BOOK REVIEWS

THE DEATH OF CONTRACT. By Grant Gilmore.[1] Columbus, Ohio; Ohio State University Press, 1974. Pp. x, 151. $8.00.

Professor Gilmore states: "We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore."[2] But he then warns that

> the most lovingly detailed knowledge of the present state of things—the most up-to-the-minute list—begins to be useful to us only when we are in a position to compare it with what we know about what was going on last year and the year before that and so on back through the floating mists of time.[3]

This entertaining and thought provoking series of lectures[4] suggests an historical point of comparison, "the general theory of contract." According to Professor Gilmore, the "theory" was a curious and ingenious machine painstakingly assembled from the spare parts of English and American case law. It was invented by Langdell,[5] developed by Holmes,[6] and perfected by Williston[7] at the Harvard Law School in the late nineteenth and early twentieth centuries.[8] At the center of the machine was the great balance wheel, "consideration."

Professor Gilmore rightly says, "[t]here are few things more fascinating in our jurisprudence than the organization of what comes, almost immediately, to be perceived as a new field of law,"[9] and observes that "the common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts."[10]

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1. Sterling Professor of Law, Yale University.
2. G. GILMORE, THE DEATH OF CONTRACT 3 (1974) [hereinafter cited as GILMORE].
3. *Id.* at 4.
4. Delivered at the Ohio State University School of Law, *id.* at ix.
5. Christopher Columbus Langdell, Dean of the Harvard Law School, 1870-1895.
6. Oliver Wendell Holmes, Jr. His Lowell lectures, *The Common Law*, were published by Little, Brown in 1881. Holmes was a lecturer at Harvard in 1871-1872, and a professor in 1882. After service on the Supreme Judicial Court of Massachusetts, he was appointed to the United States Supreme Court where he sat from 1902 to 1932.
7. Samuel Williston, Professor of Law at Harvard University, 1890-1930.
8. GILMORE 5-31.
9. *Id.* at 9.
10. *Id.* at 5.

He suggests that "the idea that there was such a thing as a general law—or theory—of contract seems never to have occurred to the legal mind," until Christopher Columbus Langdell "somehow stumbled across it."[11] As used by Professor Gilmore, the meaning of a "general law—or theory—of contract" is, however, unclear. A "general theory" is clearly different from a "general law;" and the suggestion that there was at some time a "general law" reflecting the "general theory" is contradicted by Professor Gilmore's assertion that unity of doctrine was only achieved by an extremely selective handling of case material—ignoring those cases at variance with the theory.

In fact, the book is largely concerned with the rise and fall of a "general theory" of contract. We are given an account of a development: discovery of "contract" by Langdell; exposition of a "bargain theory" of consideration by Holmes; working out of the implications by Williston.[12] Still, Professor Gilmore's definition of the "theory" remains unclear. As a legal historian he must be aware that there were "general theories" of contract long before the last quarter of the nineteenth century, for example, the work of the medieval canonists. Moreover, Langdell did not write the first book on common law contracts; that distinction belongs to John Joseph Powell,[13] who, inspired by Pothier's achievements in producing order from the disorder of the civil law,[14] attempted to do likewise for the common law.

Powell's choice of subject matter is of great significance (and here we echo Professor Gilmore's comments on Langdell). Contract law, at the end of the eighteenth century, was just beginning to emerge and expand its sphere. This development was due to many factors, but the theoretical justification was provided by continental writers.[15] By the time Christopher Columbus Langdell set out on his voyage, the dead hand of

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11. *Id.* at 6.

12. *See id.* at 5-53.

13. J. POWELL, ESSAY ON THE LAW OF CONTRACTS AND AGREEMENTS (1790). A more jurisprudential treatment may be found in H. COLEBROOK, OBLIGATIONS AND CONTRACTS (1818). For an interesting account of the transition that was occurring at that time, see Horwitz, *Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

14. R. POTHIER, TRAITE DES OBLIGATIONS (1761). Incidentally, Pothier anticipated Langdell in using the Socratic method for teaching law. *See* G. LE TROSNE, ELOGE HISTORIQUE DE POTHIER. The case method was developed for teaching ethics in the early seventeenth century.

15. In addition to Pothier, the chief influences were the writings of Kant, Hegel, and Savigny.

continental theory was lying heavily upon the common law (something it is important to remember in considering Professor Gilmore's account of Holmes' influence), and Langdell's writings exhibit that influence.[16]

Holmes' writings were an important part of the reaction to the continental influence,[17] and the reader who remembers him for his dictum "[t]he life of the law has not been logic: it has been experience,"[18] will be surprised to learn of his role in the "general theory" affair. His great series of lectures, *The Common Law*, was intended to remove the varnish of abstract theory that the law had acquired.[19] No one familiar with the development of the law of contract in the nineteenth century, which as Professor A.W.B. Simpson has said, shows the results of too many theories chasing too few facts,[20] could deny that Holmes' objective was worthwhile.[21] His analysis of contractual obligation, the "risk theory," derived from his rejection of the "will theory" of contracts, and from the Austinian concept of legal duty.[22]

In this context, Professor Gilmore's citation of Holmes' statement that "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass,"[23] in support of the assertion that the "general theory" was "dedicated to the proposition that ideally no one should be liable to anyone for anything,"[24] seems inapposite. Holmes' assertion, properly

16. *See, e.g.*, C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 16, 23 (1880) (postal acceptance rule).

17. *See generally* M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS (1963) [hereinafter cited as HOWE].

18. O. HOLMES, THE COMMON LAW 1 (1881) [hereinafter cited as HOLMES].

19. *See generally* HOWE.

20. Lecture by Professor Simpson to the Selden Society, July 3, 1974.

21. The development of the doctrine of mistake is a good example of the kind of confusion to which an excess of doctrine led. Professor Gilmore, incidentally says of Holmes' explanation of Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864) (contract void because parties said different things, not because they meant different things): "The magician who could 'objectify' Raffles v. Wichelhaus . . . could . . . objectify anything." GILMORE 41. But that method is precisely how most modern courts would approach the matter. Whether the parties' saying different things (the effect of the plaintiffs demurrer was to admit this) was important is another matter. *See, e.g.*, UNIFORM COMMERCIAL CODE § 2-322(3) (1972).

22. HOWE 77.

23. HOLMES 301.

24. GILMORE 14. Holmes apparently did not mean that there is an "election" to perform or to apply damages, the common understanding of the passage. *See* Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, Dec. 11, 1928, in 2 HOLMES-POLLOCK LETTERS 233-34 (M. Howe ed. 1941). It may be, however, that the view expressed in this letter represents belated second thoughts.

understood, means that if a person undertakes the risk of something coming to pass, he is liable to pay damages whether or not performance is within his power. Given Holmes' narrow concept of a legal duty, this view is difficult to refute.[25]

According to Professor Gilmore's exposition, a person incurs liability under the "general theory" because the law finds "consideration." Nothing is consideration unless there is "the relation of reciprocal conventional inducement, each for the other, between consideration and promise."[26] This certainly is, as Professor Gilmore says, a "mysterious phrase."[27] It is found, in a passage in which Holmes is trying to distinguish a condition from consideration. A truckman's statement that he will take a cask of brandy from Boston to Cambridge, can either be a gratuitous promise subject to a condition that if it is delivered to him, he will deliver it, or a contract, the consideration for which is the delivery to him. Holmes believed that we can only tell which it is by the way the parties have dealt with it.[28] Professor Gilmore, however, cites only part of the relevant passage and makes much play of it: "Now the vulgar error . . . has been exploded. . . . No matter how much detriment a promisee may have suffered, he has not thereby, necessarily furnished any consideration. Nor does he have, so far as Holmes takes us, any right to redress . . . ."[29] But Holmes took us only that far because in the context of that part of *The Common Law*, there was no point in proceeding further. He did not say there is no liability however much detriment a promisee may have suffered.[30]

It is difficult to see *The Common Law* as a link between Langdell on the one hand and Williston and the *First Restatement*[31] on the other. Holmes referred to Langdell as representing the "powers of darkness; he is all for logic and hates any reference to anything outside of it."[32]

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25. HOWE 236.

26. HOLMES 293-94, *quoted in* GILMORE 20.

27. GILMORE 20.

28. HOLMES 295.

29. GILMORE 20.

30. *See* GILMORE 35.

31. Holmes was skeptical of the *Restatement* project. *See* Letters from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, Feb. 24, 1923 & Dec. 11, 1928, in 2 HOLMES-POLLOCK LETTERS 114, 234 (M. Howe ed. 1941).

32. Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock, April 10, 1881, in 1 HOLMES-POLLOCK LETTERS 17 (M. Howe ed. 1941). In the same letter, Holmes describes Langdell's book on contracts as a "marvellously misspent piece of ingenuity." *Id.*

Professor Gilmore's account of Holmes' influence on Williston may well be correct, but he presents very little evidence to support it, although this deficiency may to some extent be due to the problems of turning lectures into a book.

Perhaps Holmes was misread by his contemporaries, but Professor Gilmore does not discuss this. His only such reference[33] is concerned with Holmes' influence on the rejection of the "will" theory of contracts. Gilmore says that Holmes and his successors substituted an "objectivist" approach for the "subjectivist" approach the courts had been following "almost instinctively."[34] If so, then Holmes achieved his aim. This conclusion depends, however, on what we mean by "objectivist" and "subjectivist." In *The Common Law*, Holmes was engaged in a philosophical debate, in which he was propounding "objectivism" against the "subjectivism" of Kant and Hegel.[35] No doubt his judicial decisions tended to reflect the "period style," but his philosophy was fundamentally opposed to Langdell's formalism. It is no great surprise to find him prepared to recognize reliance theory for the enforcement of a promise.[36] Perhaps a better description of contract theory in the "formal period" is "nonparticularist," rather than "objectivist." That is, rules of law were taken at a high level of abstraction and given a general application (which is not to say that the rules were simplified; on the contrary, they tended to proliferate).[37]

If Holmes' "bargain theory" was of central importance, it is interesting to speculate why this occurred. The suggestion of a connection with laissez-faire economic theory, although clearly correct,[38] does not explain the observation that the contract law in the "formal period" was often uncommercial. A good illustration is the difficulty experienced by the American courts in coming to terms with requirements contracts. Professor Gilmore suggests that the doctrine of mutuality of obligation, from which these difficulties arose, was a reflection of the reformulation of the doctrine of consideration in terms of "reciprocal conventional

33. HOWE 246.

34. GILMORE 35.

35. *See* O. HOLMES, THE COMMON LAW xv-xvi, xx-xxi (Little, Brown ed. 1963) (M. Howe introduction).

36. Martin v. Meles, 179 Mass. 114, 60 N.E. 397 (1901). *See also* K. LLEWELLYN, THE COMMON LAW TRADITION 187-88 (1960).

37. *See* GILMORE 48, 99 (tendency to view questions of fact as questions of law).

38. *See* L. FRIEDMAN, CONTRACT LAW IN AMERICA 20-21 (1956).

inducement."[39] That doctrine appeared, however, some years before *The Common Law* in the case of *Bailey v. Austrian.*[40] In that case, Justice Berry arrived at the conclusion that requirements contracts lacked consideration because there was no mutuality of obligation. He reached this conclusion after an apparent misreading of a passage in *Parsons on Contracts* dealing with "mutuality of engagement."[41] This misreading may have been due to some "felt-necessity" about the character of bargains the law ought to enforce.[42] The English courts did not have the same difficulty.[43]

The doctrine of *Bailey v. Austrian* is an illustration of the aberrations of judicial reasoning that characterized the "formal period" of United States legal history,[44] the development of which is, for the writer, more interesting than an account of possible links between Langdell, Holmes, Williston and particular doctrines. Even Williston's exposition may have been more faithful to the spirit of his time than to "the spirit of his master's thought."[45] What were the causes of this formalist phase? Professor Gilmore suggests that the state-by-state fragmentation of the law, which began quite early in the century, was a factor. He writes

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39. GILMORE 33-34.

40. 19 Minn. 535 (1873). The writer does not know whether this was the first case espousing the doctrine.

41. T. PARSONS, 1 THE LAW OF CONTRACTS 470-71 (6th ed. 1873). The cases cited by Parsons include Dorsey v. Rockwood, 53 U.S. (12 How.) 126 (1852); McKinley v. Watkins, 13 Ill. 140 (1851); Lester v. Jewett, 12 Barb. 502 (Sup. Ct. 1849); Burton v. Great N. Ry., 156 Eng. Rep. 216 (Ex. 1854); Hopkins v. Logan, 151 Eng. Rep. 103 (Ex. 1839); Biddle v. Dowse, 108 Eng. Rep. 447 (K.B. 1827); Kingston v. Phelps, 170 Eng. Rep. 163 (N.P. 1794); Nichols v. Raynbred, 80 Eng. Rep. 238 (C.P. —). In *Burton,* Parke, B., gave an example, which, while supporting the judgment, was clearly based on the supposition that a contract existed.

42. Some courts seem to have had the notion that there needed to be a measure of equivalency in the respondents' undertakings. *See* Havinghurst & Berman, *Requirement and Output Contracts,* 27 ILL. L. REV. 1 (1932). *See also* T.W. Jenkins & Co. v. Anaheim Sugar Co., 247 F. 958 (9th Cir. 1918); Crane v. Crane & Co., 105 F. 869 (7th Cir. 1901).

43. *See, e.g.,* Percival, Ltd. v. London County Council, 87 L.J.K.B. (n.s.) 677 (1918); In re Gloucester Election Petition, [1901] K.B. 683; Foxwood v. Rhodes, 33 L.T.R. (n.s.) 314 (Ex. 1875); Great N. Ry. v. Whitham, L.R. 9 C.P. 16 (1873); Bealey v. Stuart, 158 Eng. Rep. 672 (Ex. 1862); Wood v. Governor & Co. of Copper Miners in England Co., 137 Eng. Rep. 358 (C.P. 1849).

44. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION (1960); Llewellyn, *On the Good, the True, the Beautiful in Law,* 9 U. CHI. L. REV. 224 (1942); Pound, *The Causes of Popular Disaffection with the Administration of Justice,* 40 AM. L. REV. 729 (1906).

45. GILMORE 114 n.43.

that "[n]ational unity on a case level . . . required what we might call an intensive purification of doctrine."[46] This might explain the absence of the extreme of formalism in England. Gilmore suggests that distrust of the civil jury was another factor, and another possible reason for the contrasting English experience. The decline of the English civil jury had already set in at the time the United States was undergoing its greatest excess of formalism. Certainly some formalism existed in England before the decline set in, particularly during the middle years of the century.[47] In other words, formalism predates the "general theory" by some years. Moreover, the "consideration episode," which Gilmore describes as an "Anglo-American exclusive," insofar as it occurred in England, goes back at least as far as *Eastwood v. Kenyon.*[48]

Professor Gilmore's "general theory," does not seem to amount to anything more than that bundle of doctrines, delimiting and relating to the area usually called "contract law," which reflects the extreme formalism of the United States legal system in the closing years of the nineteenth century. The bundle of doctrines seems to lack sufficient cohesion to be called a "general theory," at least on the evidence presented by Professor Gilmore.

The decline of what Professor Gilmore calls the "general theory," coincided, of course, with the decline of formalism.[49] He suggests that "contract" is being reabsorbed into the mainstream of "tort." A central part of his thesis lies in his observations about sections 75 and 90 of the *First Restatement.*[50] Section 75[51] represented in substance Williston's proposal, and is, as Professor Gilmore points out, pure Holmes.[52] Section 90[53] was the work of Corbin. Professor Gilmore suggests that

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46. *Id.* at 97.

47. Some of the early "railway ticket" cases illustrate English formalism. *See, e.g.,* Walker v. York & N. Midland Ry., 118 Eng. Rep. 948 (Q.B. 1853).

48. 113 Eng. Rep. 482 (Q.B. 1840).

49. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

50. GILMORE 60-61.

51. RESTATEMENT (FIRST) OF CONTRACTS § 75 (1932):

(1) Consideration for a promise is
  (a) an act other than a promise, or
  (b) a forbearance, or
  (c) the creation, modification or destruction of a legal relation, or
  (d) a return promise

bargained for and given in exchange for the promise.

52. GILMORE 61.

53. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932):

these two sections indicate the *Restatement's* schizophrenia,[54] since they stand for the old order and the new, and the one must swallow up the other.[55] On the contrary, even if we agree with Corbin[56] (as the writer does) that consideration is not one doctrine but many, section 75 is a reasonable definition of the area in which the expectation interest will usually be protected. This is not to say that there may not be other grounds for enforcing promises, for example, past consideration in some circumstances. Section 75 is objectionable only in terms of the former tendency to confine liability within its four corners. When we come to section 90, however, we are given the somewhat uncertain decree that "a promise is . . . binding if injustice can be avoided only by enforcement of the promise." The section should not be limited to promises; statements less than promises can reasonably be expected to induce detrimental reliance in some circumstances.[57] Thus, arguably, the section does belong to the law of torts. The debate at this point, however, has perhaps become little more than terminological quibbling. It does not really matter whether we choose to call "consideration" only those elements falling within section 75 and to define "contract" in those terms. The important thing is that in the process we do not confine the reach of liability.

The writer, who yields to no one in his admiration of most of Professor Gilmore's writings, must express disappointment about this book, entertaining as it is. Apart from the account of Holmes' influence, which on the evidence the writer found not entirely convincing, *The Death of Contract* seems to add little to what has already been written on the subject.[58]

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A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

54. GILMORE 60.

55. *Id.*

56. A. CORBIN, CORBIN ON CONTRACTS § 109, at 161-63 (one vol. ed. 1952).

57. *See, e.g.*, Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

58. *See generally* L. FRIEDMAN, *supra* note 38; K. LLEWELLYN, *supra* note 44.

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