hand, shows a continued interest in developments which will pay regard to the importance of human choice. His concern with its objective manifestation results from his recognition that questions of choice must be dealt with in such a way as to assure in general the maximum regard for the values associated with freedom, consistent with the recognition of the limitations of legal method which prevent it from dealing with the ultimate merits of each individual case. He does indeed occasionally remind us of the inevitable subordination of the individual to the community in cases of need or crisis, particularly war; but he does not consider this kind of subordination either usual or generally desirable.

The Justice is particularly clear on this subject in dealing with negligence. He makes an unsuccessful attempt to rationalize some vestiges of

† Professor of Law, The University of Chicago.

¹ HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 (1963). This review will draw to some extent on both THE COMMON LAW and THE PROVING YEARS without stopping at every point to indicate which is being used or to specify a page reference.

strict liability in the common law,² and he gives an effective warning against the modern developments of strict liability which have taken place since he wrote. By and large, he wants a system that regards the individual's capacity to choose; but he thinks that such a system will destroy itself if it attempts to go too far in individualization. It may be that he is also as much concerned with certainty as Mr. Howe thinks, but the reader of Mr. Howe's chapters should be careful to compare them with the original book, and to guard against a certain tendency which we all have to project our ideas into the system of a favorite author.

Holmes' concern with bailment and possession, where the contracts teacher reaches his subject, is not an easy one for the modern reader to understand. One clue to his interest is in a reference to a so-called Neo-Kantian German's attack, apparently thought by Mr. Howe to be in the interests of freedom, equality and the will, on a 19th century proposal for German legislation enlarging the remedies available to what we would call a tenant for years. It may be that Holmes' interest in the bailee and his remedies is related to his interest in the protection which gradually evolved for the medieval tenant for years, whose interests were the least of those interests in the land with which the medieval law was much concerned. The tenant for years was still not likely to be in the ranks of the humble. A better symbol for the point which the Justice may have been making about the development of protections for hitherto unprotected people on the land would be the history of copyhold.

The Justice appears, however, to have been on the whole more interested in a special point about the commercial bailee. This was a point on which he published an article at just about the time he was becoming involved in litigation over a modern shipowner's liability for cargo damaged in transit, allegedly as a result of negligence. Representing the defendant, Holmes had the task, at the outset, of meeting an argument for something like a strict liability of the carrier, regardless of negligence. His study of the history of bailments led him to conclude that such a strict liability of any commercial bailee continued into the time of Elizabeth, but only in cases where the bailee had a remedy against a wrongdoer and only because of the existence of that remedy. He argued that when Lord Mansfield established such a strict liability of the carrier, it should have been limited to cases where the carrier had a remedy against a wrongdoer.

It will be seen that Holmes' point is a somewhat narrow one; but it will also be seen that it relates interestingly to his views about external

² But respondeat superior should have been recognized as "the decaying remnant of an obsolete institution." HOLMES, *THE COMMON LAW* 181 (Howe ed. 1963). See also *id.* at 9, 16, 18, 19-20, 178-85, especially 181-82.

standards, particularly in negligence cases. The Justice is urging a close limit on anything like strict liability, and the general treatment of bailees' liability as dependent on negligence at the time of an alleged default.

His treatment of the bailee follows, so far as it goes, his earlier treatment of negligence in general. He appears however not to notice that something new is involved in the basis of contract liability. The bailee, if he does in fact promise "to keep safely,"³ or the carrier, if he is to be understood as making such a promise, is treated as choosing to take certain chances. A contract for the sale of goods to be delivered in the future and paid for at a named price to be paid in the future comprises, among others, two undertakings. One is an undertaking by the seller to protect the buyer in case of a price increase, and the other is an undertaking by the buyer to protect the seller in case of a fall in price. No one today would test the liability of either party by his fault at a time when performance is refused. Either may be the most deserving bankrupt or near bankrupt in the world, a victim of unforeseeable price fluctuations, but each, if he was making such transactions at all, knew as a matter of daily experience about price fluctuations, and each is fairly to be understood as taking his chances on them. If another illustration is needed, consider the commercial surety underwriting the buyer's payment. Along with a tendency to enlarge the power of businessmen to underwrite price changes, for example, by an irrevocable offer, the modern law shows some tendency to develop a partly compensatory scheme of defenses based on misapprehension and unforeseen events, including breaches, beyond what may fairly be regarded as the chances taken by a promisor. The phrase "chances taken" refers in one aspect to a "subjective" element; and indeed all the elements of contract, which depends on communication, are in one aspect subjective. It is not even clear that the phrase "chances taken" is to be tested by an objective standard, in the sense of a standard designed for the ordinary person as distinct from the parties to the particular transaction. To this matter we shall return a little later, but without attempting a dogmatic solution.

An appropriate scope for "objective" treatment of promissory liability is in determining the obligation of a person whose sub-standard use of English, or any code, has left another party to a communication in a worse position than he was in before the communication took place. The liability here is to compensate for a loss like those familiar in other negligence cases, and the authorities in other negligence cases are the strongest pre-

³ See STORY, BAILMENTS, §§ 33-37, 68-72, 88 (9th ed. 1878); 2 CHITTY, PLEADING 69 (16th Am. ed. 1876); DOBIE, BAILMENTS & CARRIERS 18-19, 157 (1914); 6 WILLISTON, CONTRACTS § 1946 (rev. ed. 1938).

cedents for the similar treatment of this kind of loss. The case in which a loss of this sort occurs where neither party to the critical communication is negligent or where both are, is a further problem to which Holmes refers only in passing.

We are led back to the main theme of his discussion, after observing that from the modern point of view, he has not carried on the project with which he started. He developed a theory of the liability of the 16th or 17th century bailee which the latest of his critics, Mr. Plucknett,⁴ thinks is incorrect; and he unsuccessfully defended in litigation a limitation of the liability of the carrier at sea against the prevailing doctrine of the common law established by Lord Mansfield. In both attempts he approached an interesting transition from his discussion of tort liability to his discussion of contract, but he did not succeed in making the transition in a way helpful to the modern reader.

Besides the bailee's liability, the consequence of his sale to a buyer interested Holmes to some extent. The bailor to start with had no protection against a buyer from the bailee, and this may have been appropriate in the rough agricultural society of the age. When detinue was extended to give a remedy, it treated bona fide buyers and others alike, and this too was perhaps appropriate, when commerce was developing in a still rough but somewhat less crude order of society. Professor Waite has observed that the contrasting simplicities of the two rules might well stimulate reflection on the question whether either treatment of the bona fide buyer is appropriate in a developed legal system.⁵ The question may raise problems about those ideas which Mr. Howe views with such alarm, freedom, equality and the will, and we shall turn to it later in a slightly different form.

The history of contract, as Holmes used the term, has of course been corrected since he wrote, at various points. The most striking correction is in the history of the action on the case, where contemporary views also correct the learning of Maitland. It is remarkable how little the point of Holmes' and Maitland's lectures has been affected by the new knowledge. The pragmatic and wonderful ingenuity of lawyers, clerks and judges, which produced the extraordinary transformations of the old writs, is worth remembering. Holmes emphasizes the influence of the action of debt and the diversity of sources, while Maitland draws attention to a certain simple continuity of development. Each has his own style, and the lectures are all valuable today.

⁴ For references to observations on Holmes' view, see HOWE 211 n.22.

⁵ See Waite, *Caveat Emptor and the Judicial Process*, 25 COLUM. L. REV. 129 (1925); cf. HOLMES 80-81. On page 77 the possibility of division of damages is noticed. See the references in Sharp, Book Review, 61 YALE L.J. 1119, 1129 n.17 (1952); notes 19 and 27 *infra*.

One odd limitation in treatments of the history of contract appears as one returns to these classic studies. The history is treated as complete in the early 17th century. Lord Mansfield's quite plausible efforts to modify or eradicate consideration, defeated by lesser judges⁶ but having their influence again today, are for some reason not thought of as part of "history." The great Kent's repudiation of the doctrine that reasonable reliance would serve the purposes of consideration, a repudiation followed by Langdell but in effect now in turn repudiated by the *Restatement* and by much of the case law, is not thought of as history.

We may remember that Blackburn made leading, though sometimes groping, solutions of related problems of "objective" interpretation, error, frustration and excusing default.⁷ It is often not noticed that the allegation in the *Peerless* case is "meant and intended" and not "was fairly to be understood as meaning," as students of the subject seem to think today.⁸ Holmes treats the case⁹ as depending on a rule governing the use of proper names, but his general views of "objective" meaning¹⁰ are more consistent with more recent explanations of the case, however questionable these may be. The matter is of more than pedantic interest, for as late as the latter half of the 19th century there are traces in England and the United States of a "subjective" doctrine which, as in dicta in *Dickinson v. Dodds*,¹¹ would give effect to any uncommunicated "revocation." Such a doctrine Mr. Justice Holmes was to describe as

⁶ They had the aid of Sergeant Williams' note, explaining that his loss of a doctor's action against a master simply for fees for treatment of his servant at the servant's request, involved a refusal to follow Lord Mansfield's doctrines. The argument is startling, and judicial readiness to depend on the "learned note" may not even indicate anything about what Holmes calls "the felt necessities of the time." The note is to *Wennall v. Adney*, 3 Bos. & P. 247, 249, 127 Eng. Rep. 137, 137-38 (Ex. 1802), and it is relied on in *Eastwood v. Kenyon*, 11 Ad. & E. 438, 113 Eng. Rep. 482 (Q.B. 1840), in which eagerness to make the point may have contributed to failure to observe the presence of traditional consideration in the case.

⁷ *Smith v. Hughes*, L.R. 6 Q.B. 597, 607 (1871) (discussing "objective" interpretation); *Fowkes v. Manchester & London Life Ass. Ass'n*, 3 B. & S. 917, 928, 122 Eng. Rep. 343, 347 (Q.B. 1863) (employing it; see note 14, *infra*); *Kennedy v. Panama Mail Co.*, L.R. 2 Q.B. 580 (1867) (alleged error: no excuse); *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863) ("impossibility" or frustration: excuse); *Bettini v. Gye*, 1 Q.B.D. 183 (1876) (excused default: no excuse); *Poussard v. Spiers*, 1 Q.B.D. 410 (1876) (excused default: excuse); *Simpson v. Crippin*, L.R. 8 Q.B. 14 (1872) (unexcused default: no excuse).

⁸ *Raffles v. Wichelhaus*, 2 Hurl. & Co. 960, 159 Eng. Rep. 375 (Ex. 1864). The designation of a ship in a sales contract is not always of itself a simple condition, requiring transportation on that ship. In the *Peerless* case the critical question was what date of delivery the buyer was actually or apparently willing to gamble on in a cotton market affected by the course of events in our Civil War.

⁹ HOLMES 241-42.

¹⁰ *Id.* at 242, 246.

¹¹ 2 Ch. D. 463 (1876).

"monstrous."¹² The history reminds us how late an appearance the "objective" theory of Holmes and Professor Williston made.¹³ It also prepares us for the vigor of their reaction and the limited number of cases which support their position in its familiar formulation.¹⁴

¹² *Brauer v. Shaw*, 168 Mass. 198, 200, 46 N.E. 617, 617-18 (1897). It is the attempted revocation that the common law of contracts by correspondence legitimately limits. Holmes' treatment, in *The Common Law*, of the overall effect of the mailed "acceptance" of the mailed offer probably contains components of the subjective, the objective (but only, in any sense, for the postman) and the magical. If a rejection gets there first, that is "objective" for the other party, and no one would think of holding him, at any rate if without knowledge of the "acceptance" he changes his position. There are comparable difficulties with the loss and delay cases.

¹³ See Whittier, *The Restatements of Contract and Mutual Assent*, 17 CALIF. L. REV. 441, 441-42 (1929).

¹⁴ The cases of liability are limited to situations in which: (1) there was a markedly fluctuating or unstable market so that there was a considerable likelihood that an offer and acceptance occasioned an unproved change of position for which it would be hard to estimate compensation or (2) a change of position appears in the record as reported. Cases in Group (2) are the more numerous and should be taken to include those in which (a) a loss supposedly insured against has occurred or (b) neither party disputes the existence of a contractual obligation but there is an issue about terms or (c) there are other kinds of change in position. In addition, Mr. Williston's classic statement relies with some reason on the authorities, divided as they are, which appear to deny relief for "unilateral" mistake generally. The problem of "void" communications is considered later.

On (1), Mr. Williston's cases in his 1937 edition, section 94 n.5 are *C. H. Pope & Co. v. Bibb Mfg. Co.*, 290 F. 581 (S.D.N.Y. 1921); and perhaps *Allen & Co. v. Hay Exchange*, 123 Miss. 502, 86 So. 297 (1920) (with some indication of actual change of position). On (2)(c) his cases are *Miller v. Lord*, 28 Mass. (11 Pick.) 11 (1831); *Higgins v. Canhape*, 33 N.M. 11, 13, 261 Pac. 813, 814 (1927); *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N.W. 23 (1896). Mr. Jaeger makes no significant additions. The insurance cases include *Hazard v. New England Marine Ins. Co.*, 8 Pet. (33 U.S.) 557 (1834); and *Fowkes v. Manchester & London Life Ass. Ass'n*, 3 B. & S. 917, 122 Eng. Rep. 343 (Q.B. 1863) (*supra* note 7). POLLOCK, *PRINCIPLES OF CONTRACT* 199-201 (11th ed. (Winfield) 1942) contains interesting observations on theory, history and cases. And see ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* *136 (8th ed. 1899) (1st American ed.); I PARSONS, *CONTRACTS* 511 (*475) n.1 (9th ed. 1904), citing *Holmes, J., in Mansfield v. Hodgdon*, 147 Mass. 304, 306, 17 N.E. 544, 545 (1888); HARRIMAN, *CONTRACTS* §§ 151-52, 422 (2d ed. 1901), citing *Borden v. Richmond & D.R.R.*, 113 N.C. 570, 18 S.E. 392 (1893), a well considered case denying relief for clerical telegraphic "unilateral" mistake, with a persuasive though limited dissent. The majority in the *Borden* case relied on passages in the treatises of Bishop, Lawson, and Wharton which among other things relied on the analogies of estoppel and warranty without as yet observing that they may in some circumstances lead to different results. A student has urged the authority of what seems at least a well considered dictum in *Lucy v. Zehmer*, 196 Va. 493, 501-03, 84 S.E.2d 516, 521-22 (1954), where there was a rather moderate and compensable change of position. The most persuasive part of the court's opinion, however, is that in which the court says there is not enough in the record to show misunderstanding at the time of the transaction or anything but change of mind afterwards. See also *Smith v. Hughes*, L.R. 6 Q.B. 597 (1871). It is curious that Professor Corbin's brief treatment of "objective" theory is not correlated with his persuasive treatment of unilateral mistake. Compare §§ 104 *et seq.*, with §§ 608 *et seq.* Where a building contractor who has made an "impalpable" mistake is held liable for

These historical observations suggest a suitably skeptical approach to the lectures on Contract—Elements and Contract—Void and Voidable, which follow Holmes' lecture on History.

Taking seriously the supposed problem about consideration in *Coggs v. Bernard*,¹⁵ Holmes in effect follows the opinion of Kent in *Thorne v. Deas*,¹⁶ which did not have the advantage of Ames' researches and which neglected the cases to the contrary to be found in Langdell's case book and disposed of by Langdell in the somewhat lofty manner to which Holmes himself made critical objections. A return to the interplay of tort and contract which has characterized the evolution of assumpsit has brought us to an appreciation of section 90 of the *Restatement* and to suitable judicial developments at least in California and Pennsylvania.

Holmes' view that one promises in making a contract to perform or pay damages is serving its best use. That is to secure a recognition that there is something to be said for regarding a possible defendant's conduct in not taking advantage of the delays and imperfections of civil sanctions, though a claim is undisputed, as possible "consideration," subject to safeguards derived from ideas of duress.¹⁷

The chapter on Contract—Void and Voidable is occupied in large part with an effort to make a condensed statement about "conditions." It is partly elementary and partly complicated by the confusion between conditions implied in fact and those "implied in law," which only in recent years has begun to yield to critical treatment. The contrast referred to in the title is a recurring theme in the chapter.

The traditional differences between void and voidable which Holmes accepts have come to seem questionable. A coherent possible meaning for void is without legal consequences of any sort. Nevertheless, an apparent contract vitiated by the fraud of a third person and "void" in the traditional sense of the word may be a necessary feature of quasi-contractual relief.¹⁸ The apparent contract may be an answer to the

benefit of the bargain losses, the result must be justified, if at all, on the grounds which justify finding warranties elsewhere.

¹⁵ 2 Ld. Raym. 909, 92 Eng. Rep. 107, 1 Comyns 133, 92 Eng. Rep. 999 (K.B. 1703).

¹⁶ 4 Johns. 84 (N.Y. 1809).

¹⁷ Another legitimate use is to indicate that chance taking plays a part in expectations not only about liability but about compensation as well. By an odd but not very significant coincidence, the Justice's principal judicial statement on this subject was in a case where the problem decided seems to have received an unsatisfactory solution. *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903); cf. *Consolidated Pipe Line Co. v. British Am. Oil Co.*, 163 Okl. 171, 21 P.2d 762 (1963), cited in McCORMICK, DAMAGES 671 n.51 (1935). And see CORBIN, CONTRACTS § 1036 (1950); 1 HOLMES-POLLOCK LETTERS, 119 (Howe ed. 1961). A seemingly implied suggestion that it generally makes little practical difference to a promisee whether he gets performance or damages, is questionable.

¹⁸ *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909).

suggestion that the conduct of the party conferring a benefit was officious or neighborly.

A thoughtful English judge, controlled by the necessity for dealing with established views about impersonation, has complained of a rule by which a "void" contract of sale gave the buyer in possession no power to make a good title to a bona fide buyer from him. The result was that the original owner recovered full value from one who evidently appears on the record as an honest and non-negligent converter. The judge, dissenting, suggested that common sense in such cases requires quite often that the loss be divided and that the problem be settled by principles somewhat analogous to those now generally governing contribution among tortfeasors.¹⁹ No one knows whether common sense may not be in fact even more rigid than the law, but the judge's position is persuasive, though it may depend on one or more of those dangerous ideas, freedom, equality and will.

It may seem irrelevant to refer to such developments. In this same lecture, Mr. Justice Holmes recurs to what he says in the first: "The life of the law has not been logic: it has been experience."²⁰ His illustration at the end of the lecture is a practical judicial solution of a problem about actionable default as an excuse, in a case argued by Blackburn and C. E. Pollock and decided by Baron Parke. Since Holmes wrote, the need for generalization about such problems has led to the greatest single generalization in the *Restatement*, section 275. The supposed tension between the practical and the logical is seen here in process of resolution.

The Justice himself moreover was to say: "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."²¹ A considerable number of common-law judges over the ages have in polite language said just that and the interesting word is the word "nonsense." At points in his correspondence, Holmes appears to indicate that nonsense is what one cannot help thinking is not so. That is enough for most of us, and relieves us from any fear that the witty observation about experience and logic is to be taken seriously. Outside of the asylum, logic is, of course, a part of experience; though a rigid regard for logic may doubtless lead one into madness almost as easily as disregard of logic will do.

Holmes' generalizations about generalization are full of variety. One which has probably done some harm in the private commercial law appears in the same opinion with the observation about consideration.

¹⁹ Devlin, L.J., in *Ingram v. Little*, [1961] 1 Q.B. 31, 73-74 (C.A.). See note 5 *supra*.

²⁰ HOLMES 5, 244.

²¹ *Southern Pac. R.R. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting opinion).

"The common law is not a brooding omnipresence in the sky"²² Neither, of course, are whatever "laws" appear in the movements of the heavenly bodies. Luckily, as in the case of so many proverbial sayings, one can find enough counter-sayings even in Holmes' writing to afford a corrective.²³ The odd thing is that the position of the most naive among the lesser Athenian Sophists is often attributed to Holmes because of such remarks as those just considered. The mature pragmatism of Dewey's *Logic* should be a warning to the enthusiast.

A singular feature of Holmes' system is that it permits Mr. Howe to say that it "gives more comfort to the collectivist than to the individualist."²⁴ Though the author explicitly excluded from his lectures the place of contract in "political speculation," the editor has thus introduced the subject. It is doubtful whether it can be entirely excluded, as the editor's opinion leads us to observe.

There are, of course, some familiar texts that can be read as contrary to the editor's opinion about Holmes' views on collectivism.²⁵ If I were to defend Mr. Howe's view I would do so on two grounds. Mr. Justice Holmes' preoccupation with the lawyer's problem of "objective" standards, for example in contract law,²⁶ though he guards himself here and there, may lead one to neglect the large part played by choice, though determined, in the everyday life of a society like ours; and so to undervalue freedom of choice, including freedom of contract, in what is misdescribed as a "balancing" of interests. Second, an occasional acceptance of "trends," including perhaps a trend toward war, sounds as though the Justice were one to acquiesce, not simply on constitutional grounds but willingly and as a voter, in a supposed trend toward "collectivism." My

²² *Id.* at 222. See C. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953).

²³ A favorite example is: "My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older. I always say that the chief end of man is to frame them and that no general proposition is worth a damn." 1 HOLMES-POLLOCK LETTERS 118 (Howe ed. 1961); and see 2 *id.* at 59. The saying is closer to the Socratic and Platonic view than it may at first appear to be. Compare, e.g., BRADLEY, APPEARANCE AND REALITY 549 (2d ed. 1897): "Everything is error, but everything is not illusion."

²⁴ HOLMES xxiv; see also HOWE 175-76. It is interesting that the editor of the Holmes-Laski correspondence (see Index: Socialism) and the Holmes-Pollock correspondence (see Index: Collectivism, Economics and Socialism) comes to this conclusion. In 1915 Holmes commented on the treatment of such matters in *The Common Law* somewhat differently. HOLMES, COLLECTED LEGAL PAPERS 307 (1921). To show that emphasis on "the criterion of social welfare" was "no novelty" he cited discussions of utilitarian views of punishment in *The Common Law*. See also pages 279-82, 293-94; HOLMES 76-78; and OCCASIONAL SPEECHES (Howe ed. 1962) 169-71.

²⁵ See note 24 *supra*.

²⁶ See note 14 *supra*.

own view is that the familiar individualist texts do more justice to his opinions.

It may be worth while to risk a general observation about "subjective," "objective" and choice. Capacity to make commitments free from judicial supervision has been helped by the steady subordination of the old rules of form and consideration to simpler generalizations, more appropriate for our society. Freedom of contract of course requires security of contract. There is however a set of interests in freedom from contract. So far as it is consistent with freedom to commit oneself,²⁷ some safeguards against unchosen and not willingly chanced²⁸ consequences are appropriately given by limited but flexible relief for mistake, mutual or unilateral, if they can be distinguished;²⁹ for frustration, as in the provisions of the *Commercial Code*; and for excusing default. Regard for choice in these homely matters, as against administrative or judicial orders on behalf of a group, seems a contribution to education and a suitable gesture of respect for values much cherished in our society.

The relationship between individualism and the details of contract law is not perfectly systematic. Our ways of deciding business matters are of course much less dependent on law than we like to think. But there is a relationship. In view of a healthy tendency in *The Common Law* to oppose harsh and rigid judgments of guilt, and in view of the Justice's pervasive individualism, it seems to me that Holmes was inconsistent in defending "the objective theory" of contract law. In the sense in which the phrase is used here, "subjective theory" seems better de-

²⁷ In any event, that freedom is to be protected by liability for negligent or substandard use of language to the extent of tort (that is, "reliance") losses; ideally in cases of no negligence or negligence on both sides, by contribution to compensation for tort losses; and by normal safeguards ("restitution") against unjust enrichment. The discussion in the text is concerned with benefit of a bargain, including benefit of bargain ("expectation") losses and the corresponding damages (or decrees of specific performance) which are the characteristic and peculiar feature of liability for breach of contract. Cf. Weiss, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 *YALE L.J.* 1054 (1960). See note 5 *supra*.

²⁸ FULLER, *BASIC CONTRACT LAW* 666 (1947) in a note to *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863) gives an interesting account of psychologists' difficulties with problems raised by this suggestion. The first, and perhaps the final, professional utility in the study of philosophy, psychology, history and economics may be to warn teachers and practitioners of the limits of knowledge, and guard them against falling into traps well known to others. For a particularly interesting example, see note 30 *infra*. The limits of knowledge may be the best reason for an approach, so far as it is practically possible, to a philosophy of positivism in considering the law.

²⁹ In cases of "mutual mistake" the "basic assumptions" of parties are often not the same. For example, the tort victim in settling with an insurance company may confidently assume that his hurt is not much greater than it appears, the company that it is not much smaller. Relief for mutual mistake may occasion less disappointment than relief for "unilateral" mistake, but this is by no means always the case, as the example indicates. See *ANNOT.*, 48 *A.L.R.* 1462 and successor notes.

signed to serve the purposes which controlled his thought, and which others (including me) share.

One final curious relationship is that between the expressed preference for experience over logic on the one side and what is sometimes called Social Darwinism on the other. The editor refers at pages xxv and xxvi and in his biography to the influence of Darwin and to Social Darwinism.

Something like Social Darwinism appeared before Darwin or the Civil War, for example in Heraclitus and in the writing of John Adams. At its best Social Darwinism does not imply any disregard of logic as a means of adaptation. It is, however, true that Sumner was the only one of the eminent post-Civil War Social Darwinists who drew from his doctrine a rational conclusion about individualism and the "experience" of war. He thought that rivalry and struggle were inevitable and indispensable for life but that the case for war, and specifically the case for the war over Cuba with Spain, was nonsense. It is well known that Holmes, in spite of his sense of the tragedy of the Civil War, contributed to a somewhat Calvinist but hardly Darwinian³⁰ academic militarism, appearing among his contemporaries and at times in the thought of his followers.

In some of his remarks elsewhere, Holmes seems content to leave freedom of contract at the mercy not only of supposed economic trends but of wars as well. These lectures serve to remind us that contract was indeed affected by the tenacity of the Norman kings of England and their successors, in office or on the throne, up to the present day. Ideas and daily needs nevertheless have played a part, which is the author's principal concern here.

A reader of the correspondence between Holmes and Pollock must come to the conclusion that Holmes was a greater man than any of his more systematic writings by themselves show. I know of no study which seems so adequate an account of the tensions and heroism of his life and character as that with which Mr. Edmund Wilson concludes his volume on American writing affected by the feelings and events surrounding the Civil War.³¹

³⁰ Intraspecies lethal violence, still more intraspecies group lethal violence, appears to be relatively rare among other animals; and it is possible that its survival value has generally been negative for a species. KROPOTKIN, *MUTUAL AID*, Ch. I-II (1907 ed.), and SCOTT, *AGGRESSION* (1958) somewhat overstate the case. For some corrective observations, see COLLIAS, *Aggressive Behavior Among Vertebrate Animals*, 17 *PHYSIOLOGICAL ZOOLOGY* 83 (1944); LORENZ, *KING SOLOMON'S RING* (1952).

³¹ WILSON, *PATRIOTIC GORE* (1962).