2021

Oliver Wendell Holmes's Theory of Contract Law at the Massachusetts Supreme Judicial Court

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INTRODUCTION

Oliver Wendell Holmes, Jr., is credited with "brilliantly reformulating" Christopher Columbus Langdell's idea of a general theory of contract law, providing the "broad philosophical outline" for what has since become known as classical contract law.[1] He did this in his 1881 book *The Common Law*,[2] referred to as "the most important book on law ever written by an American,"[3] and written while he was still a practicing lawyer.[4] His series of lectures on contracts have been described as "astonishing,"[5] the main themes of which were an emphasis on the parties' overt acts rather than their undisclosed intentions,[6] adoption of a bargain theory of consideration and rejection of the benefit-detriment theory,[7] and a restrictive approach to damages.[8]

Holmes hoped that his arguments in *The Common Law* would influence the bench and the bar, and thereby influence the development of the common law.[9] And after a brief time as a professor at Harvard Law

1 GRANT GILMORE, THE DEATH OF CONTRACT 15, 23 (Ronald K. L. Collins ed., 2d ed. 1995). Gilmore credited Samuel Williston with piecing together classical contract law's details. *Id.* at 15. *See also* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1193 (1998) ("Gilmore attributed the essential shape of classical contract law to three Harvard law professors: Langdell, Holmes and Williston. By 1880, the first two members of Gilmore's triumvirate of classical architects were already busily sketching the outlines of what would become the generally accepted structure of American contract law.").

2 OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

3 Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 214 (1964); *see also* E. Donald Elliot, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 116 (1984) (referring to *The Common Law* as "the most celebrated American law book of that (and perhaps of all) time."); THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 271 (Roger K. Newman, ed., 2009) [hereinafter YALE BIOGRAPHICAL DICTIONARY] ("[I]t is one of the greatest works of jurisprudence in the English language. It is by far the most important work of scholarship by a practicing lawyer.").

4 YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 271.

5 GILMORE, *supra* note 1, at 6.

6 *See* HOLMES, *supra* note 2, at 240 ("[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."); *id.* at 242 ("The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."); *see also* Mark DeWolfe Howe, *Introduction* to HOLMES, *supra* note 2, at xxi [hereinafter Howe *Introduction*] ("The ultimate task which Holmes the jurist set Holmes the historian was to follow the evolution of common law doctrine towards its destined goal of externality.").

7 GILMORE, *supra* note 1, at 20–23.

8 *Id.* at 54.

9 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES, VOLUME II: THE PROVING

School,[10] Holmes became an associate justice on the Massachusetts Supreme Judicial Court,[11] serving as a justice on that court from 1882 to 1902,[12] thus giving him an opportunity to directly implement his theory of contract law.[13]

This Article analyzes the extent to which Holmes's theory of contract law, as set forth in *The Common Law*, can be found in his opinions as a judge on the Massachusetts court. Part I provides a background of Holmes through his writing of *The Common Law* and his appointment to the Supreme Judicial Court, including a discussion of his theory of contract law as set forth in *The Common Law*. Part II provides an analysis of his contracts opinions on the Massachusetts court, specifically those involving the objective theory of contract, the bargain theory of consideration, and damages, and the extent to which his theory of contract law can be found in those opinions. The Article ends with a brief conclusion.

YEARS, 1870–1882, at 246 (reprt. 2014).

10 Spanning from September to December 1882, Holmes's tenure at Harvard was very brief indeed. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 33 (1995).

11 YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 272.

12 DUXBURY, *supra* note 10, at 33. In 1899, Holmes was appointed chief justice. YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 272. In 1902 he was appointed to the United States Supreme Court. *Id.*

13 *See* Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 976 (1977) ("Since at least 1878 . . . Holmes had thought that a judicial position would give him the opportunity to shape American law directly through adjudication.").

I. BACKGROUND

Holmes was born in 1841 in Boston.[14] He graduated from Harvard College in 1861 and fought in the Civil War as a commissioned officer.[15] After the war, he attended Harvard Law School, graduating in 1866,[16] and then joined a small Boston law firm.[17] In the 1870s, he edited the *American Law Review* and published a series of articles in the journal.[18] He also edited the twelfth edition of Kent's *Commentaries on American Law*, which included updating the footnotes to Kent's treatment of contracts.[19] His work on the *Commentaries* led him to admire the common law[20] but, at the same time, become bothered by its disorder.[21]

Holmes was not alone in his distress of the common law's disordered state. Scholars of Holmes's generation viewed it as important to discover the common law's basic, governing principles,[22] and they set out to find an ordered scheme for the common law that would also be philosophically satisfactory.[23] Holmes joined in the exploration, setting out to give the common law a rational and scientific ordering.[24]

Initially, Holmes focused on classifying legal subjects from their most general concepts to their most specific propositions and exceptions, rather than focusing on what would later become the principal theme of *The Common Law*[25]—the idea that the law had moved away from early notions of equating liability with fault. As early as 1872, however, he showed flashes of that later theme. In an 1872 article in the *American Law Review*, he sought to distinguish civil liability from the breach of a legal duty, arguing that

14 YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 271.

15 *See id.*

16 *Id.*

17 *Id.*

18 Elliot, *supra* note 3, at 116.

19 *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 607–763 (Oliver Wendell Holmes, Jr., ed., Boston, Little, Brown, & Co., 12th ed. 1873) (1826); Elliot, *supra* note 3, at 116.

20 *See* Howe *Introduction*, *supra* note 6, at xvii.

21 *Id.* at xii–iv.

22 *Id.* at xiv.

23 *Id.* at xv; *see also* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 223 (1990) ("Once the formulary system crumbled, judges found it necessary to dwell on principles as a means of retaining the order in the common law previously provided by the forms of action.").

24 Howe *Introduction*, *supra* note 6, at xvi.

25 Note, *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46, 47 n.2 (1872) (authored by Holmes but published without attribution); *see also* Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123, 1123 n.7 (1975) ("Holmes's earliest legal articles deal with the division of the law into the proper categories.").

the word *duty* "imports the existence of an absolute wish on the part of the power imposing it to bring about a certain course of conduct, and to prevent the contrary," whereas civil liability often flowed from conduct that the law intended to allow at a certain price, such as a tax on a certain course of conduct.[26] Holmes wrote that "[l]iability to pay the fair price or value of an enjoyment, or to be compelled to restore or give up property belonging to another, is not a penalty; and this is the extent of the ordinary liability to a civil action at common law."[27] Holmes, although not ever focusing on the law of contracts in these early writings, did write in this article that this "is perhaps the fact with regard to some contracts, to pay money, for instance," and that "it is hard to say that there is a duty in strictness, and the rule is inserted in law books for the empirical reason . . . that it is applied by the courts and must therefore be known by professional men."[28] Thus, as early as 1872, Holmes was taking the position that there is not, in a strict sense, a "duty" to perform a contract, but merely a duty to pay damages in the event of nonperformance.

In the late 1870s, Holmes's emphasis in his writings shifted "from analytic classification to philosophical synthesis."[29] By 1880, Holmes had apparently come to believe that his initial efforts to devise a scientific and logical classification of the law had been a mistake.[30] In fact, in a review of the second edition of Christopher Columbus Langdell's contracts casebook, Holmes criticized Langdell's efforts to reconcile decisions that the opinions' authors had meant to be irreconcilable:

> Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote. It may be said without exaggeration that there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms. But in this word "consistency" we touch what some of us at least must deem the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps,

26 Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 790–91 (1931) (reprinting Holmes's article *The Law Magazine and Review*, 6 AM. L. REV. 593 (1872)).

27 *Id.* at 791.

28 *Id.*

29 G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 637 (1982).

30 Howe *Introduction*, *supra* note 6, at xxii.

> the greatest living theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together.[31]

But when Holmes looked at the current efforts at philosophical synthesis, he recoiled just the same. Many who sought the new order based the synthesis on Roman law, and for a time Holmes had given similar attention to it.[32] But before the end of the 1870s, Holmes became skeptical of importing Roman law into the common law, at least as Roman law had been interpreted by German jurists.[33] German interpretations of Roman law had it entangled with Kantianism and Hegelianism, and Holmes feared this influence on the common law.[34] He believed that those who sought to impose order on the common law accepted certain fallacies from Kant and Hegel, including that "no man may be looked upon as a means, but only as an end."[35] Holmes believed it was justifiable for persons to have a self-preference,[36] and he thus had a deep hostility to the Kantian metaphysics of morals.[37] And while the common law was experimental and inductive, Roman law, in contrast, was categorical and deductive."[38]

Holmes hoped to take material from his articles in the *American Law Review* and turn them into a book,[39] and he was given an opportunity that would incentivize him to do just that. He was asked to give the Lowell Lectures at the Lowell Institute in Boston, which would consist of twelve talks[40] in November and December 1880.[41] He accepted the offer and began work on what would become *The Common Law*,[42] setting out to provide a new

31 *Book Notices*, 14 AM. L. REV. 233, 233–34 (1880) (Oliver Wendell Holmes, Jr., anonymously reviewing C.C. LANGDELL, A SELECTION CASES ON THE LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (1879)). Holmes, in 1871, had been critical of Langdell's first edition of his casebook, though not to the extent he was in 1880. Holmes wrote: "It seems as if the desire to give the whole history of the doctrine has led to putting in some contradictory and unreasoned determinations which could have been spared." *Book Notices*, 5 AM. L. REV. 539, 540 (1871) (Oliver Wendell Holmes, Jr., anonymously reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (PART I) (1870)).

32 Howe *Introduction*, *supra* note 6, at xv.

33 *Id.*

34 *Id.*

35 *Id.* at xvi.

36 HOLMES, *supra* note 2, at 38.

37 Howe *Introduction*, *supra* note 6, at xxvi.

38 *Id.* at xvii.

39 SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 155 (1989).

40 NOVICK, *supra* note 39, at 157; Note, *supra* note 25, at 1123.

41 Note, *supra* note 25, at 1123.

42 NOVICK, *supra* note 39, at 157.

interpretation of the common law that might protect it from the influence of German metaphysics."[43]

Holmes believed that if the law should be based on policy rather than metaphysics, a legal jurist should seek to understand the historical roots of legal doctrines.[44] At the same time, however, Holmes's book would not be primarily a work in legal history.[45] Rather, he would use historical data to support his new interpretation of the common law.[46] In fact, Holmes wrote *The Common Law* to free the present generation from the past.[47] He believed that "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong,"[48] and to him, "at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference."[49]

Holmes wrote his contracts lectures for the Lowell Lectures in the summer and autumn of 1880.[50] While his other lectures were, in part, based on five articles he wrote for the *American Law Review* between 1876 and 1880,[51] his contracts lectures were not revisions of earlier published essays.[52] When he started preparing for the lectures, he had written nothing on the subject of ordinary contracts.[53]

In the mid-nineteenth century, English law lacked any philosophy regarding the principle of contractual obligation, with the common law forms of action enforcing promises for a variety of reasons under the writs of covenant (promises under seal), debt (promises given as part of a quid pro quo), and assumpsit (promises on which the plaintiff detrimentally relied).[54] The latter two, known as informal contracts, could be tied together by the requirement that a promise be supported by "consideration," but the closest that doctrine could come to a general theory of contractual obligation was that a promise was legally binding if there was either a benefit to the promisor

43 Howe *Introduction*, *supra* note 6, at xix.
44 *Id.*
45 *Id.* at xx.
46 *Id.*
47 Friedrich Kessler et al., Contracts: Cases and Materials 50 (3d ed. 1986).
48 Holmes, *supra* note 2, at 36.
49 *Id.* at 38.
50 Howe, *supra* note 9, at 223; Elliot, *supra* note 3, at 116.
51 Duxbury, *supra* note 10, at 33.
52 Howe *Introduction*, *supra* note 6, at xx; *see also* Novick, *supra* note 39, at 157 (noting that when Holmes was invited to give the Lowell Lectures, "[o]n the subject of ordinary contracts he had done nothing").
53 Novick, *supra* note 39, at 157.
54 Howe, *supra* note 9, at 226.

or a detriment to the promisee.[55] In the Court of Equity, the Roman law concept of *causa* was often invoked for the legal enforceability of a promise.[56]

As the forms of action declined in significance and law and equity increasingly assimilated, English jurists felt the need for an ordering theory—a fundamental principle of contractual obligation.[57] Lacking such a theory under English law, they turned to, and accepted as universal, the theory of contract espoused by Friedrich Carl von Savigny, the German jurist and historian who had interpreted Roman law.[58] For example, Sir Frederick Pollock's 1876 treatise, *Principles of Contract*, and Sir William Anson's 1879 treatise, *Principles of the English Law of Contract and of Agency in Its Relation to Contract*, were heavily influenced by Savigny.[59] And Savigny had argued that one of the elements of a contract was "an agreement of their wills."[60] As one commentator has noted, "the will theory of contract had become the prevailing understanding of the law, perhaps as early as 1806, and had influenced the subsequent development of the common law. It had found a solid, scrupulous expositor in Pollock, whose treatise on the law of contract was historically and philosophically sophisticated."[61]

Similarly, the prevailing view of contract's historical evolution came from the English historian Sir Henry James Sumner Maine, who argued contract law had evolved from formal contracts based on a party's status to consensual contracts.[62] This stance was inapposite to Holmes's view that the law had gone the other way, evolving from subjective to objective standards.[63]

The will theory was also contrary to what Holmes believed was the true basis for all legal obligation—public policy.[64] And by public policy, Holmes meant the consequences to society of a particular legal rule—

55 *Id.*

56 *Id.*

57 *Id.* at 226–27.

58 *Id.* at 225–26.

59 *Id.* at 225. Kent had previously suggested that the English doctrine of consideration was derived from the Roman law of *causa*. *Id.* at 227.

60 *Id.* at 225.

61 Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1714 (2000). Whether a subjective theory of contract in fact prevailed at this time is a matter of contention. *Compare* GILMORE, *supra* note 1, at 39 ("Holmes and his successors substituted an 'objectivist' approach to the theory of contract for the 'subjectivist' approach which the courts had . . . been following."), *with* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) (rejecting the argument that a subjective theory of contract prevailed prior to the late nineteenth century).

62 Kelley, *supra* note 61, at 1714.

63 *Id.*

64 *Id.* at 1695.

what was expedient for the community.[65] The will theory, with its focus on the subjective, diverted attention from what was the best rule for society. For example, if the organizing principles of the Anglo-American law of contracts were to follow the Hegelian mold, the law would be ignoring the realities of the marketplace.[66] Holmes later famously wrote:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[67]

Holmes wrote in *The Common Law* that "the making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."[68] He further wrote that "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals and judge parties by their conduct."[69] Holmes even handwrote in his own copy of his book that "[t]he whole doctrine of contract is formal & external."[70] As one commentator has noted, "[t]he subjective motives and the subjective intentions of the parties are thus banished from Holmes's theory."[71] Holmes's devotion to the objective theory was consistent with his

65 *Id.* at 1691, 1695.

66 Howe *Introduction*, *supra* note 6, at xvi.

67 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

68 HOLMES, *supra* note 2, at 240. Later, while on the United States Supreme Court, Holmes did acknowledge, however, that breaching a contract was "wrong." *See* Bailey v. Alabama, 219 U.S. 219, 246 (Holmes, J., dissenting) ("Breach[ing] of a legal contract without excuse is wrong . . . and if a State adds to civil liability a criminal liability . . . it simply intensifies the legal motive for doing right . . . .").

69 HOLMES, *supra* note 2, at 242.

70 *Id.* at 230 n.a; GILMORE, *supra* note 1, at 23 & 124 n.41.

71 Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 NEV. L.J. 112, 116 (2001); *see also* Robert L. Birmingham, *Holmes on 'Peerless':* Raffles v. Wichelhaus *and the Objective Theory of Contract*, 47 U. PITT. L. REV. 183, 197 (1985) ("Holmes wanted contract to depend only on externals, to be independent of mental things."). Professors Kelley and Birmingham are skeptical, however, of whether Holmes's theory did, in fact, succeed in completely banishing the subjective. *See* Kelley, *supra*, at 116. ("Holmes's purportedly purely objective theory seems to be just a confused form of the 'objective evidence of

complaint about "leav[ing] all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury,"[72] stating that "the sphere in which [a judge] is able to rule without taking [the jury's] opinion at all should be continually growing."[73]

Holmes reduced each of the elements of a contract to observable physical acts, eliminating almost all references to the parties' subjective intentions[74] and challenging Pollock's will theory of contract.[75] He even asserted that a contract was voidable only for failure of an express or implied-in-fact condition,[76] having in mind his desire to reject a subjective theory of contract.[77]

Holmes's devotion to the objective theory was particularly displayed with his treatment of the celebrated case of *Raffles v. Wichelhaus*, dealing with mutual mistake.[78] In *Raffles*, the court held that no contract formed when the parties agreed to the sale of cotton to be delivered on the ship *Peerless*, as there were two ships by that name leaving from the same port and each party meant a different ship.[79] Holmes argued that the true ground for the decision was not that the parties had each *meant* a different ship, "but that each *said* a different thing. The plaintiff offered one thing, the defendant expressed his assent to another."[80] If there was only one ship named *Peerless*, then a party who intended a different ship would be bound, but here there were two different things to which *Peerless* could refer.[81] Even here, however,

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internal states' will theory of contract formation," since "the relevant content of the communication, on Holmes's own theory, is what it says about the party's subjective intentions or subjective motives."); Birmingham, *supra*, at 197–98 ("Holmes' program to objectify contract law collapses to the extent reference depends on the intent to refer, and he might as well have talked immediately about what the parties meant."); *see also* P. S. ATIYAH, *Holmes and the Theory of Contract*, *in* ESSAYS ON CONTRACT 57, 67 (1986) (arguing that Holmes consistently prevaricated between an objective and subjective approach).

72 HOLMES, *supra* note 2, at 101.

73 *Id.* at 99.

74 Kelley, *supra* note 61, at 1727.

75 *Id.* at 1729.

76 *Id.* at 1730.

77 HOWE, *supra* note 9, at 246 n.60 (draft letter from Holmes to Harriman) ("I had this definitely in mind in what I said about void and voidable contracts in my Common Law . . . .").

78 Raffles v. Wichelhaus [1864] 159 Eng. Rep. 375; 2 H. & C. 906.

79 *Id.*

80 HOLMES, *supra* note 2, at 242 (emphasis added).

81 *Id.* In 1898, Holmes, in a letter to Pollock, wrote,

> [W]e don't care a damn for the meaning of the writer and . . . the only question is the meaning of the words but as words are not mathematic figures the question becomes what do those words mean in the mouth

Holmes did permit some inquiry into the subjective:

> So far from mistake having been the ground of decision, as mistake, its only bearing, as it seems to me, was to establish that neither party knew that he was understood by the other to use the word "Peerless" in the sense which the latter gave to it. In that event there would perhaps have been a binding contract, because, if a man uses a word to which he knows the other party attaches,

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> of the normal English speaker—our old friend the prudent man in a special garb—& therefore we let in evidence of circumstances. When we let in direct evidence of intent on the question of who or what is meant by a proper name, I still stick with my old explanation that by the *theory of speech* the proper name means only one person or thing though it may *idem sonans* with another proper name, & you let in intent not to find out what the speaker meant but what he said.

Letter from Oliver Wendell Holmes, Chief Justice, Mass. Supreme Judicial Court, to Sir Frederick Pollock (Dec. 9, 1898), *in* HOLMES-POLLOCK LETTERS 89, 90 (Mark DeWolfe Howe ed., 1942). In 1899, Holmes published *The Theory of Legal Interpretation*, and wrote,

> By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing named in every case. But under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words. *Licet idem sit nomen, tamen diversum est propter diversitatem personæ*. In such a case we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said. It is on this ground that there is no contract when the proper name used by one party means one ship, and that used by the other means another. The mere difference of intent as such is immaterial. In the use of common names and words a plea of different meaning from that adopted by the court would be bad, but here the parties have said different things and never have expressed a contract. If the donor, instead of saying "Blackacre," had said "my gold watch" and had owned more than one, inasmuch as the words, though singular, purport to describe any such watch belonging to the speaker, I suppose that no evidence of intention would be admitted. But I dare say that evidence of circumstances sufficient to show that the normal speaker of English would have meant a particular watch by the same words would be let in.

Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418–19 (1899) (citations omitted).

> and understands him to attach, a certain meaning, he may be held to that meaning, and not be allowed to give it any other.[82]

In addition to taking aim at the will theory of contract, Holmes took aim at the prevailing notion of consideration. The English jurists who followed Savigny's analysis viewed consideration as an Anglicized version of *causa*, and saw the parties' intentions to enter into a binding contract as the basis for contractual obligation; they had paid little attention to a bargain being a necessary element of contractual obligation.[83] Holmes believed that this ignored the basis for the English cases, a basis he believed was founded upon common business sense.[84] To Holmes, consideration was nothing more than a requirement that the parties have a bargained-for exchange.[85] He argued that this bargain theory showed, for example, why past consideration could not render a promise enforceable.[86]

To provide what he believed was a proper understanding of consideration, Holmes targeted the doctrine's prevailing definition, which was either a benefit to the promisor or a detriment to the promisee.[87] To prove that this definition could not be an accurate description of consideration, Holmes used a hypothetical based on the well-known case of *Coggs v. Bernard*.[88] The hypothetical involves a truckman who promises another man to carry a cask of brandy for him from Boston to Cambridge, either out of kindness or some other motive, in exchange for nothing more

82 HOLMES, *supra* note 2, at 242.

83 HOWE, *supra* note 9, at 240.

84 *Id.* at 241; *see also* HOLMES, *supra* note 2, at 215 (stating that the modern doctrine of consideration "has a foundation in good sense, or at least falls in with our common habits of thoughts").

85 *See* HOWE, *supra* note 9, at 241.

86 HOLMES, *supra* note 2, at 232.

87 *Id.* at 227. Whether Holmes's bargain theory of consideration was revolutionary is a matter of contention. *Compare* GILMORE, *supra* note 1, at 22 (referring to Holmes's bargain theory as "revolutionary doctrine"), *with* JOHN P. DAWSON, GIFTS AND PROMISES 197–98 (1980) ("[T]he concept of bargained-for exchange became an established feature of the English law of contract in the decades when English lawyers were first becoming aware that a law of contract existed. What happened about a century ago, when Holmes was 'inventing' bargain consideration, was that this central idea, which had been familiar in England for more than three hundred years, was overloaded with additional tasks for which it was wholly unsuited."); *id.* at 203 (stating that "the suggestion that bargain consideration was a 'revolutionary' invention by Justice Holmes which he first disclosed in 1881" is "more than somewhat surprising"). *See also* Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 369–70 (2007) (noting that the bargain theory of consideration can be traced to Christopher Columbus Langdell rather than Holmes).

88 Coggs v. Bernard [1703] 92 Eng. Rep. 107; 2 Ld. Raym. 909; HOLMES, *supra* note 2, at 227–29.

than the man's promise to deliver it to him.[89] Holmes argued that the older cases would hold there was no consideration because the delivery of the cask to the truckman was neither a benefit to the truckman nor a detriment to the other man.[90] The truckman (the promisor) did not benefit from the delivery to him because it would then mean he had to carry the goods, and the other man (the promisee) did not suffer a detriment from the delivery because it would mean he would have the goods carried for him.[91]

Holmes argued that this analysis did not withstand scrutiny, however.[92] He believed the attempt to explain the result with the benefit-detriment test did not work because it failed to recognize that, under that test, the detriment was to be determined at the point in time the consideration was provided.[93] Thus, the question was not whether the transaction, after being fully performed by both parties in the future, would prove to be an overall detriment to the promisee; it was whether, at the time the promisee provided the consideration, it was a detriment to the promisee. And when the other man delivered the cask to the truckman, delivery was a detriment to the other man in the strictest sense.[94] At the time of delivery, the other man had given up the privilege to not deliver the cask to the truckman, and at that point the benefit to him from the transaction was still in the future, as he had only received a promise of performance.[95] Thus, the benefit-detriment test would lead to the conclusion that the delivery of the cask was consideration for the promise to carry it, but such a result was contrary to the law.[96]

Holmes then set forth what he maintained was the proper rationale. He argued that whether a detriment to the promisee was consideration was based on whether the parties dealt with it on that footing.[97] For example, Holmes argued that a promise to pay a man money if he breaks his leg does not include consideration because breaking the leg was a condition to the payment, not consideration.[98]

Holmes provided examples of where he believed the court had applied the benefit-detriment test and come to the wrong result.[99] He first

89 HOLMES, *supra* note 2, at 227–28.
90 *Id.* at 228.
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at 228–29.
95 *Id.* at 229.
96 *Id.* at 228.
97 *Id.* at 229.
98 *Id.* at 229 n.8.
99 *Id.* at 229–30 & nn.9–10.

cited *Shadwell v. Shadwell*,[100] in which the court held that an uncle's promise to his nephew, made upon learning of his nephew's engagement, to pay the nephew "150l. yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas" was binding, as both perhaps inducing a detriment by the nephew (the nephew proceeding with the marriage or otherwise relying on the expected funds) and a benefit to the uncle (his nephew getting married).[101] Holmes obviously agreed with the dissent, believing that the letter's language could not fairly be interpreted as the uncle making the promise to induce his nephew to go forward with the wedding.[102] Holmes was also critical of *Burr v. Wilcox*,[103] in which the Massachusetts Supreme Judicial Court held that there was consideration for a promise to pay taxes that were not otherwise owed if the taxing authority reassessed the amount based on the portion of land being used by the promisor.[104] He was also critical of *Thomas v. Thomas*,[105] in which the court held that a promise to pay just £1 rent per year for a house and a promise to keep the premises in repair was consideration even though,[106] according to Holmes, the parties had "expressly stated other matters as the consideration."[107] He considered these as examples of courts having an "anxiety to sustain agreements."[108]

Holmes then turned toward determining how it was to be decided if the parties dealt with a detriment as consideration. Here, Holmes sought to walk a fine line. Adhering to objectivity, he sought to downplay reliance on motive, yet at the same time rely on it to differentiate consideration from a gratuitous promise subject to a condition. For example, Holmes acknowledged that "it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration."[109]

To do so, Holmes noted that motive must be assessed objectively and not based on motive "in actual fact."[110] By using the word "conventional,"

100 *Id.* at 229–30 n.9.

101 Shadwell v. Shadwell [1860] 142 Eng. Rep. 62, 68; 9 C.B. (N.S.) 159, 173.

102 HOLMES, *supra* note 2, at 229–30.

103 *Id.* at 229–30 n.9.

104 Burr v. Wilcox, 95 Mass. (13 Allen) 269, 272–73 (1866).

105 *See* HOLMES, *supra* note 2, at 229–30 n.10.

106 Thomas v. Thomas [1842] 114 Eng. Rep. 330, 332; 2 Q.B. 850, 855–56.

107 HOLMES, *supra* note 2, at 230 n.10.

108 *Id.* at 230.

109 *Id.*

110 *Id. See also* HOWE, *supra* note 9, at 241–42 ("Did Holmes, by making the existence or nonexistence of a contract dependent upon the reciprocal aim of the parties, allow

he likely suggested that what was relevant was manifested motivation, not actual motivation.[111] To further avoid an analysis into the subjective, Holmes argued that a bargain motive need not be the prevailing or chief motive.[112] He saw danger in a contrary rule, as a man's promise to paint a picture might be primarily based on his desire for fame, but his promise would be supported by consideration if given in exchange for a promise to pay money.[113]

Holmes thus saw consideration as a matter of form, writing that, "[i]n one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor's will. Consideration is a form as much as a seal."[114] His argument that consideration is merely a type of form was support for his attack on the will theory of contract,[115] and Holmes contrasted "form" as a determinate of legal enforceability with "consent" as a determinate of legal enforceability.[116] By explaining consideration as merely a type of form (though one having foundation in good sense), he sought to move legal enforceability away from a notion of consent. Holmes made this clear in a letter written in 1896:

> I think that in enlightened theory, which we now are ready for, all contracts are formal, and that a tacit assumption to the contrary sometimes has led Mr. Langdell astray. I had this definitely in view in what I said . . . in my Common Law . . . I will add a word of argument. I do not mean merely that the consideration of the simple contract is as much a form as a seal, but that in the nature of a sound system of law (which deals mainly with externals) the

subjectivism, in the end, to control his theory of contract? I take it that he did not. Though the lecture on elements did not itself contain any very clear statement that courts should be less interested in ascertaining the actual inducing impulse behind each promise than in discovering what manifested spirit motivated the agreement, the last of the contract lectures made it quite clear that he saw the objective standard as no less controlling in the law of contract than it was in the law of torts and of crime.").

111 HOWE, *supra* note 9, at 242. *See also* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1755 (2000) ("By the term 'conventional,' Holmes apparently meant a formal expression whose meaning and significance is artificially determined, like a bidding convention in the game of bridge. Therefore, if the parties deliberately adopted the convention (form) of a bargain, the law would enforce their promises as though they had deliberately adopted the convention (form) of the seal."); Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1833 (1983) ("'Conventional' referred to the terms of the agreement: consideration thus became a form, and a kind of objectivity was served.").

112 HOLMES, *supra* note 2, at 230.

113 *See id.*

114 *Id.* at 215.

115 HOWE, *supra* note 9, at 232.

116 *See id.*

> making of a contract must be a question of form, even if the details of our law should be changed. There never was a more unfortunate expression used than "meeting of the minds." It does not matter in the slightest degree whether minds meet or not. If the external expression on the one side and the other coincide, the fact that one party meant one thing and the other another does not prevent the making of the contract.[117]

He believed, however, that "[a] consideration may be given and accepted, in fact, solely for the purpose of making a promise binding."[118] He supposed, therefore, that a truckman's promise to carry a cask would be binding even if the owner knew the truckman was willing to carry it without any bargain, provided the truckman stated he would carry it in consideration of the owner delivering him the cask and letting him carry it.[119] Framing the agreement in the form of a bargain was sufficient: "The promise is offered in terms as the inducement for the delivery, and the delivery is made in terms as the inducement for the promise."[120] Thus, as noted by one scholar, "[i]ronically, as the bargain theory of consideration was actually elaborated by the classical school, it could be satisfied even though no bargain had been made. Under the doctrine of nominal consideration, embraced by Holmes . . . the *form* of a bargain would suffice to make a promise enforceable."[121]

Holmes's belief that consideration should play the role of a formality—even to the point of accepting nominal consideration as a basis for enforceability—was likely based on his desire to move from the subjective to the objective. In discussing the truckman example, he stated that "[i]t may be very probable that the delivery would have been made without a promise, and that the promise would have been made in gratuitous form if it had not been accepted upon consideration; but *this is only a guess after all*."[122] For example, Holmes believed that an analysis into motive was also off limits when an offeree performed the act necessary to claim a reward, and thus a finding that the offeree was in fact actuated by motives other than claiming the reward would be "beside the mark."[123] For Holmes, it was all about the expressed terms of the transaction: "It would seem therefore that the same transaction in substance and spirit might be voluntary or obligatory, according to the *form of words* which the parties chose to employ for the

117 *Id.* at 232–33 (corrected draft of letter dated Jan. 4, 1896).

118 HOLMES, *supra* note 2, at 230.

119 *Id.* at 231.

120 *Id.*

121 Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112–13 (1984).

122 HOLMES, *supra* note 2, at 231 (emphasis added).

123 *Id.* at 231 n.13.

purpose of affecting the legal consequences."[124]

Holmes then shifted toward supporting his theory that contract law was not about moral fault by discussing the proper meaning of "promise." He argued that a person could promise—in a legal sense—that an event outside of his control would happen, taking issue with the contrary definition in the Indian Contract Act of 1872,[125] which had been acclaimed by both Pollock and Anson.[126] The Act had defined "promise" as requiring a person to signify "his willingness to do or to abstain from doing anything," along with the promisee accepting the proposal. [127] Holmes took issue with this definition, believing that it confined contract law to promises relating to the promisor's conduct,[128] and thus supporting a theory that a promisor cannot be held accountable for the nonoccurrence of events that were not his fault. Instead, Holmes argued that "a promise . . . is simply an accepted assurance that a certain event or state of things shall come to pass."[129] Years later he wrote, "no contract depends for its performance solely on the will of the contractor, and that apart from special objections to wagers a man may contract for a future event that is wholly outside of his power, but the non-occurrence of which will be a breach, none the less."[130] Holmes also criticized Langdell's argument that an exchange of promises subject simply to whether a past event had occurred was not consideration for each other since only one person, in fact, promised to perform.[131] This was consistent with Holmes's apparent belief that parties could agree to assume whatever risks they wanted. Presumably, his point was that the law did not base the enforcement of promises on moral obligation, noting that in contrast to the legal world, "[i]n the moral world it may be that the obligation of a promise is confined to what lies within reach of the will of the promisor . . . ."[132]

Holmes also emphasized that, in general, a promisor was free to break a contract and would only be required to pay damages rather than specifically perform.[133] Holmes wrote 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."[134] To Holmes, a contract was

124 *Id.* at 232 (emphasis added).
125 *Id.* at 233–35.
126 Howe, *supra* note 9, at 234.
127 Holmes, *supra* note 2, at 233–34.
128 *Id.* at 234.
129 *Id.* at 235.
130 Howe, *supra* note 9, at 237 (quoting letter from Holmes to Cook, Feb. 25, 1919).
131 Holmes, *supra* note 2, at 239.
132 *Id.* at 234.
133 *Id.* at 236.
134 *Id.*

simply an agreement to assume risks.[135]

He further supported his argument that a breach of contract did not necessarily involve fault by pointing to the rule from *Hadley v. Baxendale*,[136] arguing that if a breach was viewed as a tort then any loss that was foreseeable before breach (rather than foreseeable at the time of contract formation) would be recoverable.[137] Holmes even noted support for the so-called tacit agreement test under which foreseeability at the time of contract formation was insufficient; it must appear that the defendant, at the time of contract formation, tacitly agreed to liability for the loss.[138] Holmes believed that "[w]hat consequences of the breach are assumed is . . . a matter of construction, having regard to the circumstances under which the contract is made."[139] Holmes viewed damages as simply being a part of construing the contract's terms—determining what the parties agreed to or what they would have agreed to had they thought about the matter.[140] To Holmes, the "true theory of contract under the common law" was that all of the rights and duties—including the duty to pay damages—were based on a construction of the agreement[141] and what risks the parties had agreed to assume. Thus, "[i]n the Holmesian revision foreseeability was not enough; there must have been a deliberate and conscious assumption of the risk by the contract-breaker . . . ."[142] So, while Holmes believed that contract

135 *Id.*

136 *See* Hadley v. Baxendale [1854] 156 Eng. Rep. 145, 151; 9 Exch. 341, 354 ("Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, *at the time they made the contract*, as the probable result of the breach of it." (emphasis added)).

137 HOLMES, *supra* note 2, at 236.

138 *Id. See also* Robert M. Lloyd & Nicholas J. Chase, *Recovery of Damages for Lost Profits: The Historical Development*, 18 U. PA. J. BUS. L. 315, 357–59 (2016) ("Under this test, a party seeking to recover lost profits (or any other consequential damages) had to do more than simply show that the defendant had notice of the special circumstances giving rise to the damages. They had to show that the defendant had manifested (expressly or impliedly) an intent to assume the risk of those damages." (footnote omitted)).

139 HOLMES, *supra* note 2, at 237.

140 *Id.*

141 *Id.* at 237–38.

142 GILMORE, *supra* note 1, at 58. The tacit-agreement test predated Holmes's argument for it in *The Common Law*. *See* Lloyd & Chase, *supra* note 138, at 358 ("This rule apparently originated in England shortly after *Hadley*. Most accounts trace it back to *B.C. Saw-Mill Co. v. Nettleship*, an English opinion of 1868." (footnotes omitted)); Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 349 (1998) ("Holmes drew this test from a series of English cases that followed swiftly upon *Hadley* . . . ."). HOLMES, *supra* note 2, at 237 (citing British

law should be based on policy and should also "correspond with the actual feelings and demands of the community, whether right or wrong,"[143] this apparently meant limiting liability for damages to those risks to which a party had expressly or tacitly assented.

Grant Gilmore wrote that Holmes's theory of contract "seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything," and because the ideal was unattainable, "[l]iability . . . was . . . to be severely limited."[144] Gilmore believed that the bargain theory of consideration was "a tool for narrowing the range of contractual liability," and no matter how much a promisee detrimentally relied on a promise, "[u]nless the formalities were accomplished, there could be no contract and, consequently, no liability."[145] Gilmore also argued that the objective theory—which Holmes used as support for a move away from moral culpability as a basis for liability—would not only make former issues of fact now issues of law,[146] but would lead to a theory of absolute liability that discouraged excuses for nonperformance.[147] This, in turn, Gilmore argued, made Holmes's restrictive approach to damages necessary to ameliorate the harshness of absolute liability.[148] In Part II, attention will be paid to whether there is support in Holmes's opinions for Gilmore's argument that Holmes's theory of contract was "dedicated to the proposition that, ideally, no one should be liable to anyone for anything."[149]

Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. Ltd. v. Nettleship [1868] L.R. 3 C.P. 499). But Holmes's use of the test in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 545 (1903), made the test popular in the U.S. for a short time. *See* Larry T. Garvin, Globe Refining Co. v. Landa Cotton Oil Co. *and the Dark Side of Reputation*, 12 Nev. L.J. 659, 660 (2012) ("This new test made some immediate headway, but soon fell under formidable and almost universal attack from such sources as *Williston on Contracts*, the two Restatements of Contracts, and Article Two of the Uniform Commercial Code. The courts, after gingerly stepping in that direction, turned tail and ran, so that only a few jurisdictions now employ *Globe Refining*'s tacit agreement test. It was, by any measure, a resounding failure." (footnotes omitted)).

143 Holmes, *supra* note 2, at 36.

144 Gilmore, *supra* note 1, at 15.

145 *Id.* at 23.

146 *Id.* at 46–47.

147 *Id.* at 48–49 & n.99.

148 *Id.* at 54.

149 *Id.* at 15 (citations omitted).

II. *THE COMMON LAW* AT THE SUPREME JUDICIAL COURT

During Holmes's twenty-year tenure on the Massachusetts Supreme Judicial Court from 1882 to 1902, he would have ample opportunity to implement his general theory of contract law as set forth in *The Common Law*, including the objective theory of contract and the bargain theory of consideration. And as will be shown below, Holmes consistently emphasized in his opinions his themes from the contracts lectures in *The Common Law*, though it will also be shown that Gilmore's assertion that Holmes's goal was that "no one should be liable to anyone for anything" lacks support.

A. *Objective Theory of Contract*

With respect to the objective theory of contract, Holmes repeatedly stressed that contract law duties arise as a result of a person's overt acts and not as a result of what they intended.[150] He wrote that "[i]t is . . . immaterial what the plaintiff may have intended so long as it was not disclosed"[151] and "[i]f, without the plaintiff's knowledge, [the defendant] did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts."[152] What was important was not whether the plaintiff "inwardly assented," "but whether the reasonable import of her overt acts was assent to its terms."[153]

In a case involving deceit, rather than contract, Holmes explained why he supported the objective theory, asserting it was based on "one of the first principles of social intercourse":

> When a man makes . . . a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to known [sic] what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate the

150 *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 274–75 (1993) (noting that "[i]n several decisions he attempted to strip the process of contract formation of its subjective elements and apply objective standards").

151 Norton v. Brookline, 63 N.E. 930, 931 (Mass. 1902).

152 Mansfield v. Hodgdon, 17 N.E. 544, 547 (Mass. 1888).

153 Gallagher v. Hathaway Mfg. Co., 48 N.E. 844, 845 (Mass. 1897). Holmes, however, in the same opinion, wrote: "But there is a further difficulty from which we cannot escape. Whether the plaintiff understood, and by implication agreed . . . ." *Id.*

> natural consequences of his act, as well in the conduct of others as in mechanical results. . . . [A] defendant cannot be heard to say that for some reason he had in his mind and intended to express by the words something different from what the words appear to mean and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.
>
> . . . .
>
> [A] man takes the risk of the interpretation of his words as it may afterwards be settled by the court.[154]

As is shown below, Holmes faithfully applied his objective theory to both contract formation and contract interpretation even though (as will also be shown) there were important limits to his use of the theory. The first Subsection below analyzes Holmes's decisions involving contract formation and the issue of assent. The second Subsection analyzes Holmes's decisions involving contract interpretation. The third Subsection is a brief conclusion regarding his use of the objective theory.

i. Contract Formation and the Issue of Assent

At first blush, Holmes's decisions involving contract formation and the issue of assent seem to bear little connection to one another. They range from such disparate issues as whether services were provided gratuitously, when a revocation is effective, when an acceptance is effective, whether silence can be an acceptance, and when a contract is void or voidable for duress. But a close inspection of these decisions reveals a common thread—the appropriate rule for each issue follows from an application of the objective theory of contract.

For example, Holmes held that a defendant could be held to have entered into a contract to pay for services even if he believed they were provided gratuitously as long as a reasonable person would have understood they were provided with an expectation of compensation:

> [I]t would be enough to make a contract if the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love. . . . *Of course it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts.* Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what

154 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042–43 (Mass. 1895).

> he knew that such was the expectation, he would be bound by accepting the services.[155]

In *Brauer v. Shaw*, he applied the objective theory to contract formation in refusing to find that a revocation of an offer is effective prior to receipt by the offeree.[156] The defendants had made an offer to the plaintiffs by telegram at 11:30 a.m., which was received by the plaintiffs at 12:16 p.m., and the plaintiffs telegraphed an acceptance of the offer at 12:28 p.m., which was received by the defendants at 1:20 p.m.[157] At 1:00 p.m., the defendants sent a telegraph revoking their offer, the revocation being received by the plaintiffs at 1:43 p.m.[158] Holmes held that the offer was still outstanding at the time it was accepted, and thus a contract formed,[159] writing:

> It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it has been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. *Knowingly to lead a person reasonably to suppose that you offer, and to offer, are the same thing. . . . It would be monstrous to allow an inconsistent act of the offerer [sic], not known or brought to the notice of the offeree, to affect the making of the contract*; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking.[160]

Holmes also rejected Langdell's idea that an acceptance would only be effective if such acceptance was communicated to the offeror, holding that communication (and hence a subjective meeting of the minds) was unnecessary when there was an understanding that no communication was necessary:

> But it is objected further that acceptance of the guaranty, or, more strictly, the furnishing of the consideration by the plaintiffs, was not communicated to the defendant. We are of opinion, as

155 Spencer v. Spencer, 63 N.E. 947, 948 (Mass. 1902) (emphasis added) (citations omitted).

156 Brauer v. Shaw, 46 N.E. 617, 617 (Mass. 1897).

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 617–18 (emphasis added) (citations omitted); *see also* WHITE, *supra* note 150, at 276–77 (discussing *Brauer* and concluding, "[h]ere again the question of contract formation was analyzed by reference to external evidence and objective standards").

> we have said, that it would have been open to the jury to find that the guaranty was signed on the understanding that, if it was signed, the plaintiffs would sign. *If so, when the understanding was carried out it was not necessary to notify the defendant.* He already had all the notice he needed, and to send him notice would have been merely a formal act, which is not required, either by custom, or by the theory of contract. *There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract, although such a necessity might be inferred from some of the language in [listing cases]; Langd. Cas. Cont. § 2 et seq.*[161]

Despite Holmes's emphasis on overt acts, he was willing to find that silence operated as an acceptance, provided that a reasonable person in the offeror's position would construe it as such, even if the offeree did not intend to accept.[162] In *Hobbs v. Massasoit Whip Co.*, the plaintiff sent eel skins to the defendant (a whip manufacturer), who kept them for some months without ever telling the plaintiff that it did not want them, and they were then destroyed.[163] Holmes held that there was sufficient evidence to support a finding of acceptance by silence, relying on the fact the plaintiff had sent eel skins to the defendant four or five times before and each time they had been accepted and paid for.[164] Holmes believed that it was fair for the plaintiff to assume that if the eel skins were fit for the defendant's business, as the jury found they were, the defendant would accept them.[165] Thus,

> sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. *The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party,-a principle sometimes lost sight of in the cases.*[166]

161 Lennox v. Murphy, 50 N.E. 644, 645–46 (Mass. 1898) (emphases added) (citations omitted).

162 *See* Wheeler v. Klaholt, 59 N.E. 756, 756–57 (Mass. 1901) (holding that the jury was warranted in finding that an offeree's retention of goods for an unreasonable time constituted an acceptance, when the goods were in the offeree's possession with their assent); Hobbs v. Massasoit Whip Co., 33 N.E. 495, 495 (Mass. 1893) (holding that there was sufficient evidence that offeree accepted through silence when parties had a previous course of dealing).

163 *Hobbs*, 33 N.E. at 495.

164 *Id.*

165 *Id.*

166 *Id. See also* WHITE, *supra* note 150, at 276 (discussing *Hobbs*, stating, "[t]he *Hobbs* case was

Similarly, in *Earle v. Angell*, when the defendant's testatrix had promised to pay the plaintiff $500 if the plaintiff agreed to come to her funeral and the plaintiff arguably made a counteroffer, offering to come if alive and notified in time, Holmes held there was sufficient evidence that the decedent accepted the counteroffer: "It is suggested that the acceptance varied from the terms of the offer; but the parties were face to face, and separated seemingly agreed. The jury well might have found, if that was the only question, that the variation, if any, was assented to on the spot."[167]

Holmes would not, however, infer a promise when the evidence did not support it. For example, in *Merriam v. Goss*, he refused to infer a promise by the plaintiff (who sought to redeem a mortgage) to pay for improvements to land made by one of the defendants (a prior mortgagee in possession).[168] All that was shown was the plaintiff knew the defendant was making the improvements and made no objection, when at the time both parties understood he was making them on his own account, anticipating the release of the equity of redemption to him.[169] In *Graham v. Stanton*, the plaintiff sought compensation for household services she provided for the defendant's intestate after being taken in by him from an orphanage and treated as his adopted daughter.[170] Holmes wrote that

> [i]t would be a strong thing to say that an actual contract to pay for services could be inferred from the conduct of one who takes a child into his household under the name of daughter. The fact of his calling her so implies that he is not purporting to enter into relations with her on a business footing.[171]

There was a limit, however, to Holmes's use of the objective theory with respect to the issue of assent. Holmes would not apply the objective theory to a situation in which a party was physically compelled to manifest assent, even if such compulsion was done by a third party and the other party had no reason to know of it. Holmes wrote:

> No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act, and if the signature had not been her act, for whatever reason, no contract would have been made,

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another example, for Holmes, of the objective theory of contract formation. . . . The issue was . . . not the 'actual state of mind' of the whip manufacturer, but his conduct") (emphasis added) (citations omitted).

167 Earle v. Angell, 32 N.E. 164, 164 (Mass. 1892).

168 Merriam v. Goss, 28 N.E. 449, 451 (Mass. 1885).

169 *Id.*

170 Graham v. Stanton, 58 N.E. 1023, 1023 (Mass. 1901).

171 *Id.* (citations omitted).

> whether the plaintiff knew the facts or not.[172]

Also, with respect to duress by threats, Holmes's devotion to objectivity did not prevent him from rejecting the rule that "duress must be such as would overcome a person of ordinary courage."[173] Holmes wrote that

> the dictum referred to is taken literally in an attempt to apply an external standard of conduct in the wrong place. If a party obtains a contract by creating a motive from which the other party ought to be free, and which, in fact, is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear. Even in torts, the especial sphere of external standards, if it is shown that in fact the defendant, by reason of superior insight, contemplated a result which the man of ordinary prudence would not have foreseen, he is answerable for it; and, in dealing with contributory negligence, the personal limitations of the plaintiff, as a child, a blind man, or a foreigner unused to our ways, always are taken into account. Late American writers repudiate the notion of a general external measure for duress, and we agree with them.[174]

But short of physical compulsion, if the other party did not know or have reason to know that a third-party's wrongdoing induced the party's manifestation of assent, the manifestation was effective under the objective theory: "A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant."[175]

ii. Contract Interpretation

Like Holmes's decisions involving assent, at first blush Holmes's decisions involving contract interpretation seem to bear little connection to one another. They range from such disparate issues as the meaning of words, the parol evidence rule, warranties, gaps in contracts, the duty to read rule, and mutual mistake. But again, a close inspection reveals a common thread—the appropriate rule for each issue follows from an application of the objective theory of contract.

172 Fairbanks v. Snow, 13 N.E. 596, 598 (Mass. 1887).
173 Silsbee v. Webber, 50 N.E. 555, 556 (Mass. 1898).
174 *Id.* (citations omitted).
175 *Fairbanks*, 13 N.E. at 598–99.

With respect to the meaning of words, Holmes wrote that "in the case of . . . contracts . . . we ask what the words used would mean in the mouth of one writing the language in a normal way, under the circumstances."[176]

> But evidence of actual intent is not admissible to change the construction of written instruments if otherwise plain, for the reason that what a court must look for is not what the parties had in their minds, but the meaning of the words according to the general usage of speech. Reformation, not construction, is the means for meeting such a mistake as supposed. When it is said that the intent of the parties . . . is the lodestar, etc., all that is meant is that in interpreting a particular sentence you may look at the general scheme, and the habit of language disclosed by the instrument, and may ascertain the facts under which the party acted, to qualify what might be the result of the particular words if they were taken alone.[177]

Holmes's application of the objective theory remained firm. He even rejected the idea that a word whose meaning was plain could be given a different meaning by an extrinsic agreement between the parties or as a result of a mutual mistake. He feared that, otherwise, the risks to predictability of contractual obligation were too great:

> [Y]ou cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would offer too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church. As an artificial construction cannot be given to plain words by express agreement, the same rule is applied when there is a mutual mistake, not apparent on the face of the instrument.[178]

Holmes also wrote:

> [T]o give evidence requiring words to receive an abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted directly by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed. When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal

176 Honsucle v. Ruffin, 52 N.E. 538, 538 (Mass. 1899).

177 Smith v. Abington Sav. Bank, 50 N.E. 545, 546 (Mass. 1898) (citation omitted).

178 Goode v. Riley, 28 N.E. 228, 228 (Mass. 1891) (citation omitted).

> speaker, situated as the party using the language was situated; "but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle." "If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything." . . . The case of Keller v. Webb, 125 Mass. 88, goes a good way, but was not intended, we think, to qualify the principle settled by the earlier and later Massachusetts cases, some of which we have cited. In that case evidence of conversation was admitted to show that "casks," in a written contract, meant casks of a certain weight. It was assumed that the contract meant casks of some certain weight, but did not state what, and thus that the evidence supplemented, without altering, the written words.[179]

Similarly, Holmes followed the parol evidence rule, refusing to consider evidence that contradicted the written contract.[180] He wrote:

> Of course, parties who have made a written contract may change it 30 seconds after it is made, if they want to. But, on the other hand, they may talk it over, and attempt to explain and construe it, without any intent to modify it, or make a change; and if the talk takes place soon after the writing is signed, and at the same interview, the latter kind of conversation is the more likely of the two. Perhaps, in the absence of express evidence, it would be presumed, certainly it is open to the tribunal of fact to find, that the latter, rather than the former, was what took place. Upon such a finding, the conversation becomes inadmissible, so far as it

179 Violette v. Rice, 53 N.E. 144, 144–45 (Mass. 1899) (citations omitted).

180 *See* Henry Wood's Sons Co. v. Schaefer, 53 N.E. 881, 882 (Mass. 1899) ("[I]f the defendant's counsel, contrary to the plain meaning of the defendant's evidence, wanted to contend that Wood's agreement was an agreement by the company not to enforce the note according to its tenor, such an agreement, made at the time the note was delivered, is in flat contradiction of the instrument, and cannot be proved." (citations omitted)); Clemons Elec. Mfg. Co. v. Walton, 53 N.E. 820, 821 (Mass. 1899) ("What the defendant was trying to do looks much more like an effort to override the promise to pay a certain sum, contained in the notes, by oral evidence that the real undertaking was to pay an amount equal to the claims. This was in flat contradiction of the instruments, and could not be done."); Hall v. First Nat'l Bank, 53 N.E. 154, 154–55 (Mass. 1899) ("The understanding alleged in the bill that the bank would renew the plaintiff's notes until such time as the improvement in the business situation should enable the plaintiff to proceed in business without such assistance, is an understanding which directly contradicts the promise expressed on the face of the notes; for whereas, the promise expressed in the notes is a promise to pay money at the maturity of the instrument, the contemporary understanding cuts it down to a promise to give a new promise to pay. It is not denied, and, on the contrary, rather is implied, in the bill that the agreement to renew was not in writing. If so, it could not be proved in contradiction of any written contract . . . ." (citations omitted)).

> attempts to modify what otherwise would be the construction or effect of the writing.[181]

Holmes was also reluctant to find that statements of opinion about the quality of goods would give rise to a warranty, even when the statement was allegedly made in bad faith, for fear that disappointed buyers would often remember things differently than they had actually been:

> The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as "seller's statements," apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which "it always has been understood, the world over, that such statements are to be distrusted," . . . . [T]he rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. . . .
>
> . . . . If [the defendant] went no further than to say that the bond was an "A No. 1" bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable, under the circumstances of this case, even if he made the statement in bad faith. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed.[182]

Holmes also used the objective theory to resolve matters the parties likely never considered, as was shown by *Drummond v. Crane*, in which the plaintiff sued the decedent's administrator and administratrix for breaching a contract to buy water for ten years.[183] The decedent had died shortly after entering into the contract, and the issue was whether the court should infer that the promise was only to be performed as long as the decedent lived.[184] The defendants relied on the fact that

> as the plaintiff knew, the reason why [the decedent] wanted the water was that he might use it in his business; that his business was the manufacture of woolens under a lease and business

181 Dixon v. Williamson, 52 N.E. 1067, 1067 (Mass. 1899) (citations omitted).
182 Deming v. Darling, 20 N.E. 107, 108–09 (Mass. 1889) (citations omitted).
183 Drummond v. Crane, 35 N.E. 90, 91 (Mass. 1893).
184 *Id.* at 91.

> arrangement with the Monument Mills; that by the terms of his lease the mills had a right to terminate it, and did terminate it in fact, within three months of [the decedent's] death. The plaintiff knew the kind of business in which [the decedent] was engaged, and that it was carried on under some arrangement with the Monument Mills, but did not know what the arrangement was.[185]

Holmes, however, did not consider these facts particularly important. Rather, he believed what was more important was the plaintiff's manifested motive for extracting the promise to buy from the decedent:

> [T]he motives which induced [the decedent] to make the promise are not so important an aid in determining its scope as the object which the plaintiff manifestly had in exacting it. It was perfectly plain that the reason why the plaintiff required the promise as a condition of making his investment and building the reservoir was that he might have some security for returns. The plaintiff committed himself absolutely to the investment, whether [the decedent] lived or died. Obviously, the security which he wanted was one equally independent of [the decedent]'s life. From the point of view of the plaintiff, the contract was like a guaranty, upon executed consideration, that he should have so much business for a certain time, which, of course, would run on whether the guarantor lived or died.[186]

Holmes then made it clear that it was irrelevant that the decedent likely never gave the chance of his dying within ten years any thought. Had that been the case, the decedent "might have hesitated if the present aspect of his contract had been called to his attention. But the circumstances and the words used gave notice of the extent of the obligation which he was entering into . . . ."[187]

A case similar to *Drummond* was *Rotch v. French*, in which the plaintiffs sued for breach of a guaranty to pay a dividend of six percent per annum on stock in the corporation of French, Potter & Wilson.[188] One of the issues was whether there was sufficient evidence to support an agreement to pay the dividends for the life of the corporation, even after the death of the stockholders.[189] Suspecting that neither the stockholders nor the defendant had thought about the matter, Holmes wrote:

> Probably neither party thought the transaction out to its logical

185 *Id.*
186 *Id.* (citations omitted).
187 *Id.*
188 Rotch v. French, 56 N.E. 893, 893 (Mass. 1900).
189 *Id.* at 893–94.

> end, or put to himself definitely the question how long the guaranty was to last. . . . We must decide, therefore, by drawing the line as we think most in accordance with the exact words used, and with what the parties would have been likely to agree upon if they had thought and talked about the matter.[190]

To do this, Holmes employed the objective theory, writing that

> [t]he meaning of the words might vary according to circumstances, and the interpretation of them is a question for the instructed imagination, taking the facts just as they are. When a guaranty is asked for and given in the way in which this was, what is it reasonable to suppose that a normal business man means?[191]

In providing an answer, Holmes wrote that "[w]e do not pretend to think that our conclusion is the only one possible. . . . But we think that a line must be drawn somewhere, and that it falls most naturally where we have drawn it."[192]

Holmes, although a staunch advocate of the objective theory, did not believe that the dictionary meaning of words should prevail over the commercial understanding. For example, he wrote:

> [I]f the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context or the subject-matter or the circumstances the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the contract . . . .[193]

This was also shown by his discussion of contracts for the sale of specific goods:

> [W]hen the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manilla sugar" in Gossler v. Eagle Sugar Refinery, 103 Mass. 331.
>
> But in many cases like the present [the sale of a cargo of ice of 360 tons] *the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more.* How much more may depend upon circumstances, and at times the whole question may be for the jury. *If a very vague, generic word is used, like "ice," which, taken literally, may be satisfied by a worthless article,*

190 *Id.* at 894.
191 *Id.*
192 *Id.*
193 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042–43 (Mass. 1895).

> *and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary*, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed.[194]

In a case involving defamation, Holmes made the importance of context clear:

> In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is, how may his meaning legitimately be ascertained? Obviously, in the first place, from the language used; and, in construing and applying the language, the circumstances under which it was written, and the facts to which it relates, are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it.[195]

Consistent with the objective theory, Holmes applied the duty to read rule, writing that

> [i]f a man signs a . . . contract and the other side is not privy to any improper motive for his signing it, such as may be created by fraud, duress, or mistake as to its contents, he is bound, whatever his voluntary ignorance or his involuntary misinterpretation of its words.[196]

In another case he wrote:

> The plaintiff accepted the defendant's rules by signing the contract, whether she knew them or not. . . . The plaintiff expressly adopted any rules which there might be within the reasonable import of the name, even though not set out in the contract, and, if she adopted them in the dark, she was bound none the less.[197]

And in another case Holmes held it was error for a trial court to instruct a jury that it was necessary for a party to have signed a release with knowledge

194 Murchie v. Cornell, 29 N.E. 207, 207 (Mass. 1891) (emphasis added) (citations omitted).
195 Hanson v. Globe Newspaper Co., 34 N.E. 462, 463 (Mass. 1893).
196 Clark v. City of Boston, 60 N.E. 793, 793 (Mass. 1901).
197 Violette v. Rice, 53 N.E. 144, 144 (Mass. 1899).

of its contents for it to be effective: "It is contrary to first principles to allow a person whose overt acts have expressed assent to deny their effect, on the ground of an undisclosed state of his mind, for which no one else was responsible."[198] Thus, Holmes reiterated his view that the subjective mindset of the parties bore no relevance on enforceability when their overt actions affirmed assent.

While Holmes applied the duty to read rule as an adjunct of the objective theory, he refused to apply it when the defendant was aware that the plaintiff misunderstood its terms and remained silent, finding such a failure to disclose was fraud, irrespective of any corrupt motive or intent. Holmes wrote, with respect to a particular plaintiff who could not read:

> If the petitioner was ignorant of the contents of the instrument prepared by the defendant, and was known to be so by the defendant's agents, and if he expressly declared, in good faith, that he set his mark to it as a receipt for the damage to his land alone, and the defendant's agents thereupon accepted the instrument in silence, or with words importing an assent to that declaration, such conduct would be a representation that the instrument was what it was signed for. And a representation of what is known to be false may be none the less a fraud that it is made without any corrupt motive or intent.[199]

Holmes then relied on the objective theory to ultimately hold that a defendant's motive in misleading the plaintiff as to the contents of the writing through a different oral arrangement was irrelevant:

> [I]f the conduct of the defendant's agents was calculated to lead the petitioner to suppose that the money was paid for the land alone, and did lead him to suppose so, then it was paid for the land alone. To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words.[200]

Holmes also applied the doctrine of reformation to reform a writing when, as a result of a mutual mistake, the terms did not accurately reflect the parties' deal, rejecting the notion that the formality of the written instrument precluded relief:

> Since, then, the instrument must be construed to mean what

198 Rosenberg v. Doe, 15 N.E. 510, 512 (Mass. 1888).

199 O'Donnell v. Town of Clinton, 14 N.E. 747, 750 (Mass. 1888) (citations omitted).

200 *Id.* at 751.

> the words would mean if there were no mistake, evidence of the mistake shows that neither party has purported or been understood to express assent to the conveyance as it stands. It is not necessarily fatal that the evidence is parol which is relied on to show that the contract was not made as it purports on the face of the document to have been made. *There was a time when a man was bound if his seal was affixed to an instrument by a stranger and against his will. But the notion that one who has gone through certain forms of this sort, even in his own person, is bound always and unconditionally, gave way long ago to more delicate conceptions.*
>
> So it is settled, at least in equity, that this particular kind of parol evidence that is to say, evidence of mutual mistake as to the meaning of the words used is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing.[201]

Holmes also had the opportunity to apply the objective theory to a mutual mistake case similar to *Raffles v. Wichelhaus*. In *Mead v. Phenix Insurance Co.*, the plaintiff had applied for insurance to cover grain "contained in the elevator building of the Ogdensburg Terminal Company at Ogdensburg, N.Y."[202] There were, however, two grain elevators operated by the Ogdensburg Terminal Company in Ogdensburg, one owned by the company and another leased by it, the former known as Ogdensburg's grain elevator and the latter known by the name of the lessor.[203] The plaintiff's grain was in the latter elevator, and it was the elevator to which the plaintiff obviously intended the description to refer.[204] The morning after the application was submitted, the latter elevator (with the defendant's agent present) burned.[205] Later that day the defendant accepted the application, obviously believing the description referred to the former elevator.[206] The issue was whether a contract for insurance formed covering the plaintiff's loss.[207]

Holmes first suggested that the result in *Raffles v. Wichelhaus* should be limited to the use of proper names (which had not happened here), writing that

201 Goode v. Riley, 28 N.E. 228, 228–29 (Mass. 1891) (emphasis added) (citations omitted).
202 Mead v. Phenix Ins. Co., 32 N.E. 945, 945 (Mass. 1893).
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 945–46.

> [p]erhaps it would be pressing the principle of such cases as Kyle v. Kavanagh, 103 Mass. 356, and Raffles v. Wichelhaus, 2 Hurl. & C. 906, too far to say that the description of the elevator containing the corn was one proper name in the mouth of the plaintiff and another in that of the defendant, and that, therefore, the policy was void, and the supposed contract never made.[208]

Holmes also believed, however, that it could not be said that the description on the application's face clearly pointed to one or the other elevator, or that the defendant knew the elevator that the plaintiff meant.[209] Thus, the plaintiff would have to rely on the description being broad enough to cover either elevator, and thus being "latently ambiguous."[210] Holmes held that with respect to determining the contract's meaning one would have to take account of the circumstances surrounding formation.[211] Importantly, the plaintiff knew that there were two elevators in Ogdensburg, that the defendant's agent was in Ogdensburg, and that the agent would not inquire at the elevators as to which contained the plaintiff's grain and would instead rely on the description in the application. [212] Also, the plaintiff must have had notice that if an elevator burned the agent would know about it and would not insure grain that had already been destroyed.[213] Holmes concluded that

> [u]nder these circumstances, we think it plain that justice is against the plaintiff's claim, and perhaps it is not necessary to decide with extreme accuracy what the true ground for giving judgment for the defendant is. It might be argued that the plaintiff was bound by that construction of the policy which a reasonable man would give it under the circumstances in which it was issued, if the defendant gave it that construction in fact; that the only reasonable construction is one which would describe the still standing elevator, especially as that elevator was, in a fuller

208 *Id.* at 945. Interestingly, Holmes later seemed to attribute the holding in *Mead* to the rationale of *Raffles v. Wichelhaus*. *See* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 n.2 (1899). *Kyle v. Kavanagh*, 103 Mass. 356 (1869), involved a contract for the sale of land on "Prospect Street" in Waltham and there were two such streets in Waltham. The court wrote: "The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct." *Id.* at 358–60.

209 *Mead*, 32 N.E. at 945–46.

210 *Id.* at 946.

211 *Id.*

212 *Id.*

213 *Id.*

> sense than the other, the building of the terminal company, and, therefore, that, the policy being upon grain in a building where the plaintiff had no grain, it was void.[214]

Accordingly, at the time of contract formation, a reasonable person in the plaintiff's position would have known the defendant's meaning.

iii. Conclusion on Objective Theory

An analysis of Holmes's cases dealing with the objective theory show that he was a strong follower of the theory during his time on the Massachusetts court. Importantly, however, he considered context significant in deciding how a reasonable person would construe a party's overt acts (including the language they used) and did not confine interpretation to dictionary meanings. And there were important limits to the objective theory. If a party was aware of another party's meaning at the time of contract formation, the former party was bound by the latter's meaning. If a party was physically compelled to manifest assent, there was no contract, even if the other party was unaware of the compulsion. Also, while the words of a contract could not be given an unreasonable meaning, even if the parties had agreed to such meaning, the remedy of reformation was available for mutual mistakes. And a party could not avoid a defense of duress simply because a reasonable person would not have succumbed. Having shown that Holmes remained largely faithful to the objective theory in his decisions on the Massachusetts court, the analysis now turns to the bargain theory of consideration.

B. *Bargain Theory of Consideration*

An analysis of Holmes's decisions on the Massachusetts court reveals that he consistently applied the bargain theory of consideration and refused to recognize unbargained-for reliance as a basis for making a promise enforceable. For example, in *Commonwealth v. Scituate Savings Bank*, Holmes held that a bank could not be responsible for its alleged promise to pay a judgment creditor funds from the judgment debtor's bank account in partial satisfaction of the judgment (a promise arguably inferred from the bank's treasurer issuing the creditor the bank account passbook) because the promise lacked consideration and the creditor's reliance had not been bargained for.[215] Holmes wrote that

214 *Id.*

215 Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302–03 (1884).

> even if the bank itself had issued the book, the promise contained in it would have been without consideration. . . . The only detriment to the promisee, in any way connected with the issue of the book, was the indorsement of partial satisfaction upon the execution. But that was merely an act done by the petitioner of his own motion, in reliance upon the book, not the conventional inducement for its issue. It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it. If it should be suggested that the bank was estopped to deny a consideration, the answer is, that no representation was made other than what was necessarily implied by issuing the book, and that no action on the faith of it can be taken to have been contemplated other than an attempt to collect the amount when thought desirable.[216]

Holmes followed this rule even if the promisee's reliance had resulted in substantial harm, arguing that the promisee relied at his peril: "[T]he very meaning of the requirements of a consideration for a promise or other agreement is that, if that element is wanting, the party relies on the agreement at his peril. The fact that he suffers substantial damages by doing so does not render a void contract valid."[217] In fact, with respect to an action for deceit, Holmes wrote in a dissenting opinion:

> If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases.[218]

A mere benefit to the promisor was also insufficient. For example, Holmes wrote that "[i]f . . . work is done without intent to be paid for it, the law leaves the parties where they are, and does not give it the character of a compulsory consideration, in case you afterwards change your mind."[219]

Rather, for there to be consideration, there had to be conventional inducement. "[T]he burden must be upon the plaintiffs to prove that what they seek to recover for was furnished as a consideration for a legal obligation."[220] Even actions that were necessary to enable a party to perform were insufficient because they were not bargained for. In *Kenerson v. Colgan*, the

216 *Id.*

217 Bragg v. Danielson, 4 N.E. 622, 623 (Mass. 1886).

218 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042 (Mass. 1895) (Holmes, J., dissenting).

219 Johnson v. Kimball, 52 N.E. 386, 387 (Mass. 1899).

220 *Id.*

plaintiff and the defendant entered into a contract under which the defendant promised to give her land to the plaintiff's wife upon the defendant's death, and in exchange the plaintiff promised to move to the defendant's home and care for her.[221] The plaintiff moved onto the defendant's property and erected certain buildings, but the defendant thereafter repudiated the agreement and refused to allow the plaintiff to remove the buildings.[222] The plaintiff sued to recover the value of the materials and labor employed in moving to and erecting the buildings, but Holmes held that there was no consideration for the plaintiff moving his buildings because that was not the consideration for the defendant's promise:

> According to the agreed statement of facts, the consideration of the defendant's promise to "make papers giving the property to Mary, the wife of the plaintiff, after her death," was that the plaintiff "would move from his residence in East Cambridge to her [defendant's] home in Allston, and take care of her." Moving his buildings was no part of the consideration, and therefore, conversely, the defendant's promise was not the consideration or conventional inducement for moving the buildings . . . . Moving the buildings was either a gratuitous act, or at most a means by which the plaintiff enabled himself to do his stipulated part. It was not within the defendant's request.[223]

Consistent with the bargain theory of consideration and his rejection of the benefit-detriment test, Holmes refused to find that past consideration was sufficient to make a subsequent promise binding. In *Holcomb v. Weaver*, the plaintiff recommended the defendant to a third party as a builder for a project.[224] The third party hired the defendant for the project, and the defendant promised to pay the plaintiff $250 "as a commission or compensation for his trouble in the matter."[225] Holmes noted that "if the promise was made after the plaintiff had written . . . recommending the defendant, the plaintiff would have a good deal of difficulty in showing a consideration which was not executed before the promise was made."[226]

In *Moore v. Elmer*, the plaintiff sued the administrators of an estate for breaching the following written promise by the decedent:

> Springfield, Mass., Jan. 11th, 1898. In Consideration of Business and Test Sittings Reseived [sic] from Mme Sesemore, the

221 Kenerson v. Colgan, 41 N.E. 122, 122 (Mass. 1895).
222 *Id.*
223 *Id.* (citations omitted).
224 Holcomb v. Weaver, 136 Mass. 265, 265–66 (1884).
225 *Id.* at 265.
226 *Id.* at 266–67.

> Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned [sic] do hearby [sic] agree to give the above naned [sic] Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch [sic] is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on sane [sic] on or after the last day of Jan. 1900, if my Death occurs before then whitch [sic] she has this day Predicted and Claims to be the truth, and whitch [sic] I the undersighned [sic] Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer.[227]

Unfortunately for Elmer, Madame Sesemore's clairvoyant powers were better than he thought, but fortunately for any of his creditors or heirs this did not move Holmes to find the decedent's promise enforceable:

> It is hard to take any view of the supposed contract in which, if it were made upon consideration it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.[228]

Holmes acknowledged, however, that there was no question "about the sufficiency of such a consideration to support a promise to pay for past services as well as for future ones."[229]

Holmes also applied the consideration requirement to a modification of the contract.[230] Consistent with freedom of contract, however, he believed

227 Moore v. Elmer, 61 N.E. 259, 259 (Mass. 1901) (citations omitted).

228 *Id.* at 259-60.

229 Graham v. Stanton, 58 N.E. 1023, 1024 (Mass. 1901).

230 *See* Margesson v. Mass. Benefit Ass'n, 42 N.E. 1132, 1133 (Mass. 1896) ("If it had imported more, there would have been no consideration for it, as he got nothing new, and the company incurred no detriment."); Davis v. German Am. Ins. Co., 135 Mass. 251, 256–57 (Mass. 1883) ("For, without disputing that one contract may be substituted for another, even when the consideration is executed, by way of accord and satisfaction,

that the parties had the right to orally modify their contract, even when there was a no-oral-modification clause:

> Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt. But it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way, and by any mode of expression, they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words.
>
> In deciding whether they had waived the terms of the written contract, the jury had a right to assume that both parties remembered it, and knew its legal meaning. On that assumption, the question of waiver was a question as to what the plaintiff fairly might have understood to be the meaning of the defendant's conduct. If the plaintiff had a right to understand that the defendant expressed a consent to be liable, irrespective of the written contract, and furnished the work and materials on that understanding, the defendant is bound.[231]

Despite complaining in *The Common Law* that courts, due to an "anxiety to sustain agreements," had erroneously found consideration when there was only a condition,[232] Holmes did not have difficulty concluding that there was sufficient evidence of a bargain, rather than a promise subject to a condition, even outside a business setting. For example, in *Earle v. Angell*, the defendant's testatrix had promised to pay the plaintiff $500 if the plaintiff

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the form of such a transaction cannot be made to cover what is in substance adding a new and gratuitous promise to an existing agreement upon executed consideration. Were this not so, we should probably have seen attempts to avoid the well-settled doctrine that a present debt will not support a promise to pay *in futuro* (*Hopkins v. Logan*, 5 M. & W. 241) by simply applying a different form of words and calling the new promise a substituted contract. For that presents the converse case where the assumption of the less burdensome obligation to pay in future is no consideration for the discharge of the more burdensome one to pay now, and where, therefore, the discharge being void, the promise founded upon it is void, for that reason if not for others.").

231 Bartlett v. Stanchfield, 19 N.E. 549, 550 (Mass. 1889) (citations omitted). Despite his famous dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting), "Holmes most likely agreed with the principle of freedom of contract that the *Lochner* majority delivered . . . ." Allen Mendenhall, *Justice Holmes and Conservatism*, 17 TEX. REV. L. & POL. 305, 314 (2013). "[H]e was not[, however,] about to dictate his belief to a state or local government, especially on such a liberal reading of the Constitution." *Id.*

232 HOLMES, *supra* note 2, at 229–30.

agreed to come to her funeral.[233] Holmes wrote that

> [a]ccording to the report, the plaintiff testified that the defendant's testatrix said, "If you will agree to come," etc., "I will give you five hundred dollars," etc., and that he promised to come if alive, and notified in time. We cannot say that this did not warrant a finding of promise for promise.[234]

Holmes did not suggest that the decedent's promise should be construed as simply a promise subject to a condition.[235]

Holmes also reiterated his belief that consideration was the equivalent of form,[236] and, consistent with this view, he refused to inquire into whether the promisor's promise induced the promisee to enter into the contract. For example, Holmes held that when a warranty is given in a written contract, reliance on it—and thus inducement—is presumed:

> When a representation of fact is made as an inducement to an oral purchase, no doubt the question whether it was relied on as a ground for purchasing may be material to the determination whether it is to be taken to enter into the contract as a term or warranty. But when the contract is reduced to writing, the question whether certain expressions constitute a warranty is a matter of construction, and does not depend upon the representation or promise which they embody having afforded a preliminary inducement to entering into the contract. Every expression which by construction is a term of one party's undertaking is presumed to be relied on by the other when he makes the contract.[237]

Holmes's willingness to find consideration is perhaps best exemplified by his opinion in *Martin v. Meles*, an opinion written a year before leaving the Massachusetts court that would set forth almost all of his views on the

233 Earle v. Angell, 32 N.E. 164, 164 (Mass. 1892).

234 *Id.*

235 In another case, the defendant had promised money to a college if the college raised $100,000 within five years, but, unfortunately, it was unnecessary to decide whether the raising of the money was consideration or a condition because the court concluded that the college had not raised the money. *See* President of Bates College v. Bates, 135 Mass. 487, 489 (1883) ("As the defendant must prevail on the ground that the plaintiff has not satisfied the condition of Mr. Bates's promise, it is not necessary to discuss the question whether compliance with that condition would have constituted a consideration, or whether any other consideration can be discovered.").

236 *See* Krell v. Codman, 28 N.E. 578, 578 (Mass. 1891) ("We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. This being so, consideration is as much a form as a seal.").

237 Whitehead & Atherton Mach. Co. v. Ryder, 31 N.E. 736, 737 (Mass. 1885).

doctrine.[238] In *Martin*, the defendants and other firms that were engaged in leather manufacturing had promised to contribute to a committee (the plaintiff) a certain sum of money to defray the committee's future expenses in defending lawsuits growing out of patent rights for a tanning system.[239] Holmes held that the committee made an implied promise at the time of contracting to undertake such efforts, not simply upon receipt of the money, relying on the business nature of the transaction:

> It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.[240]

Holmes's analysis—finding an implied promise to undertake efforts based on the business context of the transaction—was sixteen years ahead of then-Judge Benjamin Cardozo's similar analysis in the celebrated case of *Wood v. Lucy, Lady Duff-Gordon*.[241]

Holmes, however, believed that "[t]he most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract."[242] Holmes first seemed to chastise former opinions for finding consideration based merely on a detriment incurred by the promisee:

> In the later Massachusetts cases more weight has been laid on

238 Martin v. Meles, 60 N.E. 397 (Mass. 1901).

239 *Id.* at 398.

240 *Id.*

241 Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 14 (N.Y. 1917). Holmes, in another opinion, relied in part on the transaction's business context in interpreting a satisfaction clause as requiring "that the satisfactoriness of the system, and the risk taken by the plaintiff, were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant." Hawkins v. Graham, 21 N.E. 312, 313 (Mass. 1889). Holmes wrote that "when the consideration furnished is of such a nature that its value will be lost to the plaintiff either wholly or in great part unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies [sic], of the interested party." *Id.*

242 *Martin*, 60 N.E. at 398.

> the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void.[243]

Holmes wrote that "[t]here must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise."[244] Holmes then echoed his concern that courts have sometimes found consideration where there was only a condition: "[C]ourts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise."[245]

But Holmes's tune then abruptly changed, and he gave a nod to such a practice with respect to business agreements: "There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted."[246] Holmes concluded that a finding of consideration was justified and, consistent with his view of consideration as form, he further concluded that it was improper to inquire as to whether the committee would have in fact performed the acts irrespective of the plaintiff's promise:

> What we have said justifies, in our opinion, the finding of a consideration . . . . It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct . . . .[247]

243 *Id.* (citations omitted). For the latter proposition, Holmes cited to his opinion in *Bragg v. Danielson*, 4 N.E. 622 (Mass. 1886).

244 *Martin*, 60 N.E. at 398.

245 *Id.*

246 *Id.*

247 *Id. See also* WHITE, *supra* note 150, at 279 ("What mattered [to Holmes in *Martin*] was that a pledge had been made that invited the committee to act, and that the committee had promised to act and may have engaged in some activities in keeping with that

Thus, while reiterating that un-bargained for reliance does not make a promise binding, Holmes would not only find consideration in an implied promise; he would—consistent with his view in *The Common Law*—deem irrelevant whether the defendant would have performed irrespective of the plaintiff's promise, following his view of consideration as form. What is most significant, however, is that he advocated for finding consideration when there was a business agreement, revealing that his complaints about courts finding consideration when there was only a condition was likely aimed at promises made outside of a business context.

An analysis of Holmes's cases dealing with consideration show that he was a strong follower of the bargain theory of consideration during his time on the Massachusetts Supreme Judicial Court, and also followed his view from *The Common Law* that consideration is a matter of form, rendering an inquiry into actual motive irrelevant. Importantly, however, Holmes also struck a different tone within the realm of business: despite chastising courts in *The Common Law* for finding consideration when there was only a condition, he argued that courts should work to find consideration for business agreements. Such an approach was, in a larger sense, consistent with *The Common Law*—consistent with his belief that law should be based on public policy. Holmes's discussion in *The Common Law* of the difference between consideration and a condition focused on applying the objective theory to the requirement of a bargain. Holmes the jurist was willing to focus more on experience than logic, arguing "[t]here is the strongest reason for interpreting a business agreement in the sense which will give it a legal support . . . ."[248]

Having shown that Holmes remained largely faithful to the bargain theory of consideration in his decisions on the Massachusetts court, the analysis now turns to his treatment of damages.

C. *Damages*

With respect to damages, Holmes, while on the Massachusetts court, reiterated his view set forth in *The Common Law* that the *Hadley* foreseeability rule should be based not only on whether the damages were foreseeable at the time of contract formation, but also on whether the defendant, at the time of contract formation, assumed the risk of paying for the damages

promise. The formal shell of a 'reciprocal conventional inducement' existed. Seen in this light, *Martin v. Meles* was another in a series of cases in which Holmes followed the goal he had set forth for contract law in *The Common Law*, that of stripping contract doctrine of subjective elements where possible.").

248 *Martin*, 60 N.E. at 398.

incurred. For example, he wrote that "[t]he fundamental principle in cases of contract is that the plaintiff is entitled to recover such damages as reasonably may be supposed to have been contemplated by the parties, when making the contract, as the probable result of its breach, *and as within the risk assumed by the defendant*."[249]

But on one occasion, Holmes seemingly retreated from his belief that damages were part of the parties' agreement. In a case involving an alleged oral agreement that there would be no personal liability on a promissory note given by a corporation, the issue was whether the oral agreement was inadmissible as being in variance with the promissory note. Holmes wrote:

> [T]he rule excluding evidence of oral agreements to vary a writing goes no farther than the writing goes. And, at most, the writing only expresses the obligation assumed by the party signing it. If an oral agreement were set up to diminish or enlarge the extent of the promisor's liability for a breach of the written promise, it might possibly be held inadmissible on the ground that a contract is at common law nothing but a conditional liability to pay damages, defeasible by performance, and that therefore the amount of damages to be paid is part of the legal import of the written words. But, even on this point, the tendency of some Massachusetts cases has been the other way. *And the most obvious and natural view is, that the promise is the only thing which the writing has undertaken or purports to express, either in words or by legal implication. Certainly the writing does not extend to the remedies which the law will furnish for the collection of damages, even from the promisor himself*, as is shown by the fact that they are governed by the *lex fori;* . . . The liability in question may be part of the obligation of contracts of the corporation in a constitutional sense, so that it could not be done away with by statute as to contracts already made. *But the same thing is quite as clearly true of the ordinary remedies against the promisor, which no one supposes to be part of the contract itself.*[250]

Holmes thus left a contradictory record with respect to his view on remedies being a matter of the parties' agreement, though in 1903 he would restate his view that it was a matter of the parties' agreement shortly after joining the United States Supreme Court.[251]

In any event, Holmes did not display an attitude that damages should, in general, be substantially limited. When applying his "assumption of risk" gloss on the *Hadley* rule, he was willing to find that defendants had

249 Whitehead & Atherton Mach. Co. v. Ryder, 31 N.E. 736, 737 (Mass. 1885) (emphasis added).

250 Brown v. E. Slate Co., 134 Mass. 590, 592 (1883).

251 *See* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 545 (1903).

assumed the risk of liability for consequential losses. In one case, he reversed a lower court ruling that had held the plaintiff's lost resale profits for the anticipated sale of bicycles could not be recovered, reasoning that the loss was within the scope of the risk undertaken by the defendant:

> The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that was the object of the agreement. . . .
>
> The only difficulty in the way of the proposed measure of damages which impresses us is that, when the defendants made their contract, it was not certain, in a commercial sense, that the plaintiff could sell what he ordered. His bicycle seems to have been more or less of an experiment. But as remoteness — that is to say, whether, under given circumstances, upon an ascertained contract, certain damages are within the scope of the risk undertaken — is always a question of law, and as the auditor found the amount of the plaintiff's damages, if they were not too remote, we are compelled to say that, as between the plaintiff's claim and nominal damages, the former comes nearer to doing justice than the latter . . . . The defendants, by their contract, took the risk of damages to that extent, if it should turn out that the plaintiff could sell as it was contemplated and expected that he would.[252]

In another case, Holmes held that when a defendant sold a machine in England, but the defendant knew it was sold for use in the United States, damages for breach of warranty should include the expense involved in attempting to get it to work in the United States.[253]

Holmes also permitted the recovery of lost profits even though the amount might seem speculative:

> [W]e are of opinion that the assessor was warranted in finding substantial damages. . . . [A]nd it would be unjust to turn the plaintiff off with a dollar because he could not prove with prophetic certainty what the exact course of performance would have been. . . . [I]n estimating the worth of the contract of which the plaintiff has been deprived we are to consider not what legally might have happened but what would have happened had the

252 Johnston v. Faxon, 52 N.E. 539, 539–40 (Mass. 1899); *see also* Hyde v. Mech. Refrigerating Co., 11 N.E. 673, 674 (Mass. 1887) ("If a refrigerating company undertakes to store apples at a temperature below a certain height, decay caused, as it was shown to be in this case, by the temperature being allowed to reach a much greater height, is the specific consequence which the contract was made to prevent; and, if the decay caused a diminution of market value, such diminution may be considered as an element of damage.").

253 *Whitehead*, 31 N.E. at 738.

> defendant done as it agreed; or, to put it a little differently, we are to consider commercial, not legal, possibilities. It is absurd to imagine the defendant in performing the contract employing a lawyer's acumen to find out in what way it could deprive the plaintiff of profit instead of employing business intelligence to decide how it could best make profit for itself.[254]

He wrote in another case that "on the facts in evidence, the jury might have found substantial damages without the aid of testimony directed specifically to the amount."[255] And in a case in which a plaintiff sued a defendant for breaching a promise to not foreclose on a mortgage on the plaintiff's farm, Holmes held that the plaintiff's testimony regarding what the farm was worth to him was admissible:

> The plaintiff was allowed to testify what the farm was worth to him from June 1, 1882, to July, 1883, with his stock of cows; and the defendant excepted. Generally speaking, such a question is objectionable. But, in view of the argument, and all the circumstances, we assume that it was understood to mean simply, What was the money value of the farm to one engaged in your special business, and in your general position with regard to it? And so understood, we cannot say, on the bill of exceptions, that it was improper. It does not appear what rule of damages was laid down to the jury; but, assuming that they were allowed to adopt the standard suggested by the question and answer, still we cannot say from anything that appears in the bill of exceptions that the defendant's contract was not made in express contemplation of the plaintiff's use of the farm as a milk farm. If there was no such evidence, it was for the defendant to disclose the fact in his bill of exceptions. It would rather seem that the plaintiff was using the farm in that way at the time the contract was made; that the defendant knew that fact; and that the contract was made for the very purpose of preventing the breaking up of the plaintiff's business, according to the understanding of both parties. In that case, at least, the evidence was admissible.[256]

Holmes, consistent with freedom of contract, also readily upheld liquidated damages provisions.[257] Holmes wrote:

254 Speirs v. Union Drop-Forge Co., 61 N.E. 825, 826 (Mass. 1901).

255 Oak Island Hotel Co. v. Oak Island Grove Co., 42 N.E. 1124, 1125 (Mass. 1896).

256 Manning v. Fitch, 138 Mass. 273, 276–77 (1885).

257 *See, e.g.*, Garst v. Harris, 58 N.E. 174, 174 (Mass. 1900) ("It is suggested that the sum agreed upon in the writing as liquidated damages is a penalty. But it is admitted in the agreed facts that the damages are substantial and difficult to estimate, and it was recognized in the contract that they would be so. It has been decided recently that parties are to be held to their words upon this question, except in exceptional cases,

> [W]e heartily agree with the court of appeals in England that, so far as precedent permits, the proper course is to enforce contract[s] according to their plain meaning, and not to undertake to be wiser than the parties, and therefore that in general, when parties say that a sum is payable as liquidated damages, they will be taken to mean what they say, and will be held to their word.[258]

Holmes's support for freedom of contract extended to distinguishing between a liquidated damages provision and a price to be paid to engage in a particular act, the latter of which is not subject to a penalty analysis:

> The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, "but not otherwise." This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.
>
> The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than $2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. . . .
>
> [T]his case falls within the language of Lord MANSFIELD in Lowe v. Peers, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a court of equity will relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of

where there are special reasons for a different decision. In this case there is every reason for upholding the general rule." (citations omitted)); Standard Button Fastening Co. v. Breed, 39 N.E. 346, 347 (Mass. 1895) ("Payment by the day is a liability attached to the single case of a failure to keep and render a true account, and is required only for such time as the failure lasts. It has none of the characteristics of a penalty to be chancered, and, in our opinion, it is not one.").

258 Guerin v. Stacey, 56 N.E. 892, 892 (Mass. 1900).

> the agreement."[259]

Thus, while Holmes reiterated his gloss on the *Hadley* rule, the evidence does not support the belief that he took a restrictive approach to liability for damages.

259 Smith v. Bergengren, 26 N.E. 690, 690–91 (Mass. 1891).

Conclusion

An analysis of Holmes's contracts opinions on the Massachusetts Supreme Judicial Court shows that he closely followed his theory of contract law that he had set forth in *The Common Law*.[260] The parties' subjective intentions were generally irrelevant—what mattered was the parties' overt acts and how a reasonable person would construe them. The objective theory prevailed both in terms of contract formation and in terms of contract interpretation. The benefit-detriment test for consideration was rejected—what mattered was whether there was a bargain. The critical question was whether what the parties gave was the conventional motive or inducement for entering into the agreement. But inquiry into a party's actual motive for entering into the agreement was irrelevant; consideration was a matter of form. And despite one instance of contradictory dicta, Holmes followed and applied his "assumption of risk" gloss to the *Hadley* foreseeability rule.

At the same time, however, the analysis of Holmes's application of his theory of contract law does not reveal a dedication "to the proposition that, ideally, no one should be liable to anyone for anything," and that "liability . . . was . . . to be severely limited."[261] While Gilmore believed that the bargain theory of consideration was "a tool for narrowing the range of contractual liability,"[262]—and it did in fact have this effect when there was only unbargained-for reliance—Holmes inferred promises to find consideration, refused to inquire into a party's actual motives to defeat a finding of consideration, and argued that consideration should be found in business arrangements. And Holmes's gloss on the *Hadley* rule had, in application, no apparent limiting effect on a defendant's liability for damages. Holmes was willing to find that a defendant had assumed the risk of liability for consequential damages, and also refused to apply a strict standard with respect to proving the amount of consequential damages.

Interestingly, despite initially hoping that *The Common Law* would influence the bench and the bar, in 1900, just two years before leaving the Massachusetts court, Holmes cautioned against too dramatic a shift in the common law:

> We appreciate the ease with which, if we were careless or

260 This conclusion is consistent with that reached by Professor White. *See* White, *supra* note 150, at 280 ("In the main, Holmes was faithful in his Massachusetts contracts decisions to the principles of contract law he had affirmed in *The Common Law*."). White, however, discussed fewer cases than this Article, inasmuch as his biography did not focus on contract law.

261 Gilmore, *supra* note 1, at 15.

262 *Id.* at 23.

> ignorant of precedent, we might deem it enlightened to assume [a particular power]. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain. No one supposes that this court . . . could abolish the requirement of consideration for a simple contract. In the present case we perceive no such pressing need . . . as to justify our departure from what we cannot doubt is the settled tradition of the common law . . . . It will be seen that we put our decision, not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case.[263]

This passage was consistent with Holmes's application of his theory of contract law while on the Massachusetts Supreme Judicial Court. If his theory set forth in 1881 in *The Common Law* was "astonishing"[264] and "dedicated to the proposition that, ideally, no one should be liable to anyone for anything" and that "liability . . . was . . . to be severely limited,"[265] his application of his theory reveals a much more restrained approach.

263 Stack v. N.Y., New Haven & Hartford R.R., 58 N.E. 686, 687 (Mass. 1900).

264 GILMORE, *supra* note 1, at 6.

265 *Id.* at 15.