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# The Development of the Nineteenth-Century Consensus Theory of Contract

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PHILIP A. HAMBURGER

The consensus theory is well known. According to consensus theory, contract is the product of the consensus or “meeting of the minds” of contracting parties; if there is no consensus, there is no contract. Today, even after repeated challenges, consensus theory continues to be important and even essential in many approaches to contract.

The role of the parties’ consensus was not always apparent in case law. Until well into the nineteenth century, the most important remedy for breach of contract in both England and America was the action for breach of promise known as “assumpsit.” As a result, lawyers typically discussed contract law in terms of promise (an obligation ostensibly created by one person) rather than in terms of consensus and contract (an obligation created by two or more persons). Only in about 1800 did lawyers and judges in cases of assumpsit begin regularly to apply modern contract theory—the highly generalized theory based on the will or consensus of the contracting parties.

This apparently sudden development of the consensus theory has recently been the subject of debate, chiefly among historians of law. Most participants in this debate believe that the history of the consensus theory offers opportunities for a better understanding of the foundations of modern contract law. They also view, however, the history of consensus theory as a testing ground for different conceptions of doctrinal change. Similarly, this article will examine the development of consensus theory to investigate the capacity of the common law for doctrinal change or innovation.

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The problem of doctrinal innovation in the common law has provoked interest not only for its own sake but also for its bearing on theories of law that assume the capacity of doctrine to conform promptly (and almost automatically) to intellectual and economic forces external to the common law. Indeed, the development of contract in nineteenth-century cases has been perceived as one of the prime common law examples of doctrinal innovation caused by external influences.<sup>1</sup> Consequently, the development of modern contract law is a particularly appropriate field for studying the possibility of such innovation.

The central role that contract is frequently thought to play in our society has encouraged interest in the history of contract. Many academics still believe that relationships in modern, commercial society are largely contractual.<sup>2</sup> From this perspective, contract is the quintessentially modern relationship. As a result, contract appeals to us for philosophical as well as practical reasons and has acquired a symbolic and sometimes almost mystical significance. Such attitudes contribute little to the clarity of the historical debate but much to its importance.

This article argues that the common law was not, at least in the case of the consensus theory, always susceptible to change caused by external influence. On the whole, such influence produced alterations in doctrine only when doctrinal discontinuities were avoided and when lawyers had the opportunity and the need to use the new doctrine.

### *The Theoretical Debate*

Two rather different perspectives on doctrinal change are apparent in much scholarship on the history of law, and both are pertinent to this study of consensus theory. By far the more influential point of view asserts that legal doctrine is the product of social and economic forces, including intellectual trends that reflect those forces. In past centuries, this perception has been explored by historians as different as Robert Brady and A. V. Dicey, and by political economists as diverse as Adam Smith and Karl Marx.<sup>3</sup> In this century, the approach has become more sharply focused in the works of such historians as P. S. Atiyah, L. Friedman, M. J. Horwitz, and W. Hurst. These exponents of what can be called a societal approach are noteworthy for their emphasis on the economic and related intellectual influences upon law.

Although the various proponents of the societal theory take very different views of it, its principle advocates appear to share a belief that the law directly and promptly reflected societal forces. For example, Horwitz argues that the bench and bar in nineteenth-century America united to promote commercial interests and were able to alter doctrine

for this purpose because they had an “instrumental” understanding of law.<sup>4</sup> Atiyah explains changes in nineteenth-century English contract doctrine as a reflection of liberal economic thought and ideology.<sup>5</sup> For these historians, law was a product of societal forces, hardly ever an impediment.

A rather different approach is apparent in the work of other historians, of whom A. W. B. Simpson can be taken as an example. Simpson has carefully examined contract doctrine and how it has changed.<sup>6</sup> His general approach is not necessarily inconsistent with the societal perspective, but it suggests at the very least that an accurate explanation of law’s relationship to society requires a firm grasp of how legal doctrine changes. In connection with contract, Simpson is explicit about the need to understand the nature of doctrinal change.<sup>7</sup>

Underlying Simpson’s concern about doctrine and its capacity for change is an important assumption or observation about the nature of judge-made doctrine: it is somewhat conservative. That judges cannot innovate—that they find the law rather than make it—is one of the profound half-truths of the common law. To state the proposition more accurately, discontinuities in doctrine can only occur if they are imperceptible or are sufficiently well disguised that they can be plausibly denied. Unlike legislative alterations, undisguised changes in judge-made doctrine or common law have not typically been accommodated by the Anglo-American legal system—particularly when such changes were perceived to be inconsistent with prior doctrine.

If there has been hostility to open discontinuities in common law doctrine, it is necessary to explain why any given innovation was permitted. As a result, even changes that are clearly derived from forces external to legal doctrine seem to require some internal, doctrinal explanation. Moreover, to the extent that discontinuities in doctrine could not be sufficiently disguised, it is possible that hostility to open discontinuities impeded the capacity of the law to conform to external forces. Indeed, some historians have suggested this.<sup>8</sup> Thus, an evaluation of the relationship between law and society must take under consideration the views of Simpson and others who have studied the capacity of the common law for doctrinal innovation.

If an attempt were made to accommodate the observations of both Simpson and the historians who take a societal approach, it could be suggested that common law doctrinal change was not simply the product of external influences. Although subject to a host of external forces (many of them complex and many in conflict with one another), common law doctrine has also had some independent internal requirements, especially that it have apparent continuity with past doctrine.

Of course, this requirement was not always met, and policy considerations have often been internalized to a degree that has made continuity in doctrine a rather negligible requirement. Nevertheless, the common law does have a strong tradition of antagonism to open breaks in doctrine. This, and possibly other internal requirements of doctrine, sometimes delayed or impeded the influence of external forces upon the shape of doctrine, unless or until those forces found a legislative outlet.

The degree to which the common law has assimilated or resisted external influence has in part depended upon the opportunities to avoid open discontinuity in doctrine, and in any given instance the existence of such opportunities has been almost accidental or fortuitous. Hence, the remarkable nature of common law change. The common law has often, but not consistently, adapted to changing circumstances. However, it has frequently—again, not consistently—resisted the prompt conformity to external demands that could have made it a mere reflection or instrument of those demands.

By delaying or impeding at least some of the pressures brought to bear on it, legal doctrine has demonstrated a degree of independence—a characteristic of immense political and social importance. Although the common law's resistance to external influences, like its adaptability, has often been erratic as a result of the somewhat fortuitous nature of the opportunities for doctrinal change, such fortuity may, in fact, be one of the sources of the law's valuable independence from external pressures.<sup>9</sup>

Rather than explore the entirety of the societal approach or of the hypothesis suggested in the previous paragraph, this article examines the capacity of common law doctrine to change in response to external influences. Of course, an understanding of the common law's capacity to conform to external pressures is closely related and even essential to those other areas of investigation. Yet this article aims, on the whole, to evaluate only the capacity of the common law to change.

In this connection, it is useful to distinguish between an inquiry into the influences that shaped doctrine and an investigation of the influences that made a given doctrine attractive to lawyers and judges. Although the two overlap considerably, they are not the same. To determine the capacity of doctrine to change, one must understand what shaped a doctrine at different times, but one need not always have complete or detailed knowledge of what it was that endeared the doctrine to a particular group of lawyers and judges. As a result, the question of what shaped doctrine will take precedence over the question of what influences made lawyers and judges find the doctrine appealing.

A final caveat is required. In examining what shaped the consensus theory, this article concentrates on intellectual sources. It does so, not because the possibility of direct economic influence is theoretically unacceptable, but because (as will be seen) the evidence suggests economic interests had little direct effect on the essential elements of consensus analysis.

### *The Historical Debate*

Historical accounts of the consensus theory of contract have almost uniformly assumed that the theory had little basis in common law in the two or three centuries prior to 1800. Historians have supposed that development of the theory in the mid-nineteenth century was a relatively sudden innovation, produced largely by the exposure of common lawyers to external influences, intellectual or economic. For example, Grant Gilmore, Atiyah, Horwitz, and Simpson argue that the common law hardly recognized a concept of contract in the sixteenth through eighteenth centuries and that it received the consensus theory from other sources in the late eighteenth and especially the nineteenth centuries.

In an account not unflattering to academics, Gilmore argues that contract law became part of the known world in 1871, when Dean Langdell of Harvard Law School discovered, as Columbus did the New World, the consensus analysis.<sup>10</sup> (The daring adventure that Columbus pursued across uncharted and dangerous seas, Langdell accomplished more sedately and with fewer risks in the pages of an early case book.) Indeed, Gilmore goes further and argues that Langdell not only invented the consensus theory but also was the first to treat contract law, not as the many bodies of law relating to contracts, but as a single field of law, unified by the concept of contract. He was, writes Gilmore, the first to perceive the thing called "contract," an abstraction consisting of the notion of mutual or reciprocal obligations.<sup>11</sup>

Atiyah's history of contract law must be taken more seriously. Atiyah turns to broad but elusive intellectual trends to show the influence of late eighteenth- and nineteenth-century liberal economic theories and related ideas about the role of contracts. According to Atiyah, contract law was "an amalgam of classical economics, of Benthamite radicalism, of liberal political ideals, and of the law, itself created and molded in the shadow of these movements."<sup>12</sup> Contract itself, he believes, is part of "one of the great intellectual movements of modern times."<sup>13</sup> Thus, to an astonishing extent, Atiyah treats the development of nineteenth-century contract doctrine as a part of broader intellectual history.

Horwitz has an even more dramatic view. He presents American contract law and particularly consensus theory as a creature of nineteenth-century judicial concern for commercial interests—a solicitude that could be translated directly into doctrine, because judges and lawyers had in the early nineteenth century an “instrumental” view of law.<sup>14</sup>

Even Simpson, who is highly skeptical of the existence of sudden innovation in the common law, argues that there was such innovation in nineteenth-century contract law.<sup>15</sup> Simpson has shown the existence of simple contractual analysis in late medieval common law.<sup>16</sup> Yet he also indicates that in the sixteenth through eighteenth centuries analysis based on promise (an obligation ostensibly created by one person) precluded that based on contract (an obligation created by two persons).<sup>17</sup> He traces the development of the consensus theory to the nineteenth-century influence of natural law and civilian ideas—ideas that, he suggests, were largely copied by common lawyers.<sup>18</sup> This conclusion has led Simpson, who is acutely sensitive to the improbability of such copying, to write an account of how the adoption of consensus ideas was accomplished by a legal system so unreceptive to open discontinuities in doctrine.<sup>19</sup> A major part of his explanation is that beginning in about 1790 civil law was viewed as jurisprudence—as a generalized, almost philosophical analysis of legal principles.<sup>20</sup>

In sum, notwithstanding their considerable differences, Gilmore, Atiyah, Horwitz, and Simpson present the consensus theory as a sudden and late development. They state that consensus theory had little foundation in the common law and (with the exception of Gilmore) argue that the theory was, instead, largely the product of various influences external to the common law.

In associating Simpson with Atiyah and Horwitz, this article of course recognizes that Simpson's approach is very different from that of these other historians. Unlike Atiyah and Horwitz, Simpson identifies civil law rather than ideological or economic influences as the external source of consensus theory, and, in general, he rejects the possibility of direct external influence on common law without an internal explanation. Simpson, however, has accepted an internal, doctrinal explanation of consensus theory that is important but not fully satisfactory. Moreover, despite his disagreement with Atiyah and Horwitz, he adopts a chronology that lends support to their conclusions. With respect to Simpson, this article dissents from these opinions of his concerning the consensus theory, not from his general approach to legal history or even contract.

This article reconsiders the development of the consensus theory.

The theory developed not late and suddenly, but relatively early and gradually as common lawyers slowly came to be familiar with civilian ideas on consensus. Rather than just make use of those ideas, however, common lawyers modified them into a generalized theory compatible with common law. Late eighteenth- and nineteenth-century liberal ideas, far from being the chief source of the consensus theory, shaped only a small portion of it. Similarly, early nineteenth-century judicial instrumentalism and sympathy for commercial interests—to whatever extent they existed—did not, respectively, facilitate open doctrinal innovation in the area of consensus theory or shape much of the theory.<sup>21</sup> For the most part, the common law could change as a result of external influence only if the change avoided open discontinuities in doctrine and only if it had an opportunity to be addressed in cases.

Parts I, II, and III of this article will explore the sixteenth- through eighteenth-century origins of the consensus theory that appeared in nineteenth-century case law and will attempt to explain how the theory came to be accepted in the face of the common law's hostility to undisguised discontinuities in doctrine. Part I will demonstrate that among the influences on the new consensus theory of contract was a rudimentary but broadly applicable common law concept of contract. Contract law was not, as Gilmore has said, merely a collection of rules concerning different types of agreements. Nor were common lawyers, even though they had to sue in *assumpsit* and talk about promises, incapable of thinking about contract abstractly.<sup>22</sup> The common law relating to contract was based on an underlying abstract notion of reciprocal or mutual obligation. This understanding of contract laid the foundation for the development of the highly generalized consensus theory.

In Parts II and III, this article will confirm Simpson's argument that the common law assimilated natural law and civilian ideas on consensus and that the common law adopted those ideas, not as superior foreign doctrine, but as jurisprudence, a general account of abstract legal principles. Common lawyers, however, began to treat such ideas as jurisprudence long before the nineteenth century, and they did more than just borrow the ideas. They adopted them selectively to create a consensus theory more generally stated and more compatible with common law than that of the civilians. Because the civilian ideas that formed the basis of the consensus theory were assimilated as jurisprudence, and because this civilian jurisprudence on consensus developed at a relatively early date and in a way that made it harmonious with the common law, the consensus theory was not perceived as an innovation. Moreover, Parts II and III will attempt to shed some light



on the ideas of Atiyah and Horwitz. Notwithstanding Atiyah, although economic liberalism may have encouraged the use of the consensus theory, it played a very limited role in shaping that theory. In accord with Simpson's ideas and contrary to Horwitz's suggestions, early nineteenth-century judicial promotion of commercial interests did not contribute much to the essential shape of the consensus theory. Horwitz's thesis concerning an instrumental attitude to law fails to explain why the consensus theory was not rejected as an innovation inconsistent with prior doctrine.

Part IV will attempt to explain why the consensus theory appeared in case law when it did. It will show that lawyers were receptive to a consensus theory of contract by at least the late eighteenth century but that before the mid-nineteenth century they used only parts of the theory in case law. This delay in the application of much of the consensus theory was a result of various common law and other obstacles. As soon as consensus theory became broadly influential upon the perceptions of common lawyers, it appeared regularly in case law, but only with respect to issues for which it could be used in litigation.

### **I. The Common Law Foundation of the Consensus Theory: The Concept of Contract**

It is necessary to consider the possibility that the common law itself in the sixteenth through eighteenth centuries provided a foundation for the consensus theory of contract. Although this possibility has been broached by some historians, it has not in general been looked upon with favor, because the form of action in which the consensus theory developed, *assumpsit*, was an action for breach of promise. *Assumpsit* was an action for a wrong involving an obligation created by one party rather than an action for enforcement of a contractual right created by two or more parties. Nevertheless, contract did have a basis in the common law of the sixteenth, seventeenth, and eighteenth centuries. Although lawyers in the three centuries prior to 1800 had to sue in *assumpsit* and talk in terms of promises, they could and did think about agreements in terms of contract—an abstract notion of reciprocal obligation.

In the early nineteenth century, the chief remedies for breaches of agreements or contracts were actions of *assumpsit*, *covenant*, and *debt*. *Covenant* was an action for breach of contracts contained in sealed deeds, but by the later Middle Ages it was infrequently used.<sup>23</sup> *Debt* was an action for a certain amount of money or fungible goods,

owed on the basis of a statute, custom, contract, or obligation (a sealed deed). Because it was an action for the amount owed rather than for damages, and because when not brought on an obligation it allowed a defendant to wage his law (that is, to defend himself with "oath helpers"), debt was used chiefly for the enforcement of penal bonds.<sup>24</sup> After about 1600, the most widely available and most attractive remedy for agreements not in sealed deeds was the action of assumpsit, which offered a plaintiff the advantages of damages and a jury trial.

It was in actions of assumpsit that the consensus theory developed, yet an action for tortious breach of promise hardly seems the place to look for the seeds of modern contract theory. Indeed, the apparently abrupt change in the law relating to agreements from actions of assumpsit to the nineteenth-century consensus theory of contract has given credence to the idea that nineteenth-century contract law developed chiefly from sources external to the common law.<sup>25</sup> It would be astonishing, however, if so great a change in doctrine did not have some basis in earlier common law. As will be seen, the nineteenth-century consensus theory did have a foundation in prior law; it built upon an existing concept of contract.

The use of the word "contract" as a generic term for an agreement is a relatively recent development.<sup>26</sup> There was a time in the Middle Ages when a narrow concept of contract, known as covenant, was the basis of one of the chief remedies for breach of contract.<sup>27</sup> The existence of restrictions on the enforcement of covenants in royal courts<sup>28</sup> and the development and growing popularity of other remedies for contracts gave rise to a series of specialized remedies, each of which dealt with a particular type of contract: covenant for sealed deeds, debt for various sums certain, assumpsit for certain breaches of undertakings or promises, and account for an accounting. The concept of contract, once known as covenant, thereby lost its name to one of the specialized actions for contracts and after some delay acquired its present appellation: "contract."<sup>29</sup> The term "contract," which had denoted only those agreements that created enforceable debts,<sup>30</sup> thus came to replace "covenant" as the general term for most agreements.

The history of the concept of contract, however, may have differed slightly from the history of the terminology of contract. As mentioned above, a concept of contract or "covenant" had existed among common lawyers before the remedy of covenant was restricted to sealed deeds.<sup>31</sup> That restriction forced lawyers to expand their reliance upon other contractual remedies, most notably assumpsit. Nevertheless, common lawyers did not forget the concept of contract. As Simpson has shown, late-medieval lawyers were quite capable of employing contractual and

even some simple consensus analysis in connection with actions of covenant and debt,<sup>32</sup> and it is conceivable that their ideas survived to contribute to later common law notions of contract.

Gilmore, however, asserts that a generalized notion of reciprocal obligation was not employed in the centuries prior to 1871.<sup>33</sup> Even Simpson and S. F. C. Milsom suggest that since lawyers increasingly had to turn to assumpsit and discuss promises, notions of contract and consensus were largely eclipsed in the sixteenth through eighteenth centuries.<sup>34</sup>

It is important to determine whether Simpson and Milsom are correct or whether the concept of contract continued to be influential even while assumpsit was ascendant and lawyers had to talk in terms of promises. In particular, it is important to determine whether the abstract concept of contract or mutual obligation was eventually understood to underlie assumpsit—the action within which modern contract law developed yet which began life as a trespass on the case, that is, an action for a wrong. If the concept of contract came to be understood to underlie assumpsit, this fact would demonstrate the vitality and broad applicability of the common law concept of contract. It would show that common lawyers could think of contract as an abstraction or concept independent of the remedies therefor, and that they did not think of contracts merely as promises, even though they sued in assumpsit.

Of course, contract was familiar to common lawyers from its role in everyday transactions and in political and religious theory. The question, rather, is whether lawyers during the sixteenth through eighteenth centuries thought contract significant for legal doctrine.

A number of historians have already suggested that assumpsit was understood to be based in contract. The earliest indications of such an understanding of assumpsit have been discussed by W. M. McGovern and include casual remarks by St. German in his *Doctor and Student* of 1527<sup>35</sup> and the probability (also explored by R. H. Helmholz, Milsom, and Simpson) that consideration in actions of assumpsit was understood to be equivalent to similar requirements in certain other remedies for contracts.<sup>36</sup> McGovern further points out that in the seventeenth and eighteenth centuries assumpsit was classified as a contractual rather than a tort remedy for purposes of joinder of actions.<sup>37</sup> J. H. Baker observes that in 1598 assumpsit “could be defined in modern terms as ‘a mutual agreement between the parties.’”<sup>38</sup> In addition, he notes that one of the reasons given in 1612 for allowing assumpsits for money against executors was assumpsit’s basis in contract.<sup>39</sup> The remainder of Part I of this article will examine the transition

to a contractual understanding of *assumpsit*, the approximate date of that transition, and the acceptance and influence of the concept of contract.

Although *assumpsit* was and would continue to be a trespass on the case, *assumpsit*'s categorization as a type of trespass became increasingly unsatisfactory. *Assumpsit* began its development in the fourteenth century as an action against one who had undertaken to do something for the plaintiff and had done it badly.<sup>40</sup> From the start, therefore, it was used as a remedy for misfeasance in the performance of an agreement. When *assumpsit* became available in the early sixteenth century for acts of nonfeasance,<sup>41</sup> it became a remedy for contractual situations not easily analyzed as wrongs. As a result, *assumpsit*'s conceptual location in trespass seemed increasingly artificial—more a matter of tradition than of logic. *Assumpsit* continued to be an action of trespass on the case, but it now appeared to require classification and treatment as a contractual remedy.

Indeed, the dissonance between the remedy and the reality may have been what prompted common lawyers to talk abstractly about contract. *Assumpsit* increasingly appeared to be so artificial that for some purposes lawyers had to discuss it in terms of a largely abstract justification. Lawyers could not describe *assumpsit* as a contract remedy, but they could explain it as founded upon contract.

The earliest unambiguous evidence that the new, contractual understanding of *assumpsit* affected judicial opinions was a series of sixteenth-century variance cases dealing with the question of whether *assumpsits* were "entire." Contracts were said to be entire. Consequently, in actions brought upon contract, the plaintiff's evidence could not vary from the description of his contract contained in his declaration.<sup>42</sup> Wrongs, on the other hand, were thought to be several. Therefore, in actions based on wrongs (such as trespass and trespass on the case), the plaintiff's evidence could vary from his declaration, as long as the evidence supported enough of the declaration to state the cause of action.<sup>43</sup> According to traditional analysis, an action of *assumpsit* was an action of trespass upon the case—a claim for a wrong. Thus, a plaintiff declaring in *assumpsit* would not be nonsuited if, for example, he declared upon a contract for the sale of two horses and proved a contract for only one. Like other trespasses, an *assumpsit* was several.<sup>44</sup>

By Elizabeth's reign, however, *assumpsits* were held to be contractual and therefore entire. According to Judge Catlin in 1572, Queen's Bench had ruled "twice or thrice . . . that if an *assumpsit* be brought upon several things, and part only is found for him, the plaintiff shall have no judgment for any part."<sup>45</sup> Not until 1587 and 1589, however, did

the Court resolve the issue decisively.<sup>46</sup> In 1587, in *King v. Robinson*—an action of assumpsit—Queen's Bench denied recovery to a plaintiff whose declaration described only part of his promise, and the Court explicitly "denied" a contrary case of 1541.<sup>47</sup> Two years later in *Simms v. Wescott*, a plaintiff declared upon an assumpsit to do several things, and the jury found that only one was promised.<sup>48</sup> In Queen's Bench, the plaintiff's counsel insisted that assumpsits were several, like other trespasses and trespasses on the case. Croke argued the contrary for the defendant: "[T]he *Assumpsit* whereof the Plaintiff hath declared, although it consist of divers things, yet it is entire, and if the whole is not found nothing is found; and the Case of 21. E[dward] 4.22. was cited touching variance of Contract, as where an Action of Debt is brought upon a Contract of a horse, and the Jury found a Contract for two horses, the Plaintiff shall never have Judgment."<sup>49</sup> Three of the four judges accepted this argument. Although the fourth, Gawdy, disagreed with his colleagues, they gave judgment for the defendant later when Gawdy was absent, and their opinion prevailed. These Elizabethan cases held that assumpsits were similar to debts and covenants and therefore were entire. They thereby made an astonishing departure from the precedents that had treated assumpsits, like other trespasses and trespasses on the case, as several. They reveal that in the sixteenth century assumpsit came to be understood as founded on contract, in spite of its historical derivation as a remedy for a wrong and its continued categorization as a trespass on the case. As one late sixteenth-century case explained, "an assumpsit is in the nature of a covenant, and is indeed a covenant without writing."<sup>50</sup>

Not unlike plaintiffs in tort actions, plaintiffs suing on indebitatus counts were permitted to prove lesser quantities of, for example, money owed or goods sold and delivered, than they had stated in their declarations.<sup>51</sup> As a result, it may be supposed that the placement of assumpsit in the conceptual category of contract was a temporary, late sixteenth-century development that was quickly disturbed by the development of indebitatus assumpsit in the early seventeenth century. In fact, the requirements applied to the indebitatus counts reveal that assumpsit continued to be considered contractual in nature. Indebitatus counts were actions of assumpsit brought in lieu of debt and required only generalized declarations of the underlying facts. The plaintiff declared that the defendant, being already indebted to the plaintiff, promised to pay. Unlike a traditional declaration on assumpsit, which specified the details of a particular agreement and the damages arising from its breach, a declaration upon an indebitatus count alleged a certain type and amount of debt and relied on the court to imply an

agreement to pay the debt or, as it was later described, "a several contract for restitution."<sup>52</sup> Perhaps because the agreement to pay was thought to be implied or because *indebitatus assumpsit* was understood to be a restitutionary remedy, proof of a lesser amount of either consideration given or money owed was not material.<sup>53</sup> The materiality of a plaintiff's other allegations, however, was unaffected by the implication of the agreement or the restitutionary nature of the remedy. Since the defendant's obligation was based on an implied contract, those other allegations had to be proved as alleged, without a variance. For example, in 1690 in an action of *indebitatus assumpsit* for goods sold, the plaintiff declared that four defendants had made the promise, and the jury found that only three of them had done so. Common Pleas recited the old rule that "[t]orts are in their nature several, so one defendant may be found guilty and the other not guilty, but 'tis not so in actions founded upon contract." Following this rule, the Court gave judgment for the defendants on the ground that there was "an intire contract, and they must all be found to promise, or else 'tis against the plaintiff."<sup>54</sup> The Court construed the *indebitatus* counts as based on contract.<sup>55</sup>

Thus by the late sixteenth century, common lawyers came to view *assumpsit* as one of several remedies founded on an abstract notion of reciprocal obligation. Contract had become a legally significant concept, which influenced and was influenced by judicial decisions.

General surveys of the law recognized the abstract idea of contract and its broad application to all the actions used as remedies in contractual situations.<sup>56</sup> Although common lawyers traditionally had little interest in, or use for, abstract theoretical discussion of contract or most other legal subjects, they organized their general surveys in a way that reflected theoretical developments. The first of the surveys was Henry Finch's *Law, Or A Discourse Thereof* (1627). He broke from the traditional legal categories used by abridgers to facilitate searches for precedent and sought, instead, to provide a systematic analysis of the law. After a general discussion of the sources of law in Book One, he proceeded to discuss the following subjects: possessions, things, and (to a limited extent) persons in Book Two; wrongs in Book Three; and courts and procedures, including actions, in Book Four. The importance of this arrangement for purposes of contract law was the strict division, borrowed from Justinian's *Institutes*, between possessions and things on the one hand and wrongs or remedies on the other. Whereas Book Three set out the wrongs recognized by English law by listing various pleas of the Crown and private actions, Book Two on possessions and things did not adhere to the ready-made

categories provided by the forms of action. It thereby allowed Finch to escape the artificialities of common law pleading. Thus, Finch was able to address not only the forms of action but also contracts, which he mentioned, together with bailments, as things relating to personal property.<sup>57</sup> Although Finch had very little to say about contract, he at least took notice of its existence.

Finch's analysis was immensely popular and influential. Hale and Blackstone borrowed from Finch's approach to contract, and, in addition to discussing the remedies for breach of contract, they presented contract as a means of acquiring title or right in things.<sup>58</sup> To modern lawyers and historians, who live in a world in which contract and the remedies therefor are supposed to be closely linked, Blackstone's bifurcation of contract and contract remedies has seemed awkward and artificial. To seventeenth- and eighteenth-century lawyers, however, such a division was an accurate and elegantly conceived reflection of the awkward reality.<sup>59</sup> Finch, Hale, and Blackstone recognized that contract was quite distinct from the remedies for contract and required separate discussion.

Finally, it should be noted that around 1600, as earlier, the importance of the parties' intent was discussed in some contract cases. For example, Hobart referred to "an act, deed, or bargain . . . , containing the will and intent of the parties" and observed that deeds are to be construed according to "that intent."<sup>60</sup> Although not a statement of consensus theory, this is a reminder that intent was understood to play a role in contracts.

The survival and vitality of a rudimentary concept of contract was important for the development of the consensus theory. Because common lawyers were aware of a notion of mutual obligation, they were apt to appreciate consensus theory. Moreover, they had become accustomed to thinking of contract as a highly generalized concept or abstraction rather than as a body of rules relating to particular remedies or types of agreement. They understood that the abstract idea of contract more closely resembled legal reality than did the artificial categories of the forms of action. As a result, they were not unprepared to take a jurisprudential view of contract.<sup>61</sup>

## **II. Civilian Jurisprudence**

To understand how the consensus theory evolved from civilian sources, it is first necessary to study the role of civil law in England and America. Therefore, Anglo-American knowledge and treatment of

civil law is the subject of Part II. Discussion of the consensus theory and its development from civilian ideas is deferred to Part III.

Before launching into the evidence on civil law, however, it may be useful to review precisely why civilian ideas are significant for the development of the consensus theory. Simpson, Atiyah, and Horwitz present differing explanations of the growth of consensus theory, but their accounts share a sudden, late chronology and a view that consensus theory was an innovation produced almost entirely by influences external to the common law. Simpson contends that consensus analysis was introduced after 1790 (chiefly after 1800) from civil law—a system that had long treated contracts as the product of consensus. He argues that consensus analysis was mostly copied from civil law, although he is slightly ambiguous about the degree to which this was simply copying. To explain this innovation, Simpson shows that common lawyers could adopt civilian consensus analysis because they considered it general jurisprudence—a body of abstractly stated legal principles rather than mere foreign doctrine.<sup>62</sup> In addition, Simpson suggests that such ideas were received into the common law only after they had been legitimized through their appearance in early nineteenth-century common law treatises.<sup>63</sup> Atiyah professes not to dispute this account but draws attention to the liberal economic theories that he believes both encouraged and largely shaped contractual analysis after about 1770. Horwitz also argues that the consensus theory was a nineteenth-century creation.<sup>64</sup> In contrast to Simpson and Atiyah, however, he suggests that lawyers and judges produced the consensus theory to promote commercial interests, and that they were willing to innovate in this way because they had an instrumental view of law.<sup>65</sup>

In fact, the chronology was not as late or sudden as has been thought, nor were the effects of external influences as direct. Civilian ideas were indeed the source of much of the consensus theory and were adopted as jurisprudence, but they were adopted much more gradually and much earlier than has been asserted. Moreover, this gradual assimilation of civilian ideas went beyond copying. It was a highly selective reception, leading to the development of a jurisprudence of contract that departed considerably from its civilian progenitor and became largely consistent with the common law. As for late-eighteenth- and nineteenth-century liberal ideas, they may have encouraged the use of the consensus theory of contract, but they had relatively little effect on the basic components and outline of that theory, which developed chiefly from civil law both before and during the period of liberal influence. Similarly, nineteenth-century judicial instrumentalism and concern for commercial interests had much less effect on the shape of consensus theory than has been



claimed by Horwitz,<sup>66</sup> for the essential components of consensus theory had developed already in the eighteenth century.

In sum, the process whereby the consensus theory evolved from external influences and the chronology of that development must be reconsidered, and, to this end, the jurisprudential role of civil law in England and America will now be explored.

### *The Early Development of a Jurisprudential Role for Civil Law*

Several historians have recently emphasized the importance of civil law for the Anglo-American legal system. Helmholz demonstrates that common lawyers turned to canon law and civilian learning to illuminate a broad range of subjects.<sup>67</sup> Focussing on the seventeenth century, D. R. Coquillette discusses how, after about 1607, political obstacles prevented civil law from being openly accepted as broadly relevant to the law of England. According to Coquillette, seventeenth-century English civilians therefore merely employed civilian ideas in specialized but important fields, such as admiralty and mercantile law.<sup>68</sup> Other historians, including Simpson and M. H. Hoeflich, make the important observation that in the nineteenth century civil law was regarded in both England and America as the chief source of jurisprudence and therefore as a means of supplementing the common law where that law was silent.<sup>69</sup> A historical analysis similar to that used by Simpson and Hoeflich for the nineteenth century can be applied to earlier periods. A jurisprudential role for civil law began to be widely accepted in the seventeenth century after attempts to integrate the two legal systems more directly ended in failure.

In the late sixteenth and early seventeenth centuries, some English lawyers and civilians advocated the integration of civil and common law. The establishment of the regius professorships at Oxford and Cambridge in about 1540 had guaranteed civil law a prominent institutional niche in post-Restoration English academic life. In addition, civil law had an important role in admiralty and other specialized areas.<sup>70</sup> From at least the late sixteenth century, however, some Englishmen attempted to integrate civil and common law.

Several illustrations of the efforts at integration may be useful. The examples are taken from discussions of contract, because these probably encouraged common lawyers to assume that contracts were formed by the consensus of the parties. William West prefaced his *Symboleography* (1590), a book of precedents and writings, with an essay that applied intent analysis to most types of agreements and wills used in England, including oral agreements.<sup>71</sup> West explained that "[T]he substance of

all contracts consisteth in consent"<sup>72</sup>—a theme he expounded at length and (according to an early eighteenth-century civilian) "passed . . . off for the pure Common Law of England."<sup>73</sup> Although *Symboleography* was used largely by lawyers other than pleaders, it was a well-known work that went through fifteen or sixteen editions between 1590 and 1650, making it something of a best-seller.<sup>74</sup> Other early seventeenth-century English authors on civil law included William Fulbecke, whose dialogues set forth parallel concepts of the civil, common, and canon laws and attempted to explain their similarities and differences.<sup>75</sup> Fulbecke understood that contract underlay a diversity of remedies, including *assumpsit*,<sup>76</sup> and had one of his characters, Codicognostes, begin the dialogues by stating: "The chief ground of contracts is co[n]sent so that the persons which contract must be able to consent, so consent groweth out of knowledge and from a man's free will, directly by sufficient understanding. . . ."<sup>77</sup> Another, more learned author was John Cowell, who digested the common law into *Institutes* based on civilian categories.<sup>78</sup> Although he was much maligned because of the political implications of his work, Cowell's writings came to be well known and respected.<sup>79</sup> Cowell's *Institutes* included a sophisticated analysis of the common law on contract in terms of civilian ideas. Cowell recognized that contracts (oral, written, or nonverbal) were a product of agreement or, for nonverbal contracts, mutual giving. In connection with verbal contracts, he discussed "a certain conception of words which consist of Question and answer, as if it be said, dost thou promise? I do promise . . . Wilt thou engage? I will engage."<sup>80</sup> This was, of course, offer and acceptance.

These late sixteenth- and early seventeenth-century English authors applied civilian ideas directly to the common law in an attempt to reconcile the two systems, and for this reason they failed to develop a successful role for the civil law in England. Even those who did not blatantly advocate the use of civilian doctrine instead of common law understood civil law to be generally relevant in England. Hence, their attempts to understand the relationship between the two systems and the extent of their compatibility.<sup>81</sup> This approach to civil law was unacceptable to most Englishmen and English lawyers. Although the civil law attracted many for its maxims, its clarity, and its apparently scientific analysis of morality and law, it also in the seventeenth and much of the eighteenth century inspired distrust as an instrument of foreign, Catholic tyranny. Its doctrines relating to the prerogative, personal rights, and criminal law and procedure were considered particularly inimical to the common law and England's constitution. Since hopes for a direct and open relationship between civil and

common law were dashed by political realities, the chief visible role for the civil law in seventeenth-century English law was, as Coquillette argues, to provide a body of ideas that could be used by common lawyers in specialized areas, such as admiralty and mercantile law.<sup>82</sup> In addition, as shown by Simpson and Stein, civil law was used as source of maxims based on natural law.<sup>83</sup> Nevertheless, a broader role for the civil law was possible long before the early nineteenth century.

The development of a widely acceptable general role for the civil law had to wait only until the restoration of the monarchy in 1660 and particularly the Revolution of 1688, when the struggle between Crown and Parliament was resolved in a way that eventually precluded most people's fears of tyranny in England. The post-Revolutionary political settlement was so tied to the common law that not even a civilian with the wildest imagination could plausibly suggest the general employment of civilian doctrine in England. More important, such a role for the civil law could no longer reasonably be feared. As a result, civil law was able at last to develop a relatively secure general position in relation to the common law system. It achieved this relationship to the common law not as custom, not as foreign doctrine, and not as a general law with which English law was to be made compatible. Instead, civil law expanded upon the role already played by civilian maxims. Civil law, particularly those portions of it that were not politically objectionable, came to share part of the role of natural law. To some extent, civil law had long had a jurisprudential relationship to the law of England. For centuries, it had been a source of ideas. Now, however, civil law was openly and explicitly considered a source of jurisprudence for the common law—a philosophizing jurisprudence distinct from doctrine and thus different from jurisprudence as it existed on the continent.<sup>84</sup> In this guise, the civil law and related natural law gradually found a nonspecialized place in English legal thought that did not threaten English law or liberty and therefore could be broadly, acknowledged and appreciated.<sup>85</sup> Civil law (including, as will be seen, civilian ideas on consensus) thus found an undisguisedly jurisprudential role in English law, not after 1790 or 1800, but at least one hundred years earlier.<sup>86</sup>

### *Knowledge of Civil Law and Its Jurisprudential Role*

Simpson suggests that eighteenth-century English common lawyers did not read treatises on civil law—a position that would confirm his view that civilian ideas on consensus were adopted as jurisprudence rather abruptly after about 1790.<sup>87</sup> Coquillette, however, demonstrates

that civilian learning played an important role in the mid-eighteenth-century Massachusetts bar.<sup>88</sup> Indeed, many common lawyers appear to have been somewhat familiar with civil law as jurisprudence throughout the eighteenth century, and their familiarity increased during that period until, by the late eighteenth century, the jurisprudential role of civil law was well established. As will be seen later, this knowledge of civil law permitted a reception of civilian ideas on consensus long before 1790.

The increasing eighteenth-century interest in the civil law and its jurisprudential role is apparent from the torrent of civilian and natural law publications that became available in England. In the late seventeenth century, English translations of continental treatises began to appear frequently: Grotius, five times between 1650 and 1750; Pufendorf's *Law of Nature and Nations*, six times; Pufendorf's *On the Duty of Man and Citizen*, seven times during the first half of the eighteenth century;<sup>89</sup> Domat, three editions during the first three-quarters of the century; Heineccius, twice in that period; Justinian's *Institutes*, on three occasions in the middle of the century. Most of these and other foreign works were also available in England in numerous Latin editions.

At the turn of the eighteenth century, English civilians began to publish general works in which they espoused a jurisprudential role for civil law. These English writings included four editions of a *New Institute*,<sup>90</sup> one edition of a *New Pandect*<sup>91</sup> and various histories of Roman law.<sup>92</sup> Lectures were given at the Universities, and, from the mid-eighteenth century, some transcripts or outlines thereof were printed, a few in numerous editions.<sup>93</sup> Other lectures took place in Edinburgh.<sup>94</sup> Almost all these works (except, of course, the histories) presented the civil law as the embodiment of general legal principles or jurisprudence and presented contract as a thing formed by the consensus of the parties.

Simpson discusses many of these continental and English volumes in his history of the treatise as a genre. He does not believe, however, that common lawyers read civilian publications during most of the eighteenth century.<sup>95</sup> Consequently, he does not fully recognize the relationship of civilian books to the common law of that period.

English common lawyers knew and even appreciated civilian writings. In the late sixteenth and early seventeenth centuries, many common lawyers had been familiar with civil law from their university or legal studies.<sup>96</sup> The study of civil law does not appear to have died out after this period, and it may have flourished as the seventeenth-century political prejudices against civil law diminished. In the eighteenth century, the Inns of Court regularly purchased and otherwise acquired

books on natural and civil law.<sup>97</sup> Extant records of private legal libraries reveal similar interests.<sup>98</sup> Moreover, citations in law reports,<sup>99</sup> commonplace books, and surviving reading notes<sup>100</sup> indicate that at least some eighteenth-century lawyers read the civilian publications.

Many common lawyers learned about civil law at Oxford and Cambridge. Civil law was often considered the most refined system of law and morals and therefore was taught, if superficially, as an essential component of a clergyman's or gentleman's education.<sup>101</sup> (Incidentally, this study of civil law as part of a gentleman's education aimed to inculcate principles of reason and morality rather than technicalities, and thus contributed to the generalized, jurisprudential role of civil law in England.<sup>102</sup>) It is impossible to determine how many future lawyers attended lectures, studied accompanying outlines, or read more substantially in civil law at the Universities, but the number of such students probably was significant. Although a university degree was not required for the practice of law,<sup>103</sup> a university education of some sort was common, particularly among lawyers who became judges. Between 1688 and 1714, about 44 percent of the students at the Inns of Court had attended university in England or Ireland;<sup>104</sup> in 1785, 35 percent of all barristers had attended Oxford or Cambridge; and, during the last three quarters of the eighteenth century, 70 percent of the bench had a university education.<sup>105</sup> It is probable, therefore, that many eighteenth-century lawyers and judges had studied civil law at university. Certainly, some identifiable judges had done so.<sup>106</sup>

Already in the eighteenth century, some knowledge of civil law, whether acquired at university or privately, appears to have been considered necessary for law students. Several late seventeenth- and early eighteenth-century writers lamented that the civilians were not studied,<sup>107</sup> and most eighteenth-century recommendations to law students made clear that lawyers should have some knowledge of civil law.<sup>108</sup> Both the complaints and the recommendations (not to mention an acquaintance with the habits of students) lead one to suspect that many students paid little attention to a law that held out scant promise of practical usefulness. Yet the recommendations also indicate that students—especially ambitious students<sup>109</sup>—were thought to benefit from having some knowledge of civilian learning.

Parenthetically, it should be noted that almost all eighteenth-century recommendations to law students to study civil law encouraged only superficial study. According to Roger North, it was "not at all needfull to study questions" in civil law "but ye rise and progres[s of civil law] in Gross . . . is but a necessary knowledg[e]: & so farr taking up butt little time, & had by meer inspection of some books, & peruseing their

Introductions it may w[i]th eas[e] & pleasure be interlac'd w[i]th ye common law."<sup>110</sup> Lord Thurlow believed students should have a "cursory view" of civil law.<sup>111</sup> Most eighteenth-century law students could not be expected to pursue the technical details of civil law, and standards may have been tailored to match expectations. Moreover, as Mansfield said, "[l]ong comments [on Justinian's *Institutes*] would only confound you and make your head spin around."<sup>112</sup> Whatever the reasons for commending only general familiarity with the subject of study, superficial knowledge of civil law was highly compatible with and may even have encouraged the non-technical, jurisprudential approach to civil law. Indeed, the same political reasons that made necessary a jurisprudential rather than a more direct approach to civil law also made merely superficial knowledge advisable. The civilian Thomas Wood warned university students "designed" for the clergy not to read beyond the *Institute*, Grotius, and Pufendorf: "These last two Authors have drained out of many Volumes of the Civil Law, the greatest Part of the rational Learning concerning the Natural Rights of Mankind, which our *English* Lawyers do not disallow of. But if you go farther in this Study, have a care lest you take a Fancy (as too many have done) of bringing our Laws to the Standard of the Civil Law in *every Point*."<sup>113</sup> Although Wood's admonition was aimed at students destined for the Church rather than the law, it reveals a fear that study of civilian technicalities could endanger a student's appreciation of his common law inheritance.

Scottish educational and legal traditions stimulated interest in civil law and its jurisprudential role. The Scots studied civil law as an important part of their general education and professional training, even pursuing the subject at Leiden and other continental universities.<sup>114</sup> Consequently, lawyers and judges of Scottish origin may have brought with them a sympathetic interest in civil law and occasionally even some knowledge.<sup>115</sup>

Familiarity with civil law could hardly be avoided by the common law judges who had to decide cases under civil law. Common law judges not only had to resolve questions relating to prize and admiralty but also sat with civilians on the Court of Delegates (the civil law court of appeals).<sup>116</sup> Decisions of the Delegates, moreover, sometimes had to be studied by practitioners in Chancery.<sup>117</sup>

Civil law had a special importance as jurisprudence in equity. Reports reveal that from the beginning of the eighteenth century Chancellors and others in courts of equity regularly cited civil law.<sup>118</sup> Civilians advised the judges<sup>119</sup> and occasionally argued in court.<sup>120</sup> One civilian, William Strahan, apparently used his translation of Domat to promote

the jurisprudential use of civil law in courts of equity.<sup>121</sup> This interest in civil law stemmed in part from a tradition of civilian influence in the Court of Chancery, especially with respect to legacies. Increasingly, however, civil law provoked the interest of courts of equity as an exposition of natural law and equitable principles—a role for the civilian jurisprudence that seemed particularly apt because civilians had expressly portrayed their system as “equitable.” Indeed, the adoption of the natural and civil law jurisprudence relating generally to contract may have first occurred among equity lawyers. The jurisprudential approach to natural and civil law on contract appeared clearly in Ballow’s *Treatise of Equity* (1737). Ballow analyzed equity jurisdiction in terms of contract and contract in terms of civilian-derived consensus theory.<sup>122</sup>

Incidentally, the civilian jurisprudence encouraged an equitable approach to law. The civilian jurisprudence was a system of morality and “natural equity.” Against the background of a jurisprudence that emphasized the equitable purposes of law, it is hardly surprising that some eighteenth-century judges, including Mansfield, relied upon general, equitable principles in their decisions. As a result, even in jurisdictions in which separate court systems were maintained, equity began to merge into law long before the formal merger of the two in the nineteenth century.

The study of civil law as jurisprudence occurred not only in England but also in America. Even prior to the Revolution, American lawyers took an interest in civil law.<sup>123</sup> For example, as Coquillette shows, some knowledge of civil law was expected of lawyers in Massachusetts in the two decades prior to the Revolution.<sup>124</sup> In colonial Virginia, civilian volumes, especially Pufendorf and Grotius, were relatively common,<sup>125</sup> and by the 1730s, they were being cited in cases.<sup>126</sup> Indeed, through much of the eighteenth century, Grotius, Pufendorf, and other civilian or natural law writers were the standard moral and jurisprudential texts in American schools.<sup>127</sup> After the Revolution, many American lawyers and judges read civil law with enthusiasm. Civilian jurisprudence was especially attractive to Americans because it provided a means of simultaneously asserting independence and denying provincialism, and because it held out the possibility, however illusory, of law that was simple, scientific, and manifestly just and therefore appropriate for the new republic.<sup>128</sup> Looking ahead to the nineteenth century, it was only natural that in such circumstances civil law became well established as jurisprudence in law schools and law books.<sup>129</sup>

In sum, Simpson argues that common lawyers were largely unfamiliar with civil law in the eighteenth century—a point of view that suggests

common lawyers could not have assimilated civilian ideas on consensus prior to about 1800.<sup>130</sup> It is clear, however, that many common lawyers had some knowledge of civil law from at least the very beginning of the eighteenth century. Civil law was fashionable, and its fashionableness increased as the century progressed.

### *Civilian Jurisprudence as a Supplement to Common Law*

Eighteenth-century common lawyers were familiar with civil law and its jurisprudential role, but to what degree were they willing to think of and use civil law as a form of jurisprudence? Simpson shows that common lawyers were willing to adopt civilian ideas on consensus despite their hostility to doctrinal innovation, in part because they treated civil law as jurisprudence. According to Simpson, however, common lawyers began to take this jurisprudential approach to civil law beginning around 1790.<sup>131</sup> In fact, they treated civil law as jurisprudence much earlier.

Precisely what was meant by civil and common lawyers who insisted that civilian jurisprudence could supplement common law can only be understood in the context of natural law. The English had occasionally insisted that their legal system was based on natural law. Nevertheless, common lawyers acknowledged that the civil law's orderly categorization of substantive legal principles more clearly rested on such a foundation, so much so that they thought civil law was scientifically derived from natural law.<sup>132</sup> This understanding of civil law acquired particular significance and appeal in the late eighteenth century, when lawyers and others increasingly thought of legal study as a science and doubted whether the common law was sufficiently scientific or even rational.

Because civil law was jurisprudence, scientifically based on natural law, the foundations of morality and law, including the common law, could be elucidated from it. Civilians recommended civil law as a means of understanding the reasons of the common law and as a supplement to common law where that system was silent.<sup>133</sup> Even some common law judges occasionally took this stand. Holt used civil law in *Coggs v. Barnard* (K.B. 1703) to elucidate the law of bailments and thereby began a long and fruitful tradition in this field.<sup>134</sup> While sitting in Chancery, Chief Justice Lee cited Domat on partnerships, "not as authority on which a judgement is to be founded" but, "as said by my Lord *Raymond*, . . . as the opinions of learned men."<sup>135</sup> In *Harvey v. Aston* (1737), two daughters unsuccessfully sought property under a will and a trust, even though they had violated a condition that they



not marry without their mother's consent. Responding to the objection that civil law treated such restrictions as unlawful, Judge Comyns of Common Pleas (who was sitting in Chancery with the Chief Justices and Hardwicke) said that "in regard to the determinations of this or other Courts in Westminster Hall, Selden seems to make a proper observation . . . if there was not express rule of the common law in the case, the rule of the civil law was followed; or if both laws agreed, the matter was in some measure confirmed or explained by the words in the civil law."<sup>136</sup> Another report confirms that Comyns believed "what *Selden* lays down . . . seems to direct how far it [civil law] shall be admitted."<sup>137</sup> Later in his opinion, after reciting civilian rules to confirm the common law on conditional payments, Comyns declared: "The Rules of the Civil Law when consen[se]nt to Reason and Conscience & not interfering w[i]th any Maxim of the Com[m]on Law have frequently been followed by this Court not as . . . Rules of ye Civil Law, but . . . as Rules of Reason and Equity."<sup>138</sup> Long before the nineteenth century, at law and especially in equity, lawyers advocated use of civilian jurisprudence to supplement Anglo-American doctrine where it was silent.<sup>139</sup>

The civilian jurisprudence probably appeared more traditional than it was. In addition to cases in which courts employed civilian ideas jurisprudentially, equity in some instances had largely historical reasons for employing civil law, and King's Bench sometimes had the excuse of mercantile custom and the law of nations. Looking at these cases, eighteenth-century common lawyers may have perceived a long tradition of reliance upon civilian jurisprudence to fill voids in the common law, not least in the field of contract.

The jurisprudential role of civil law could appear traditional and find acceptance precisely because it supplemented rather than challenged the common law. In 1765, in a case of *assumpsit* upon a bill of exchange, the judges of King's Bench abandoned the doctrine of consideration for purposes of commercial transactions among merchants<sup>140</sup>—Wilmot (but not the other judges) doing so with the assistance of civil and natural law. The judges thus directly challenged a very clear and well-established common law doctrine, and it is hardly remarkable that they did not prevail.<sup>141</sup> Wilmot's use of civil law in that case, however, was unusual, for he could be understood as having attempted to substitute civil law for common law. In contrast, other common lawyers who sought the adoption of civilian ideas typically said they desired only to make additions to the common law. Consequently, they met with few of the troubles encountered by Wilmot in

his opinion on consideration.<sup>142</sup> As a means of supplementing common law, civilian jurisprudence was generally accepted.

### III. The Development of the Consensus Theory

It has been seen that common lawyers were familiar with civil law and were capable of using it as jurisprudence. Therefore, it is now possible to consider the reception of civilian ideas on contract.

#### *The Civilian Jurisprudence on Contract and Its Reception*

Simpson argues that common lawyers copied civilian contract ideas beginning in about 1790 and chiefly after 1800.<sup>143</sup> Moreover, he is somewhat ambiguous about the degree to which civilian ideas were simply borrowed or were adapted. Although he indicates that, for lawyers, "successful creative work consists in a combination between intelligent plagiarism and systematization of what is lifted from others," he also suggests that civilian contract ideas were "largely plagiarized."<sup>144</sup> Thus, he leaves open the possibility that these ideas were copied with relatively little modification.

In fact, the reception of civilian contract notions began much earlier than 1800 and was highly selective. The consensus theory developed, at least in the minds of common lawyers, during the seventeenth and especially the eighteenth century. As common lawyers studied civilian contract doctrine, they gradually modified it and so produced a contract jurisprudence consistent with their needs and attitudes and compatible with the common law. Thus, the consensus theory was an early development and was not simply the direct product of external influences.

Some caution is requisite when attempting to ascertain how common lawyers understood the civilian jurisprudence relating to contract, for individual lawyers left little evidence of their opinions on that subject and probably were not unanimous. Nevertheless, one can observe the general outlines of their understanding of contract jurisprudence.

Civilian and natural law writings published in England included extensive discussion of contract and its foundation in consensus and suggest the range of civilian ideas on contract that may have been available to common lawyers. Such publications repeatedly indicated that the mutual consent and intent of the parties was the basis of contracts.<sup>145</sup> Many of the civilian and natural law writings discussed the role of intent in offer and acceptance, duress, mental incapacity,

mistake, and equality.<sup>146</sup> These texts usually treated civilian ideas, including consensus theory, as universal rather than foreign law.

Eighteenth-century common lawyers increasingly accepted these civilian notions as a source of jurisprudence but did not find them all equally attractive. Common lawyers accepted some components of the civilian doctrine but not others, modifying it into a peculiarly common law consensus theory.

For example, the reception of civilian ideas on contract into English and, eventually, American accounts of jurisprudence simplified and sifted out many of the details of civil law. As mentioned above, almost all recommendations to law students to study civil law encouraged only superficial, general knowledge. Moreover, common lawyers needed civilian ideas on very general problems of contract. Common lawyers already had their own system of remedying and categorizing contracts and therefore took less interest in the civil law's classification of different types of contracts and promises than did civilians. For purposes of bailments, such categories were of great interest; for contracts in general, they were not. Thus, in his extensive manuscript treatise on contract law (written prior to 1726), Baron Gilbert displayed considerable familiarity with civilian categories of contract and little inclination to adopt them or other parts of civil law. He had, however, assimilated consensus theory, and he used it in his discussion of consideration: "Where the Solmenitys of Law are wanting to shew a serious Intention of the partys [such intention] must be Collected from the Consideration[.] [N]ow where there is any Error in the Consideracon the Contract cannot be Obligatory because there was plainly no Intention to be Obligated nor no Union of minds . . ."<sup>147</sup> Although Ballow, in his 1737 treatise on equity, discussed civilian consensus theory extensively and framed much of his book around it, he ignored civilian doctrine concerning the different types of contract and promise.<sup>148</sup> A similar approach is apparent in some brief notes entitled "Of Contracts," jotted down by Chancellor Henley in his commonplace book. He based these notes on civilian theory and referred to "[t]he Intention of the parties" but did not mention the types of contract and promise in civil law.<sup>149</sup> Thus, the need to treat civil law as jurisprudence and the irrelevance of the details of civil law on contract led common lawyers to simplify the civilian doctrine to a few generalized, jurisprudential ideas. This simplification contributed to the distinctly generalized and conceptual character of common law consensus theory.<sup>150</sup>

Civilian doctrine directly incompatible with common law precedent on consideration encountered stiff opposition. In response to civilian doctrine, Baron Gilbert defended consideration at length in his man-

uscript contract treatise.<sup>151</sup> When, about half a century later, Wilmot experimented with civilian doctrine inconsistent with the common law consideration requirement, the response was swift and decisive.<sup>152</sup> This rejection of an aspect of the civilian theory in deference to precedent on consideration reveals that the civilian theory was modified in a way that made it compatible with common law. Parenthetically, it also shows that what Horwitz considers to have been the interests of commerce could not prevail against well-established doctrine. Consideration was the chief traditional doctrine of common law contract that could be considered (as it is by Horwitz) an obstacle to commerce, and yet it could not be removed.<sup>153</sup>

The civilian doctrine of equality, in which assent and fairness were intimately connected, encountered much skepticism among common lawyers. Starting with the assumption that each party should fully understand his contract, equality required openness and fairness in bargaining, and a just price.<sup>154</sup> From the early eighteenth century until well into the nineteenth, the doctrine attracted the interest and enthusiasm of many lawyers and judges. It could not, however, be received directly into the common law. Equality and related civilian ideas must have seemed somewhat out of place in England and America, for reasons of law, economic practice, and sympathies that favored freedom of contract. As a result, courts either ignored those ideas or used modified versions of them for restricted purposes.<sup>155</sup> Even Thomas Rutherforth—the mid-eighteenth-century Cambridge professor of divinity who lectured in detail on equality in contracts—recognized that the doctrine of equality faced strong skepticism. When discussing equality of knowledge (i.e., disclosure of known defects), he remarked to his students that “common practice in buying and selling may have prejudiced you against this conclusion.”<sup>156</sup> Long before the contributions of Adam Smith and other theorists, continental ideas incompatible with English attitudes, economic practice, and precedent could be anticipated to receive an unsympathetic hearing.<sup>157</sup> Not surprisingly, those ideas made only a very limited impression on the common law.

It should be noted that although the English could simplify civilian contract doctrine to make it compatible with a jurisprudential role, the concept of equality and the civilian ideas inconsistent with the consideration requirement were fundamentally incompatible with English attitudes and law. These civilian notions could not be made acceptable merely by simplification, nor could they be wished away. Such ideas were, of necessity, included in discussions of jurisprudence, though at times without approval.<sup>158</sup> They were jurisprudence but, to most, were not directly acceptable as law.<sup>159</sup>

The predominantly skeptical approach to the concept of equality had some basis in civilian writings. For example, Domat, like most civilian and natural law writers, recognized a relationship between contracts, commerce, and the distribution of material benefits: "The use of Covenants is a natural Consequence of the Order of Civil Society, and of the Ties which God forms among Men. For as he has made the reciprocal Use of their Industry and Labor, and the different Commerce of Things necessary for supplying all their Wants; it is chiefly by the Intervention of Covenants that they agree about them."<sup>160</sup> Domat, however, went further. Under the title of "An indefinite liberty for all sorts of pacts," he elaborated that "[c]ovenants are arbitrary, and vary according to the Wants of Mankind . . . provided that they have nothing in them contrary to Law, and good Manners."<sup>161</sup> More than most continental civilians and natural lawyers, Domat used language consistent with English attitudes toward contractual and economic freedom.

Some civilian ideas on contract, rather than being accepted or rejected, were simply not publicized in England or the United States prior to the nineteenth century. The consensus ideas expounded by seventeenth- and eighteenth-century publications in these countries did not include notions of frustration of purpose or foreseeability of damages (neither of which are necessary components of a consensus theory).<sup>162</sup> Moreover, the principle of intention to create legally binding relations had not yet appeared widely in England or America.<sup>163</sup>

The reception of civilian contract ideas clearly reveals the great selectivity of common lawyers' acceptance of those notions. It also demonstrates the relatively minor role of both liberal economic theory and nineteenth-century solicitude for commercial interests in shaping the common law's consensus theory. As Simpson points out, the civilian ideas on consensus, which increasingly were accepted as jurisprudence, included most of the essential elements of nineteenth-century consensus theory. If this line of analysis is pursued, it becomes clear that only the rejection of the doctrine of equality reflected the influence of late-eighteenth- and nineteenth-century liberal theories, and even this rejection began so early that it could have been only partially the product of those liberal ideas. Common law precedent, economic practice, and non-theoretical economic sympathies probably contributed more to the rejection of the doctrine of equality. Similarly, early nineteenth-century concern for commercial interests could have had little effect on the Anglo-American rejection of the doctrine of equality, which began by at least the mid-eighteenth century. Thus, although liberal economic theories (and, perhaps, nineteenth-century promotion of commercial

interests) may have contributed to some peripheral details of consensus theory, they had only a limited and late influence on the shape of the essentials of consensus analysis.

Having shown that the reception of civilian ideas on consensus was very early and selective, this article must examine whether the civilian-derived consensus theory was understood to be compatible with common law precedents—whether it could really be viewed as a mere supplement to common law. In England and, apparently, America, civilian consensus theory was shorn of its technical details, leaving only vague, jurisprudential generalizations about consensus that were largely compatible with the common law. Nevertheless, portions of that theory were not entirely consistent with Anglo-American precedents. Yet when early nineteenth-century commentators occasionally noted the discrepancies between consensus theory and precedent (e.g., with respect to equality, mistake, and duress) at least some had few doubts about the superior accuracy of the consensus theory or about its departure from precedent.<sup>164</sup> Consensus theory could be accepted as jurisprudential truth even when precedent or other factors precluded its adoption as legal doctrine.

In general, however, conflicts between precedent and consensus theory were not observed, because the consensus theory prompted discussion of subjects not previously addressed by the common law. In this respect, lawyers thought of consensus theory quite differently than they did the civilian ideas on consideration introduced by Wilmot, which collided directly with a major body of common law doctrine. Although some precedents were not in accord with consensus theory, they had not prompted discussion of consensus, and consequently were not precedents on what now appeared to be the substantive question of law: the existence of consensus. On that, common law was silent.<sup>165</sup>

To summarize, the reception of civilian ideas on consensus was much more selective and occurred much earlier than has been thought. Common lawyers adopted civilian ideas on consensus gradually during the seventeenth and eighteenth centuries. They thereby transformed those ideas into a highly generalized consensus theory that was suited to a jurisprudential role and was compatible with the common law.<sup>166</sup>

### *The Appeal of the Consensus Theory*

Although it has already been suggested that the consensus theory had great appeal to common lawyers in the eighteenth century, further evidence on this point must be examined.<sup>167</sup>

Atiyah and Horwitz suggest that consensus analysis attracted common

lawyers because it reflected late-eighteenth- and nineteenth-century liberal economic theories and was the instrument of nineteenth-century judicial concern for commercial interests.<sup>168</sup> As discussed above, liberal theories had little effect on the shape of the main components of the consensus analysis, and nineteenth-century solicitude for commercial interests had almost no effect. Nevertheless, it is conceivable that these influences were partially responsible for the appeal of the analysis. Yet late eighteenth-century liberal thought and nineteenth-century commerce were not necessary for the development of the consensus theory, as is clear from the theory's civilian origins in continental countries (a point eloquently made by Simpson)<sup>169</sup> and its early development in England (as discussed above). Consensus theory first became attractive to common lawyers for reasons unconnected with late eighteenth-century liberal theories or nineteenth-century commercial interests. Moreover, even when liberal theories were developed and became influential in the late eighteenth century, they were not necessarily associated by common lawyers with consensus analysis. The civilian consensus theory was more clearly affiliated with legal arguments for paternalism than freedom in contract law. Unlike discussions favoring contractual freedom, paternalistic arguments regularly relied upon civilian consensus ideas and vocabulary.<sup>170</sup> Thus, late eighteenth-century liberalism and nineteenth-century commercial interests probably can explain, at most, only part, perhaps only a small part of the appeal of the consensus theory.<sup>171</sup>

Another explanation of the appeal of the consensus theory is that of Simpson. He writes that the theory attracted common lawyers beginning in the late eighteenth century because it provided them with what had long been absent from the common law, a description of the consensual reality of contracts. As will be seen, the theory was appreciated for this reason, though long before the late eighteenth century.

Of all civilian jurisprudence, that relating to contract was of particular interest, because it supplied this need for a description of the consensual reality of contract. Beginning in the late sixteenth century, English writers on civil law gave prominence to contract and its English parallels.<sup>172</sup> In the last half of the seventeenth century, two leading judges, Hale and Holt, borrowed a civilian label to distinguish between actions on contract and actions "ex quasi contractu."<sup>173</sup> One late seventeenth-century judge, Ventris, used consensus theory (apparently of civilian origin) to argue in a conveyancing case that "an assent is not only a circumstance, but 'tis essential to all conveyances; for they are contracts, . . . which necessarily suppose the assent of all parties."<sup>174</sup> An early eighteenth-century English civilian, Ayliffe, recognized the

relevance of civilian jurisprudence to the common law of contract. Noting that civil law could not be directly adopted in England, Ayliffe explained that, nevertheless, "[w]e have derived many of our Definitions, Divisions and Maxims, from the *Roman . . . Law*"—a debt Ayliffe thought of some importance, as the common law "originally gave no methodical Account of Things purely rational, as of Obligations, Contracts. . . ." <sup>175</sup> In 1798, Arthur Brown, Professor of Civil Law at the University of Dublin, wrote that "the debt of our Code to the Civil, is most conspicuously shewn in . . . Contract. . . . The obligation here is so universal, we have so little of original fund, and the analogy is so complete, that we cannot be expected to mark diversity, except in some very few instances." <sup>176</sup> Similarly, William Jones commented, "the greatest portion of [Pothier's works] is law at *Westminster* as well as *Orleans*." <sup>177</sup> Although common law provided remedies for contracts, it did not describe contracts. Civil law did. <sup>178</sup>

Civil law seemed especially relevant to common law in the area of contract not only because common law did not describe contract but also because common law appeared to obfuscate the contractual and consensual reality of agreements. An expectation that legally recognized events and the remedies therefor should somehow be related could not be satisfied by the artificial categories of common law contract actions, especially when contrasted to the logical generalizations of civil law. This disparity between the civil law of contract and the common law actions became increasingly apparent as the forms of action came to be treated as mere forms. Under a variety of influences, including the civilian jurisprudence, eighteenth- and nineteenth-century common lawyers became self-conscious about the formalities of the common law. When they sought the law that lay behind the formalities, they paid particularly close attention to the concept of contract that lay behind the contractual actions and to the consensus that underlay contract. Their awareness of consensus as the chief substantive ingredient of contract encouraged, and was encouraged by, their view of assumpsit as a mere formality.

The degree to which the consensus theory was assimilated is illustrated by brief statements in general surveys <sup>179</sup> and particularly by the popularity of three treatises on contract: Henry Ballow's *Treatise of Equity* (1737), John Joseph Powell's *Essay Upon the Law of Contracts and Agreements* (1790), and William Jones's *Essay on the Law of Bailments* (1781). <sup>180</sup> Ballow's *Treatise of Equity* was a general account of equitable principles relating to agreements, including uses and trusts. <sup>181</sup> He analyzed contract on the basis of the "assent" of the parties. Whereas Gilbert earlier had discussed the need for a "union of minds" only in



passing, Ballow addressed the issue directly and systematically, giving great emphasis to the need for "an union of minds and affections."<sup>182</sup> That such analysis of intentions in contract occurred at an early date in a volume on equity is to be expected. Practitioners in courts of equity probably were more familiar with civilian writings than their colleagues at law and certainly were accustomed to examining the intentions of the parties and the realities of agreements in order to do justice. In his *Essay*, Powell aimed to discover the general rules upon which contract decisions at common law and in equity were founded. Like Ballow, he believed that the assent of the parties was the basis of contract and presented a detailed account of the consensus theory. Unlike Ballow, however, he did not simply assert those principles of consensus, but used them to analyze cases.<sup>183</sup> Finally, Jones's work attempted to elucidate the law of bailments by analyzing the civil and common law on that subject. Jones believed that "the intention of the parties . . . constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government."<sup>184</sup> As they themselves asserted, Ballow, Powell, and Jones were applying to contract the scientific jurisprudence of the civil law that had become increasingly popular in the course of the seventeenth and eighteenth centuries.

Parenthetically, it should be noted that these authors not only expounded the consensus theory but they also took a broad view of the role of contracts in society. According to Atiyah and Simpson, Adam Smith originated the view that contract—particularly freedom of contract—was the means by which individuals in a society cooperated to improve their material situation.<sup>185</sup> In fact, as mentioned above, various natural lawyers and civilians took a somewhat similar position, albeit while accepting some paternalistic restraints. They believed that "[t]he use of Covenants is a natural Consequence of the Order of Civil Society, and of the Ties which God forms among Men." By means of contracts, men agree about "the reciprocal Use of their Industry and Labor, and different Commerce of Things necessary for supplying all their Wants."<sup>186</sup> Eighteenth-century English writers on contract appear to have written in the same tradition. Ballow thought that "a pact or covenant, in the general sense of it, comprehends all things about which men agree, in their transactions, negotiations, and intercourse with one another."<sup>187</sup> Powell understood contracts to "comprehend the whole business of human negotiations. They are applicable to the correspondence of nations, as well as to the concerns of domestic life. They include every change and relation of private property, and consequently furnish the principal subject, on which all legal and equitable jurisdiction is exercised."<sup>188</sup> Jones reminded his readers that "the contracts above

mentioned [bailments], are among the principal springs and wheels of civil society; that, if a want of mutual confidence were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces."<sup>189</sup> Such a statement even appeared in the leading eighteenth-century treatise on *nisi prius*: "Mutual commerce and intercourse is of the very essence of society; . . . thus the chief advantage of society would entirely fail, unless its laws were so framed as to bind its members to a strict performance of their contracts, by compelling them to make an adequate satisfaction for the breach of them."<sup>190</sup> These authors were following a tradition that pre-dated Adam Smith.<sup>191</sup>

Thus, by the late eighteenth century, some important common law treatises—including all of those that focused on contract—had discussed the relevant civilian analysis, not as superior foreign law, but as a lucid description of jurisprudential truth.<sup>192</sup> When translations of Pothier's *Obligations* were published in America and England in the first years of the nineteenth century, that work probably was not perceived as a novel approach to contract. Instead, it was a strikingly sophisticated and authoritative presentation of an already familiar and accepted civilian jurisprudence.<sup>193</sup>

Questions of consensus began to be addressed regularly in case law when the civilian jurisprudence prompted large numbers of common lawyers to perceive those questions and to think of them as issues of law. In contrast, Baker has written that "there were few decided cases before 1800 on questions so beloved of the 'classicists' . . . because previously those questions were thought to be within the province of the jury. And this is surely the explanation of the 'transition to contract.' "<sup>194</sup> This is, however, an incomplete explanation. In particular, it should not be understood to diminish the significance of the consensus jurisprudence, for that jurisprudence had the effect of encouraging lawyers to see new issues of law. It is conceivable that, even without the assistance of civilian ideas, common lawyers could have independently created a consensus analysis and employed it in case law. They did not do so, however, except in a very simple way. Although, as discussed in Part I of this article, common lawyers had long made some rudimentary assumptions about contract and even consensus,<sup>195</sup> they did not develop sophisticated and elaborate ideas on consensus until they began to assimilate the civilian analysis. Moreover, as will be seen below, there were no procedural or doctrinal obstacles to the development of case law on some important issues of consensus.<sup>196</sup> Yet common lawyers did not discuss such issues in cases until, through their study of civilian jurisprudence, they gradually became familiar

with questions of consensus and saw those questions as problems of law. Matters of law could be treated as such only when they were so perceived. By the close of the eighteenth century, the civilian-derived consensus analysis had become familiar as jurisprudence to many lawyers and judges, and it shaped their perception of the issues in contract cases.

Part III of this article has attempted to trace the development of the consensus theory and to explain why it was not perceived as an innovation. The development of the consensus theory was not, as has been claimed, shaped principally by liberal ideas or by judicial solicitude for commercial interests; above all, it was not a sudden change without foundation in prior common law. On the contrary, common lawyers developed the consensus theory of contract from civilian contract jurisprudence, not only after about 1790, but already in the seventeenth and eighteenth centuries. Moreover, civilian ideas on contract were not simply copied. Common lawyers could not innovate in contract law in the face of well-established precedent, and for this and other reasons they largely rejected the civilian doctrine of equality and the doctrine inconsistent with consideration. By rejecting and modifying various aspects of civilian contract notions, common lawyers adapted those ideas into a contract jurisprudence largely compatible with Anglo-American law. This civilian-derived theory provided common lawyers with something that had been missing from their legal system—a description of the consensual reality of contracts—and the theory thereby revealed to them a range of legal issues of which they had not previously been aware.

#### **IV. The Slow Appearance of Consensus Theory in Case Law**

The appearance of case law applying consensus theory was hardly immediate. In contrast to the extensive treatment of consensus theory in civilian and common law treatises, and in spite of the obvious appeal of the theory to late eighteenth- and early nineteenth-century common lawyers, consensus analysis did not regularly appear in a wide variety of contract cases during the first half of the nineteenth century. This is not to say that courts did not employ the theory. In two important categories of cases—those concerning offer and acceptance and those dealing with mutual mistake—late eighteenth- and especially early nineteenth-century courts regularly applied consensus analysis and, in some American cases, did so expressly in reliance on civilian sources.<sup>197</sup>

Yet these cases raise the question of why courts did not regularly discuss consensus theory in other types of contract cases. If a reception of civilian consensus theory occurred in the seventeenth and eighteenth centuries, and if portions of that analysis appeared regularly in cases already in the early years of the nineteenth century, it may be wondered why many other elements of the theory did not regularly turn up in case law until about fifty years later.<sup>198</sup> The answer to this question will illustrate that even widely accepted ideas could not always affect case law automatically or promptly.

An explanation of the delay in the appearance of consensus theory may, perhaps, be sought in Simpson's argument concerning its reception through treatises. Simpson suggests that the common law did not make use of civilian contract doctrines until those civilian ideas had been legitimized through their appearance in late eighteenth- and early nineteenth-century common law treatises. "[I]t is to the rise of the treatise," according to Simpson, "that we must attribute the change in the character and structure of basic contract law."<sup>199</sup> This view, however, can be questioned. Although common law treatises clearly facilitated the reception of civilian ideas into case law, they probably were not directly necessary for the reception. The hypothesis that courts were slow to use consensus theory because they had to wait for civilian doctrine to be legitimized in common law treatises is undermined by the fact that early nineteenth-century courts cited continental civilian works to supplement silences in the common law. American judges were particularly eager to display their knowledge of civil law and often put their opinions in writing.<sup>200</sup> Consequently, reports of the cases in which they supplemented common law, including contract cases, cited civilians relatively frequently.<sup>201</sup> Early nineteenth-century English reports were less likely to cite civilians to fill gaps in the common law, and the printed reports of English cases on general contract law apparently did not do so. Nevertheless, English courts were openly willing in some other cases to supplement common law with civilian learning.<sup>202</sup> Moreover, both English and American courts occasionally adopted civilian ideas directly but without citations. For example, as early as the late eighteenth and early nineteenth centuries, English and American judges were willing to apply consensus theory of civilian origin in cases of mutual mistake and of offer and acceptance. Although such judges often did not cite civilian authorities, they probably had not derived their knowledge of consensus theory exclusively or even chiefly from the relatively few common law treatises on contract that had been published, let alone those treatises that applied consensus analysis to the action of *assumpsit*. Indeed, Simpson points out that

the leading opinion on offer and acceptance, *Adams v. Lindsell* (1818),<sup>203</sup> was an unattributed “borrowing” from Pothier.<sup>204</sup> Thus, although common law treatises stimulated appreciation of civilian jurisprudence on contract and in the nineteenth century supplied some judges with knowledge of the civilian and other ideas that they applied in cases,<sup>205</sup> those treatises were not the only source of such knowledge. Both English and American judges took over civilian ideas on consensus directly from civilian as well as common law sources and did not have to wait for such ideas to be legitimized in common law treatises before they could apply them in their decisions.

This is not to say that judges who employed civilian ideas believed civilian sources to be authoritative. As Simpson has noted, they turned to civil law simply to elucidate jurisprudential truth. Certain civilian contract ideas had for a long time been considered a form of jurisprudence rather than mere foreign law and therefore were perceived, not as competitive legal doctrine, but as an accurate, jurisprudential description of contract. Contract was thought to be largely the same in civil law countries as in common law countries, with only the remedies being different. Such an understanding of civil law and of contract explains why the consensus theory was not considered an innovation and why the relevant civil law did not require reception through treatises.<sup>206</sup>

An alternate reason for the delayed appearance of parts of the consensus theory is suggested by the work of Atiyah. He argues that liberal economic theories made essential contributions to the development of the consensus theory of contract,<sup>207</sup> and it may be supposed that courts and pleaders had to be exposed to those theories for half a century or more before they could be receptive to a consensus analysis. Such a delay, however, was not necessary. Although the writings of classical economists became influential in the late eighteenth and especially the early nineteenth century, lawyers were already receptive to consensus analysis, as has been illustrated by the treatises of Ballow (1737), Jones (1781), and Powell (1790). Moreover, although much consensus analysis entered case law only after 1850, some consensus analysis had already done so in the late eighteenth and particularly the early nineteenth century. Thus, the liberal economic ideas of Adam Smith and his followers may have encouraged the use of the consensus theory of contract and even may have helped to shape one component of that theory.<sup>208</sup> They do not explain, however, why different elements of the consensus theory entered case law at different times.

Another tempting explanation is that defendants frequently pleaded the general issue.<sup>209</sup> In the eighteenth century, according to Baker, the

use of the general issue precluded development of consensus analysis.<sup>210</sup> Baker writes that such analysis did not appear in case law because "[t]here was no machinery for producing it."<sup>211</sup> Some machinery, however, did exist. The general issue, by itself, could not have greatly delayed the development of substantive law on contract either in the eighteenth century (as argued by Baker) or in the nineteenth century, because issues of law could be raised after the defendant pleaded generally. Indeed, some of the earliest common law cases to raise questions of consensus (cases of offer and acceptance and of mutual mistake dating chiefly from the first decades of the nineteenth century) reveal that questions of law hidden by the general issue were easily raised in the judge's instructions and in motions for arrest of judgment and new trial.<sup>212</sup> The negligible role of the general issue, by itself, in delaying discussion of consensus is confirmed by the fact that questions of consensus were not raised in common law cases any later than they were raised in suits in equity, where there was no general issue.<sup>213</sup>

What explains the introduction of different elements of consensus theory into case law at different times? Although two issues of consensus theory—mutual mistake and offer and acceptance—were promptly discussed in case law, other issues were not, because of various common law and other impediments. In other words, the different issues of the consensus theory could appear regularly in case law only to the extent that judges and lawyers had occasion to use them. In litigation, more than in their treatises, lawyers and judges were subject to some practical constraints.

It must be emphasized that this article makes no attempt to trace all the influences that shaped or encouraged the use of consensus theory in the nineteenth century. That is a task far beyond the scope of this inquiry. Only the obstacles (perhaps only the chief obstacles) to the judicial application of consensus theory in the nineteenth century are here considered.

### *Mistake in Understanding*<sup>214</sup>

In suits in equity and in the chief actions at law that could be brought upon contracts, various obstacles in the common law largely foreclosed opportunities for judicial discussion of mistake in understanding (and certain other questions of consensus). These obstacles and the demise of some of them in the nineteenth century will now be examined.

*Indebitatus Assumpsit, Covenant, and Debt on Obligation:* In the chief actions at law for contracts (other than actions of special assumpsit

and debt on simple contract), there were few opportunities for judicial discussion of the theory that contract is formed by consensus.

Actions of indebitatus assumpsit were unlikely to give rise to consensus analysis of contract formation. The plaintiff in such an action did not have to show a promise or contract but instead had to prove a situation that would imply a promise or contract.<sup>215</sup> When using indebitatus assumpsit as a contractual remedy, the plaintiff had to show that the consideration was completed or executed. In the words of Baron Gilbert, "the Law implies a several contract for Restitution, and . . . the Gist of the Injury is not whether such a particular Contract is broken, but whether the Goods were delivered or Money paid to the Defendant."<sup>216</sup> Thus, in actions of indebitatus assumpsit, questions of consensus concerning contract formation were unlikely to arise, since these questions were irrelevant to the shortcut by which the law implied a contract.<sup>217</sup>

In actions of covenant and of debt on obligation, the necessity of sealed deeds or specialties largely precluded certain questions of consensus.<sup>218</sup> The existence of the specialty usually determined any issue of intent to create legally binding relations and of offer and acceptance at the very start of an action. The specialty also discouraged analysis of mistake in understanding, by excluding extrinsic evidence and inviting interpretation according to rules of law.<sup>219</sup> Issues of mistake in understanding were unlikely to arise for other reasons as well. The sealed deeds upon which actions of covenant and debt on obligation were brought were usually drafted in standard language that left little room for claims of mistake. That the standard form of bond frequently contained or was accompanied by a power of attorney to acknowledge judgment further reduced the chances that a question of mistake in understanding could arise.

Thus, the actions of indebitatus assumpsit, covenant, and debt on obligation were hardly fertile fields for the development of doctrine on questions of mistake in understanding. Much of the sterility of these forms of action was to survive their abolition and other procedural reforms, for the obstacles to discussion of consensus in these actions were not merely matters of form and procedure. Sealed deeds, bonds drawn in standardized language with powers of attorney to confess judgment, and obligations implied by law remain unfruitful sources for questions of mistake in understanding, intention to create legally binding relations, and offer and acceptance.

*Special Assumpsit and Debt on Simple Contract:* Under traditional rules of pleading, a plaintiff was obliged to state in his declaration his

understanding of his contract.<sup>220</sup> As a result, questions of mistake in understanding were not regularly raised by defendants as questions of law in actions of special assumpsit (an assumpsit in which the declaration described a particular agreement) or in actions of debt on simple contract (debt on a contract that was not a sealed deed).

In any lawsuit on a contract, the plaintiff would not normally use his declaration to raise as a question of law the possibility of inadequate consensus, for by raising such an issue, he would only put himself at risk. Consequently, to the extent permitted by the facts, plaintiffs in their declarations almost always avoided any indication that the consensus might have been defective.

Following the filing of the declaration, the next opportunity for raising mistake in understanding as a question of law was a special plea by the defendant, but it was at this point that a rule concerning the plaintiff's declaration had an unfortunate effect upon both the plaintiff and the development of a substantive law of contract. Since the plaintiff was obliged to state the legal effect of his contract, a defendant who disagreed with the plaintiff's understanding could simply insist that he had not made the contract declared upon by the plaintiff.

Not only were potential questions of law thus transmuted into questions of fact, but even as questions of fact they were trivialized by being discussed as variances. As has been explained in Part I, if the evidence varied from the declaration (even if it tended to show that an agreement had been made, but that it differed from the one described in the plaintiff's declaration), the defendant would insist that there was a variance. He thereby could defeat an otherwise valid claim. The issue raised by such a defense was whether the defendant made the agreement described by the plaintiff's declaration; a variance between the plaintiff's declaration and the evidence would lead to a nonsuit. Since a plaintiff had to state his understanding of his contract in his declaration, the defendant's insistence on another understanding was a claim of a variance.<sup>221</sup> For example, suppose a hypothetical Buyer and Seller agreed to the sale of "hemp," and Buyer and Seller had in mind different types of hemp. Suppose further that Seller attempted to convey, and Buyer refused to accept or pay for Seller's hemp. If Seller sued, he would have to state the legal effect of his contract and therefore would have to declare that Buyer promised to pay for the type of hemp intended by Seller. In response, Buyer would plead that he had made no such promise, and, indeed, in some senses he had not. At trial, Seller would attempt to prove the contract as he understood it, and Buyer would simply claim a variance between Seller's declaration and the evidence.



The defendant would plead the general issue and not raise the variance defense until trial, because this strategy had the advantage of surprise and because it afforded the plaintiff no opportunity to amend his pleadings to avoid the variance (as he would have been able to do in response to a special plea).<sup>222</sup> As Sir Frederick Pollock observed in 1876, a defense based on mistake in understanding "was properly done under the forms of Common Law by a general traverse rather than by special pleading."<sup>223</sup> In this way, questions of law raised by differences between the parties' intentions were reduced to a single question of fact: whether there was a variance.

Although defendants were not likely to claim mistake in understanding in a special plea, they might have pursued the issue at or after trial. Appeals, motions for arrest of judgment, and writs of error could raise questions of law on the basis of information contained in the record, and motions for new trial, directions to juries, and special verdicts could raise issues of law on both the record and the evidence.

Nevertheless, the variance defense took its toll, for it diverted parties and judges from discussing the parties' differences of understanding as the basis of substantive law. The argument of a defendant that his contract, promise, or intention had been different from that described in the plaintiff's declaration looked very much like the ancient claim of a variance. Consequently, it was almost automatically treated as such by the parties and the bench. Moreover, a defendant had good reason to treat a difference of understanding merely as a variance rather than as a question of consensus. A variance was a frequently used, traditional defense that, upon the appropriate facts, required relatively little evidence and almost guaranteed a nonsuit. In contrast, a defendant's claim of mistake in understanding rested on a point of law that had not yet been clearly established as a defense.

Of course, the rules concerning declarations and variances discouraged only defendants from raising questions of mistake in understanding. They had no effect on the cases in which other persons proposed the existence of such mistakes. In several of the earliest reported cases of mistake in understanding, trial judges raised the issue in their instructions to juries, apparently without prompting by the parties.<sup>224</sup> Moreover, plaintiffs could argue that there had been a mistake in understanding and eventually came to do so regularly in situations in which it was useful<sup>225</sup>—for example, when seeking to avoid a disadvantageous agreement and recover, instead, for work done. Even defendants occasionally raised a defense somewhat similar to mistake in understanding in cases involving brokered contracts.<sup>226</sup> These various types of cases provided important, but still limited, opportunities for

the development of precedents on mistake in understanding. Although judges and plaintiffs could raise the question of mistake in understanding, defendants, as a result of certain rules of pleading, typically did not.<sup>227</sup>

Mid-nineteenth-century defendants came to be obliged in some cases to assert mistake in understanding because of the ingenious attempts of plaintiffs to avoid the variance rule.<sup>228</sup> Although plaintiffs were required to declare the legal effect of their contracts and thus to explain their understanding, they had strong incentives to avoid declaring anything but the most literal and indisputable facts with respect to the language of their contracts. Even a slight misstatement of a contract could trigger a nonsuit under the variance rule.<sup>229</sup> To avoid a variance, a plaintiff whose contract contained ambiguous language had to draft a declaration that merely recited the contractual language without attempting to state its legal effect, and in the early 1820s, one such plaintiff thereby defeated a claim of a variance.<sup>230</sup> This case and later, similar ones departed from the requirement that a plaintiff had to declare the legal effect of his contract and thus offered an escape from the effects of the variance rule. Chitty wrote:

If these cases may be considered as establishing the position, that if, in a doubtful case, a party set out the words of a deed or written instrument, as being those contained in the document itself, the Court will put the proper construction upon it, it seems to be advisable to adopt this course, (namely, to profess to set forth the instrument, and to give its precise words,) when there exists any uncertainty as to the exact legal effect and construction of them. . . .<sup>231</sup>

As a result, it became customary in many cases of ambiguous contracts for plaintiffs to declare upon the indeterminate language rather than upon a particular construction of it. Plaintiffs eventually did this even in cases of mistake in understanding, their goal being to prevent defendants from taking advantage of the variance defense. Such plaintiffs probably did not realize that by cleverly avoiding the variance rule they were risking a fate worse than nonsuit.

A declaration that prevented a defendant from claiming a variance encouraged the defendant to employ his next-best defense, and in at least one case that defense was mistake in understanding. In *Raffles v. Wichelhaus* (1864),<sup>232</sup> the plaintiff apparently drafted a declaration that incorporated the ambiguous language of his contract and did not assert a particular interpretation of it. As a result, the defendants were almost obliged to plead mistake in understanding.<sup>233</sup>

Thus, the anti-variance tactic employed by plaintiffs—verbatim (or

at least neutral) recitation of the ambiguous contractual language without stating its legal effect—prompted the defendants in *Raffles* to raise the issue of mistake in understanding, for they could not easily deny that they had made the contract declared upon by the plaintiffs. Once the mistake-in-understanding defense had been established as effective in a case in which the defendants had no choice but to rely on it, it apparently became generally attractive,<sup>234</sup> possibly even when a variance defense was also available.

*Suits in Equity.* In equity, unlike at law, procedure and the nature of actions were not what delayed the development of cases on the consensus analysis of mistake in understanding. Although a large number of the contracts discussed in equity were sealed deeds, in equity sealed deeds did not preclude discussion of mistake in understanding to the same degree they had at law, apparently because judges in equity were more willing to put aside the legal meaning of contractual language and examine the parties' actual intentions. As at law, the requirement that plaintiffs state the effect of their contracts permitted defendants to transform problems of mistake in understanding into questions of fact, but it did not thereby prevent discussion of mistake in understanding. Defendants in equity had, as will be seen, a well-established doctrine of mistake and therefore had no reason to treat their differences in understanding solely as questions of fact. Thus, there were no major obstacles in procedure or in the nature of actions that diverted courts of equity from regularly discussing mistake in understanding.

Nevertheless, an analysis of mistake in understanding that was unambiguously consensual entered cases in equity relatively late, because a broad, equitable doctrine of mistake diluted, confused, and at times even obscured the relevant consensus analysis. A vague doctrine of mistake had been discussed occasionally in the English Court of Chancery since at least the first half of the eighteenth century.<sup>235</sup> Although originally it developed in part from civilian consensus analysis, the equitable approach to mistake elaborated on traditional policies of avoiding injustice and of not granting specific performance on ambiguous or indefinite agreements—indeed, its consensus element typically was submerged beneath those policies.<sup>236</sup> The civilians had often analyzed mistake in understanding and mutual mistake together as a single, undifferentiated question of error or mistake, and courts of equity, as a result of their emphasis on equitable policies rather than consensus, had little reason to disentangle the civilian analysis. They even applied their equitable approach to mistakes that did not clearly raise issues of consensus.<sup>237</sup> This broad, equitable doctrine of mistake often obscured

or confused questions of consensus and rendered a purely consensual approach largely superfluous. As a result, the consensus analysis of mistake in understanding, which had influenced equity in the first half of the eighteenth century, became distinctly evident in printed equity reports only after about 1790. Indeed, not until the last half of the nineteenth century was it used regularly in equity in an unadulterated and unambiguous form.<sup>238</sup>

### *Offer and Acceptance and Mutual Mistake*

Offer and acceptance and mutual mistake were addressed in cases long before the demise of the variance rule—indeed, they were the first issues of consensus analysis to be discussed in case law—because, on the whole, they were not stifled by rules of pleading or other obstacles.

It may be thought that the rules concerning declarations and variances precluded offer-and-acceptance analysis, as they had precluded discussion of mistake in understanding. In fact, they did not have this effect. In a substantial class of offer-and-acceptance cases, defendants could not avoid the underlying question of law—that a failure of offer and acceptance is fatal. When a plaintiff declared upon an offer he had previously rejected or failed to accept, the defendant could not easily deny that this was his contract without also explaining why it was not a contract at all.<sup>239</sup> Moreover, offer and acceptance was one of the most appealing elements of the consensus theory and therefore, perhaps, may have been used even when a variance could also have been claimed. Thus, by at least the late eighteenth century, parties and judges began to discuss the issue of offer and acceptance.<sup>240</sup>

Before showing that judicial discussion of mutual mistake, like that of offer and acceptance, was relatively unimpeded, it is necessary to consider why mutual mistake is an issue of consensus.<sup>241</sup> The logic of consensus analysis of mutual mistake is apparent only against the background of civil law. The civil law had in several ways (including the doctrine of equality) attempted to ensure that contracting parties largely understood their contract and its subject matter.<sup>242</sup> Without such an understanding, a party could not assent to the contract. Thus, if two parties came to an agreement about something that, as it later turned out, did not exist at the time of contracting (or was different than they had supposed), they did not have a sufficient understanding of the facts to come to a true consensus.<sup>243</sup> The reception of civilian jurisprudence in England and America, however, produced a consensus theory that was less paternalistic about the parties' knowledge.<sup>244</sup>

Consequently, as the civilian jurisprudence gradually declined in importance toward the end of the nineteenth century, lawyers were left with a consensus analysis of mutual mistake but without some of the assumptions upon which that analysis was founded.<sup>245</sup>

Courts of equity were slow to discuss mutual mistake in purely consensual terms. The equitable approach to mistake (developed by the English Court of Chancery in the early eighteenth century) was applicable to, *inter alia*, cases of mutual mistake.<sup>246</sup> In equity, therefore, consensus analysis of mutual mistake frequently was obscured by, or mixed with, equitable concerns. A purely consensual approach became common only gradually in the mid-nineteenth century.<sup>247</sup>

At law, however, consensus analysis of mutual mistake was free of both procedural and doctrinal impediments. Like questions of offer and acceptance, issues of mutual mistake were not subject to the deadening effect of the rules concerning declarations and variances. Cases of mutual mistake, in which the parties shared the same mistake about their contract's subject matter, were distinct from questions of mistake in understanding, because cases of mutual mistake did not involve differences of intention between the parties. Since cases of mutual mistake did not concern differences of intention, they did not permit the question of consensus to be transformed into a variance. At law, moreover, there were no eighteenth-century versions of mistake to complicate the application of the consensus theory. Consequently, consensus analysis of mutual mistake regularly began to appear in cases in the first quarter of the nineteenth century—shortly after the early offer-and-acceptance cases.<sup>248</sup>

The development of offer-and-acceptance and mutual-mistake analysis in case law shows that consensus theory was already available for use by judges in the late eighteenth and especially the early nineteenth century. It also illustrates that judges and lawyers regularly employed the consensus theory only when they had the opportunity and the need to do so.

### *Mistake as to a Party*

Like offer and acceptance and mutual mistake, mistake about a party to the contract was an issue of consensus that encountered no procedural obstacles. Unlike offer and acceptance and mutual mistake, however, it was not discussed in cases until the last half of the nineteenth century, since lawyers had other, more traditional doctrines to deal with the problem.

For example a defendant who thought he had contracted with one

person and was sued for breach by another could raise the issue of consensus but did not have to. Instead, he could respond with the general issue, hoping to prevail on the question of fact and to show a variance, namely that he had contracted with someone other than the plaintiff. The defendant could also claim that he had a right to choose with whom he would contract, that the plaintiff had no privity or rights under the defendant's contract, and, in some cases, that the plaintiff had engaged in a form of fraud or misrepresentation.<sup>249</sup> Consequently, parties and courts had little need to resort to the question of consensus. They appear to have done so regularly only in the last half of the nineteenth century.<sup>250</sup>

### *Duress and Mental Incapacity*

In cases of duress and mental incapacity, litigants and judges availed themselves of consensus theory relatively infrequently, because existing precedent and doctrine greatly reduced the advantages of such analysis.

When the consensus theory became influential as jurisprudence in the eighteenth century, some important common law writers took advantage of it to explain the law relating to duress and mental incapacity.<sup>251</sup> The eighteenth-century common law on mental incapacity and duress did not permit contracts to be undone as frequently as did the civilian jurisprudence and tended to make contracts voidable rather than void, but it was largely consistent with civilian ideas. It had always rested on the rarely articulated assumption that unfree acts were not binding. Consequently, explanations of existing case law in terms of consensus probably were not perceived as innovations.

Cases of duress and mental incapacity, however, used consensus theory relatively rarely, apparently because precedent and doctrinal problems largely eliminated the reasons for employing that analysis. By the mid-nineteenth century, the common law had already squarely addressed many of the basic questions of duress and mental incapacity and had produced ample precedent that was at least partly consistent with the consensus theory. Nineteenth-century writers could easily observe that the common law on these subjects did not entirely comport with civil or natural law, but neither those writers nor judges could do much to enlarge the scope of common law in the face of the large body of unambiguous precedent.<sup>252</sup> Thus, when parties wishing to claim duress or mental incapacity found existing common law sufficiently generous, they usually had no need to turn to consensus analysis, and when they thought precedent unsatisfactory, they had little reason to think it would be sacrificed for the consensus theory. In sum, although

consensus theory could justify compatible common law precedents, it was not useful to litigants and judges.<sup>253</sup>

American judges did not always feel as closely bound by precedent as their English counterparts, and consequently, in some cases of duress and mental incapacity, they relied on the consensus theory. For example, English law did not allow a person to avoid his act or deed on the ground of duress of goods.<sup>254</sup> In the eighteenth century, however, plaintiffs increasingly were able to recover money paid by mistake or as a result of deceit, and eventually they also were permitted to recover money paid in response to extortion.<sup>255</sup> This last category suggested a bifurcated analysis of duress of goods: parties could argue duress of goods to recover extorted payments but not to avoid unfulfilled contractual obligations.<sup>256</sup> American courts, however, were willing to reinterpret and depart from English precedents and therefore, even in cases of executory contracts, were free to recognize that economic as well as personal duress could deprive a contracting party of the ability to assent.<sup>257</sup>

An American flexibility concerning precedent also allowed American courts to discuss consensus analysis relating to insanity and drunkenness. At common law it was a maxim that a party could not avoid his contract by pleading his own incapacity—a rule that eighteenth- and early nineteenth-century English courts qualified with a number of exceptions.<sup>258</sup> In the nineteenth century, various American courts rejected even the qualified rule, and some used the consensus theory as justification.<sup>259</sup>

English judges and lawyers, on the other hand, tended to respect both precedent and the policy of protecting those dealing with the insane or inebriated and therefore were more willing than their American counterparts to accept the qualified rule against pleading one's own incapacity. Although in 1845 the Court of Exchequer suggested that consensus theory might justify relaxation of the rule, in 1848 it expressly allowed precedent and policy to limit consensus-based claims of mental incapacity.<sup>260</sup> As a result of English attitudes and the 1848 ruling, English lawyers and judges, especially after mid-century, rarely reached the issue of consensus. For English lawyers and judges, the only disputable questions involved, not whether, but when the insane or inebriated could avoid their contracts, and this was a matter of policy and precedent.

Even when they could use the consensus theory in cases of duress and mental incapacity, English and American courts appear to have done so relatively infrequently. Why? In cases of mental incapacity, an analysis in terms of the protection of the incapable frequently may

have displaced the relevant consensus theory. The protection analysis was at least as traditional and provided a sufficient explanation of the law. Moreover, it explained the common law cases with ease. In contrast, the consensus theory could not explain all categories of incapacity without the benefit of some rather awkward assumptions.<sup>261</sup> Similarly, consensus theory was often inappropriate in cases of duress, because duress was a doctrine that existed well beyond the confines of contract. Even when consensus theory could explain duress in contract cases, a desire for doctrinal consistency with respect to duress precluded discussion of the theory. For example, in the American cases that allowed duress of goods as a ground for avoiding the performance of a contract, the courts borrowed the doctrine of duress of goods from what were viewed as non-contractual cases (concerning recovery of extorted payments).<sup>262</sup> As a result, the courts had to argue the similarity of the two types of cases. Consensus theory was not directly applicable to the non-contractual cases, and consequently, in transposing the doctrine of duress of goods from the non-contractual to the contractual cases, the courts did not regularly rely on consensus theory to explain duress. Instead, they tended to base their arguments on the non-voluntary nature of duress of goods in both contractual and non-contractual situations.

In sum, lawyers and judges occasionally employed consensus theory in cases of insanity and drunkenness when it served their needs. In most cases of mental incapacity, however, and especially cases of duress, precedent and doctrinal obstacles rendered discussion of consensus theory relatively unnecessary or unattractive.

### *Remoteness of Damages, Frustration of Purpose, and Intention to Create Legally Binding Relations*

Remoteness of damages, frustration of purpose, and intention to create legally binding relations were among the issues on which there was little consensus analysis in case law until relatively late. The reasons for the delay, however, had little to do with either procedure or precedent.

Neither procedure nor precedent can explain the slow development of a general rule on remoteness of damages. The question of excessive damages had been raised on motions for new trial from the early eighteenth century,<sup>263</sup> and therefore judges probably could have established a general rule on remoteness of damages, had they wished to do so.<sup>264</sup> As shown by J. L. Barton, however, English judges were uncertain how to formulate such a rule.<sup>265</sup>

Similarly, frustration of purpose could have been treated as a question



of law long before the nineteenth century. No rule of pleading precluded judicial discussion of frustration, nor did precedents pose obstacles. Although the defenses of an act of war and an act of God turned up several times in the seventeenth-century reports, they were distinguishable issues.<sup>266</sup>

The question of intention to create legally binding relations also was largely free from impediments of pleading and precedent. In cases involving sealed deeds, the issue of intention to create legally binding relations was unlikely to arise, since the deed created an almost irrebuttable presumption that such intention existed.<sup>267</sup> In cases not involving sealed deeds, however, the issue of intention to create legally binding relations could easily be raised. Thus, prior to the last half of the nineteenth century, courts could have engaged in consensus analysis of the question (and in one 1795 case may have done so), but in general they apparently did not.<sup>268</sup>

Two reasons may be suggested for the common law's slowness in applying consensus analysis to damages, frustration, and intention to create legally binding relations. First, the analysis applicable to two of these issues probably was not considered essential to a consensus theory. Although contracts were created by consensus, it was by no means a corollary that the foreseeability of the injury from a breach should limit the amount of damages. Frustration of purpose was also only remotely connected to the notion that contracts are formed by consensus. A second and related reason for the common law's slowness in applying consensus analysis to the three issues under discussion was that the civilian contract jurisprudence of the late-seventeenth and eighteenth centuries did not deal explicitly with these questions. Civilian consensus theory on damages and intention to create legally binding relations did not become widely available to common lawyers until the early nineteenth-century translations of Pothier on *Obligations*,<sup>269</sup> and civilian consensus theory on frustration of purpose was almost nonexistent. (Incidentally, the absence of civilian theory on frustration created an opportunity for separate doctrinal development on each side of the Atlantic. The English doctrine developed from discussion of implied conditions,<sup>270</sup> and a now long-forgotten American version grew out of mutual mistake.)<sup>271</sup> Thus, the consensus analysis relating to damages, frustration, and intention to create legally binding relations was not entirely necessary to a consensus theory and, indeed, was not much discussed in the civilian treatises read in England and America until relatively late. As a result, it is hardly surprising that such analysis was slow to turn up in cases.<sup>272</sup>

It can be concluded that, even in the guise of jurisprudence, consensus analysis did not appear in case law automatically. The questions of offer and acceptance and mutual mistake arose in cases already in the late eighteenth and especially the early nineteenth century because they encountered few obstacles in precedent and were useful to litigants. Other consensus issues, however, found their way into case law more slowly. Mistake in understanding as applied at law met with impediments in the nature of certain contracts and contract actions and in the drafting of plaintiffs' declarations—declarations that frequently led mistake in understanding to be treated as the question of fact known as a variance. Only when plaintiffs declared upon indeterminate language without asserting a particular construction of it, did they succeed in preventing defendants from claiming variances. They thereby encouraged defendants to raise mistake in understanding as a question of law. The common law had already addressed duress and mental incapacity in a manner consistent with, but less extensive than, civilian analysis of those issues. Therefore, consensus analysis was useful for treatise writers who had to explain existing common law precedents on duress and mental incapacity, but it could not develop much doctrine beyond those precedents. Indeed, some civilian ideas—such as those on equality and consideration—were incompatible with common law and could not easily enter cases. Other aspects of consensus analysis—mistake in understanding and mutual mistake as applied in equity, mistake as to a party, and, to some extent, duress and mental incompetence—could be raised but often were displaced by more traditional analysis. Finally, the three issues of foreseeability of damages, frustration of purpose, and intention to create legally binding relations were not employed in case law until a late date because they were slow to be introduced as jurisprudence or were only peripherally related to more traditional consensus theory. Clearly, even once civilian ideas on consensus were widely accepted, they appeared regularly in case law only when they had a role to play in litigation. Judicial opinions could not always reflect intellectual developments.

### Conclusion

Recent scholarship has suggested that the consensus theory of contract was the product of the common law's exposure, chiefly in the nineteenth century, to influences external to the common law. According to Horwitz, early nineteenth-century lawyers and judges created consensus theory to facilitate commercial interests. Atiyah argues that consensus

analysis was the result of late eighteenth- and nineteenth-century liberal economic theories and associated ideas. Simpson has shown that consensus analysis derived from civil law and that it was capable of being adopted without the appearance of doctrinal discontinuity, in part because it was considered a form of jurisprudence. Although Simpson thereby has established the foundation for any historical study of the consensus theory, he assumes that the theory had a late and sudden development. Simpson argues that the nineteenth-century consensus theory had little basis in prior common law, that common lawyers began to read about and assimilate the civilian jurisprudence on contract only in the very late eighteenth century, and that they used the civilian jurisprudence only after it had been legitimized by its appearance in common law treatises. In arguing, moreover, that common lawyers copied civilian ideas on consensus, Simpson has left unclear whether they did so in a way that substantially modified those ideas.

In fact, the development of the consensus theory of contract was not sudden or late. Nor was it just borrowed from civil law. Common lawyers attributed significance to the concept of contract not only in medieval times and in the nineteenth and twentieth centuries but also during the interim period. Already in the last half of the sixteenth century, rather than in the late eighteenth, common lawyers began to apply the concept of contract to actions of *assumpsit*. Similarly, the common law assimilation of civilian ideas on consensus commenced long before the nineteenth century. Throughout the eighteenth century and even earlier, common lawyers studied civil law, including civil law on contract, attributing to it a jurisprudential role. They occasionally even used civilian ideas to supplement common law. Common lawyers, however, did more than employ the civilian description of contract. They adopted it very selectively and, in so doing, developed their own theory of contract, which was consistent with both common law doctrine and the jurisprudential role of civil law. It was for these reasons that, by the late eighteenth century, the theory was capable of being used to supplement common law without the appearance of doctrinal discontinuity. Nevertheless, even after the consensus theory was widely accepted, it did not appear in case law automatically. It turned up in cases only gradually as various elements of the theory were found to be useful in litigation.

With respect to Horwitz's argument that consensus theory was the product of nineteenth-century judicial concern for commercial interests, it has been seen, to the contrary, that the consensus analysis derived mostly from the earlier, common law reception of civilian ideas.

Sympathy for freedom of contract shaped a small part of consensus theory, but this sympathy was broader than a narrow concern for commercial interests, and it began to affect the consensus theory by the mid-eighteenth century, if not earlier. Thus, the shape of the consensus theory was, on the whole, the product of neither the nineteenth century nor instrumentalism and commercial interests. Judges did not and could not simply change doctrine in the area of consensus theory, however instrumental their attitudes toward the law. As is suggested by the resilience of the doctrine of consideration, they could innovate only to the extent that they could avoid open discontinuities in doctrine.

Similarly, it must be doubted whether consensus theory was a consequence of late-eighteenth- and nineteenth-century liberalism, as argued by Atiyah. Some of Atiyah's critics suggest that his claims are exaggerated, but they do not explain the kind or degree of influence that liberal economic theories had on contract law. Although economic liberalism may have encouraged the use of consensus theory in the late eighteenth and nineteenth centuries, it did relatively little to shape the main components of the theory, other than to contribute to skepticism about civilian ideas on equality. Even in this, however, late eighteenth- and nineteenth-century liberal economic thought was by no means as influential as common law precedent, economic practice, and a non-theoretical sympathy for freedom of contract, which already in the mid-eighteenth century had precluded general acceptance of notions of equality.

Economic liberalism and solicitude for commercial interests shaped little of the consensus theory; furthermore, these influences were not required for the acceptance of the theory. Consensus analysis may have gained some of its popularity because it seemed to embody liberal ideas, but this does not mean that either liberalism or nineteenth-century sympathy for commercial interests was necessary for broad acceptance of the analysis. Simpson points out that on the Continent consensus theory preceded such developments. The theory also had a degree of priority in England and America. It preceded and was capable of flourishing independently of both nineteenth-century commercial interests and late eighteenth- and nineteenth-century liberalism.

By examining the history of the Anglo-American consensus theory with a view to understanding why the law was capable of changing and why the law changed when it did, this article has sought to contribute to a more complete account of the development of contract. It has attempted to trace the degree to which ideology and economic interests shaped the consensus theory. It has treated the consensus

theory, not as a specifically English or American phenomenon, but as a transatlantic development. Rather than present the history of the consensus theory as a sudden event of the early nineteenth century, it has explored the theory's gradual evolution. In so doing, it has also examined how and when civil law came to be understood as a form of jurisprudence.

More than the story of contract or the debate about various intellectual and economic influences, this article has attempted to elucidate some of the ways by which common law doctrine assimilated external influences. The appearance of the consensus theory in nineteenth-century cases was not simply the product of common lawyers' exposure in the early nineteenth century to external influences, whether civil law, liberal ideas, or commercial interests. On the contrary, external influences could—at least in the case of the consensus theory—produce doctrinal change only to the degree that lawyers and judges avoided the appearance of doctrinal discontinuity and had occasion to use the new doctrine in cases.

The common law reflected some of the various external influences brought to bear on it but rejected others. Even to the extent it reflected external influences, it could not always do so promptly, completely, or directly. The common law contained impediments to change that led it on occasion to resist pressures rather than merely to adapt to them.

## NOTES

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1. P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); M. J. HORWITZ, *THE TRANSFORMATION OF THE COMMON LAW*; Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q.R. 247 (1975).

2. GILMORE, KESSLER, & KRONMAN, *CONTRACTS*, ch. 1 (1986).

3. Note that some of these historians and theorists did not completely or consistently adopt this perspective.

4. HORWITZ, *TRANSFORMATION*, ch. 6 (1977).

5. ATIYAH, *RISE AND FALL*.

6. A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975); Simpson, *Innovation*.

7. Simpson, *Innovation*; Simpson, *The Horwitz Thesis and the History of Contract*, 46 U. OF CHI. L. REV. 533 (1979).

8. E.g., Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984).

9. Of course, a lawyer's appreciation and conception of a given doctrine—and even of doctrinal continuity—are linked to his perceptions of matters beyond the confines of doctrine. Therefore, the need to avoid the appearance of doctrinal discontinuity cannot be purely internal, and doctrine cannot be literally independent. Yet the possibility of avoiding the appearance of doctrinal discontinuity is frequently the product of a confluence of factors so varied, remote, and complex in their interaction that it is often, in a sense, accidental or fortuitous whether such a possibility will or will not exist. (Perhaps, moreover, some ideas, including legal doctrines, can be attractive because they are aesthetically pleasing or familiar.) For these reasons, it seems possible to use the words “internal” and “independent,” albeit with qualification.

10. G. GILMORE, *THE DEATH OF CONTRACT* (1972).

11. *Id.* at 13.

12. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193, 194 (1978). Although Atiyah discusses the sympathy for economic freedom that existed prior to the late eighteenth century, he makes clear his belief that it was the late eighteenth-century liberal economic theories rather than earlier attitudes that “led to the evolution of modern contract doctrine.” ATIYAH, *RISE AND FALL* at 398. References in this article to economic liberalism or liberal thought should be understood to mean late eighteenth- and nineteenth-century theories rather than earlier, non-theoretical sympathy for freedom of contract.

13. ATIYAH, *RISE AND FALL* at 1.

14. HORWITZ, *TRANSFORMATION*, chs. 5 & 6.

15. Simpson, *Innovation* at 250.

16. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 166 & 185–93.

17. Simpson, *Innovation* at 257–59.

18. *Id.* at 247. Simpson is slightly ambiguous about such copying. For details, see note 144 *infra* and accompanying text.

19. *Id.* at 247.

20. *Id.*

21. Simpson argues that concern about commercial interests shaped little of the consensus theory. Simpson, *The Horwitz Thesis*. My examination of the development of the consensus theory supports Simpson's position on Horwitz.

22. For contrary views, see: Simpson, *Innovation* at 247 & 252; ATIYAH, *RISE AND FALL* at 139 & 446.

23. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 43 & 117; S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 251 (1981). Kirafly's analysis of selected sixteenth- and seventeenth-century plea rolls reveals no more than five and usually only one or two actions of covenant *per term* in Common Pleas, King's Bench, or the Exchequer. A. K. KIRAFLY, *THE ACTION OF THE CASE*, app. A (1951).

24. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 88.

25. Simpson, *Innovation* at 258; ATIYAH, *RISE AND FALL* at 137.

26. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 189.

27. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* at 246, 249 & 309.

28. Ibbetson, *Words and Deeds: The Action of Covenant in the Reign of Edward I*, 4 L. & HIST. REV 71 (1986).

29. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW at 249.

30. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 189; S. F. C. Milsom, *Sale of Goods in the Fifteenth Century*, STUDIES IN THE HISTORY OF THE COMMON LAW 105 (1985).

31. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW at 246-47.

32. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT at 32-33, 166 & 185-93.

33. GILMORE, THE DEATH OF CONTRACT at 13.

34. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW at 355-56. Simpson writes that "between then and today we have moved from an essentially one-sided conception—a promise broken—to an essentially two-sided notion—a contract broken." Simpson, *Innovation* at 257-58. According to Simpson, "[T]he nineteenth century . . . saw a shift in emphasis from the essentially unilateral notion of a promise to the conception of a contract—a bilateral conception . . ." Simpson, *Introduction to CHESHIRE & FIFOOT, LAW OF CONTRACTS* 11 (1981).

35. ST. GERMAN, DOCTOR AND STUDENT 228-33 (Selden Soc. Vol. 91, 1974). One of the student's comments is particularly suggestive: "... thys is properly called a concorde/ but yt ys also a contract & a good accyon lyeth vpon yt/ how be it yt ys not moche argued in the lawes of Englande what dyuersyty is betwene a contracte/ a promyse/ a gift/ a lone/ a bargeyne/ a couenant/ or such other / for the intente of the lawe ys to have the effecte of the mater argued and not the termes." *Id.* at 228. See McGovern, *The Enforcement of Informal Contracts in the Later Middle Ages*, 59 CALIF. L. REV. 1145, 1190-91 (1971).

Professor McGovern concludes that in the fourteenth and fifteenth centuries, *assumpsit* was already understood as being based on contract. This seems unlikely, and therefore I am reluctant to rely on McGovern's thesis to prove my argument. See 2 THE REPORTS OF SIR JOHN SPELMAN 257 (J. H. Baker ed., Selden Soc. Vol. 94, 1978).

McGovern cites cases of *assumpsit* concerning venue. In some such cases, judges found venue in the place where the breach occurred, and in other cases they found venue in the place where the agreement was made. According to McGovern, this reveals that the action of *assumpsit* was based on the concept of contract. In fact, the cases he cites are susceptible to a variety of interpretations, and, in light of the fact that venue was not denied to plaintiffs who sued in the place of breach, one must be cautious about asserting that the allowance of venue in the place of contracting was based on a contractual conception of the action of *assumpsit*.

McGovern points out that a statute of 1503 provided plaintiffs in actions of *assumpsit* the same process as was available in actions of debt and trespass, but this does not mean that *assumpsit* was thought to be based on the concept of contract. As McGovern notes, the statute itself explained that it was designed to prevent "grette delays in accions of the case." It tells us nothing about the concept of contract and its relationship to *assumpsit*. Moreover, McGovern's discussion of damages proves little about the conceptual treatment of actions of *assumpsit* and debt because, as McGovern discusses, relatively little is known about the damages given in these actions. McGovern argues further that it is difficult for historians "to identify any difference between debt and *assumpsit*" with respect to the requirement of consideration. Sixteenth-century lawyers, however, did make such a distinction.

Notwithstanding the difficulties with McGovern's view of medieval actions of

assumpsit, his arguments are very apt and important when he applies them to more recent developments in the law of assumpsit.

36. Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q.R. 406 (1975); MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* at 358; SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT*, chs. 4-7. Maitland discussed the background of consideration and concluded: "all along there is a strong feeling that . . . purely gratuitous promises are not and ought not be enforceable." 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 213-14 (1968). Whether the consideration doctrine was directly derived from similar requirements in canon law or equity is a question that need not be discussed here.

37. McGovern, *The Enforcement of Informal Contracts* at 1192.

38. J. H. BAKER, *AN INTRODUCTION TO ENGLISH HISTORY* 281 (1979) (citing an argument of counsel in *Slade's Case*).

39. *Id.* at 286-87 & 336. See *Pinchon's Case*, 9 Coke 86, 77 Eng. Rep. 859 (K.B. 1612):

As to the other objection, that this personal action of trespass on the case *moritur cum persona*; although it is termed trespass, in respect that the breach of promise is alledged to be mixed with fraud and deceit to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then if he to whom the promise is made dies, his executors should not have any action, which no man will affirm. And an action *sur assumpsit* upon good consideration, without specialty to do a thing, is no more personal, *i.e.*, annexed to the person, than a covenant by specialty to do the same thing.

9 Coke at 89, 77 Eng. Rep. 863.

40. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* at 274.

41. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* at 332.

42. Y.B. 21 Edw. 4, 22 as described by Croke. See text at note 49 *infra*. Prior to the sixteenth century, this rule may have been understood to apply to actions brought upon a right.

43. *Case of 32 Hen. 8* (1541), cited in R. BROOKE, *LA GRAUNDE ABRIDGEMENT* (1573, *i.e.* 1574), under Verdict, No. 90 (assumpsit to do two things and only one found). The law with respect to variances from declarations probably derived from, and was understood to be related to, similar law concerning variances from writs. See, for example, the case of 42 Edw. 3 (1368) cited in *id.* under Waste, No. 28 (exception to variance in writ "non allocat. car nest semble det [sur] obligation").

44. *Lewes v. Style* (K.B. 1506) cited in Croke Eliz. 79, 78 Eng. Rep. 339. Note that in the late sixteenth century the accuracy and relevance of the report of this case was disputed. (J. H. Baker has identified the case's name and its importance for the development of the action of assumpsit in situations involving nonfeasance. 2 *THE REPORTS OF SIR JOHN SPELMAN*, 277). *Case of 32 Hen. 8* (K.B. 1541) cited in Brooke's *Abridgment* under Verdict, No. 90.

45. *King v. Robinson*, Croke Eliz. 79, 80, 78 Eng. Rep. 339, 340 (Q.B. 1587). One of the cases to which Catlin referred may have been Billingsley's Case, 2 Dyer 219, 73 Eng. Rep. 486 (1568).

46. The cases of 1587 and 1589 appear to be the last in which the newer doctrine was seriously disputed. Incidentally, it may be no coincidence that these cases, which treated assumpsit as a remedy based on contract, were decided by Queen's Bench. This was the court that took the lead in extending the action of assumpsit to reach contracts otherwise actionable in debt.



47. Croke Eliz. 79, 78 Eng. Rep. 339 (Q.B. 1587).

48. Croke Eliz. 147, 78 Eng. Rep. 404, 1 Leonard 299, 74 Eng. Rep. 273 (Q.B. 1589).

49. 1 Leonard 299, 300. Gawdy had just recently joined the bench and had not participated in the *Robinson* decision.

50. Hunt's Case, Owen 42, 74 Eng. Rep. 886 (C.P. 1588). Blackstone later used similar language. See note 179 *infra*. In *Sharington v. Strotton*, Plowden argued "sir, by the law of this land there are two ways of making contracts or agreements for lands or chattles. The one is, by words . . . ; the other is, by writing . . . And because words are often times spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. . . . [E]very deed imports in itself a consideration." *Sharington v. Strotton*, Plowden 298, 308-9, 75 Eng. Rep. 454, 470-71 (K.B. 1565).

According to Milsom, common lawyers in the period prior to the nineteenth century did not have a concept of contract that included both assumpsits and covenants and thus could not describe contract as something enforceable upon either consideration or a sealed deed. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* at 356. The material presented here indicates otherwise. See also 2 W. SHEPPARD, *ACTIONS ON THE CASE FOR DEEDS* 42 & 44 (1675); G. Gilbert, *Of Contracts*, British Library, Hargrave 265, fol. 43 (quoted in note 268 *infra*).

More generally, Hunt's Case shows that lawyers could discuss the concept of contract even when they did not have a clear name for it. For another discussion of a concept without mention of its name, see the case of 42 Edw. 3, cited in note 43 *supra*.

51. G. GILBERT, *THE LAW OF EVIDENCE* 135 (1754).

52. Baron Gilbert, writing prior to 1726, stated the rule as follows:

Note, the Difference between an Assumpsit in Deed and an Assumpsit in Law; in the Assumpsit in Deed where the Contract are [sic] mutual, and either Side declares for Non-performance, there he must set forth the very Contract, and if he mistakes in Quantities of Sums, he fails; because his Injury is in the Non-performance of the very Contract alledged in the declaration, and if he does not show such a Contract, he does not intitle himself to a Recompense of the Breach of it.

But where he brings his Action for an Assumpsit in Law, if he shows Part of the Goods delivered, or Part of the Money lent, 'tis good; because on ev'ry several Delivery of Goods, or Receipt of Money, the Law implies a several Contract for Restitution, and there the Gist of the Injury is not whether such a particular Contract is broken, but whether the Goods were delivered or Money paid to the Defendant, and the Quantities of the Goods or the Sum is no farther material than to increase or lessen the Damages.

GILBERT, *THE LAW OF EVIDENCE*, at 135 (1754).

53. *Baker v. Edmonds*, Aleyn 28, 83 Eng. Rep. 898, Style 62, 82 Eng. Rep. 531 (K.B. 1671). (An early case, however, held *contra*. *Bagnal v. Sacheverell*, Croke Eliz. 292, 78 Eng. Rep. 546 (K.B. 1593). For a suggestion that this approach was appropriate in actions of debt, see the discussion of Y.B. 22 Edw. 4, fol. 2a. pl. 8 in the report of *Bladewell v. Sleggein*, 2 Dyer 219, 73 Eng. Rep. 485 (1562). The relief from the rigors of the variance rule probably contributed greatly to the popularity of the indebitatus counts.

54. *Bland v. Hazelrig & Alios*, 2 Ventris 151, 86 Eng. Rep. 363 (C.P. 1690). See also: *Franklin v. Walker* (Northampton Assizes 1667), cited in GILBERT, *THE LAW OF EVIDENCE*, at 132; F. BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* \*129.

55. It may be objected that the indebitatus counts were restitutionary. Actions brought on indebitatus counts, however, were not always restitutionary, other than in a superficial sense. The use of the phrase "quasi contract" and Baron Gilbert's description of the indebitatus counts as "restitutionary" suggest that those counts were seen as a restitutionary remedy, perhaps in the beginning of the seventeenth century and certainly toward its close. Indebitatus assumpsit, however, could have been restitutionary only in a very limited way. The restitutionary basis of the remedy was much obscured by talk of implied promises. More important, to the extent consensus and even merely contractual analysis was known and appreciated, the use of indebitatus assumpsit as a remedy for actual agreements (including express agreements) reduced the restitutionary basis of indebitatus assumpsit to something like a pleading requirement or even a fiction. Thus, it seems unlikely that all claims brought in indebitatus assumpsit were considered restitutionary. The cause of action or remedy was restitutionary, but the underlying claim frequently, perhaps typically, was understood to be contractual. See also note 171 *infra*.

56. Hale's *Analysis* and Blackstone's *Commentaries* expressly treated assumpsit as a remedy for breach of contract. HALE, *ANALYSIS OF THE COMMON LAW* § 41; 3 BLACKSTONE, *COMMENTARIES* at \*154. Although Finch, in his *Law, or a Discourse Thereof*, did not clearly identify assumpsit as one of the remedies for breach of contract, he revealed his contractual understanding of assumpsit in his *Nomotechnia*, a revised and supposedly superior edition of his *Law*. In *Nomotechnia*, Finch discussed assumpsit together with covenant and debt on obligation as "personal charges." H. FINCH, *NOMOTECHNIA*, bk. 2, ch. 16 (1613). See also note 59 *infra*.

In the early seventeenth century, William Noy wrote about what he called "the general learning of making and dissolving of contracts." W. Noy, *A Dialogue and Treatise on the Law*, in *THE PRINCIPLE GROUND AND MAXIMS* 348 (1821). The leading eighteenth-century treatise on nisi prius described covenant, debt, assumpsit, and account as actions "founded upon contract" and explained that "Of all actions founded upon contract, none is in more general use than the Action of Assumpsit, which is founded upon a contract either *expressed* or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract." BULLER, *INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* at \*128. Note the following title: *Law of Actions on the Case for Torts and Wrongs, Being a methodical collection of all of the cases concerning such actions, viz. 1, Trover and Conversion of Goods; 2, Malicious prosecutions; 3, Nusiances; 4, Deceits & Warranties; 5, On the common custom against carriers, innkeepers, etc.* (1720).

57. H. FINCH, *LAW, OR A DISCOURSE THEREOF* 179 (1759).

58. HALE, *ANALYSIS OF THE COMMON LAW*, § 28; 2 BLACKSTONE, *COMMENTARIES* at \*442-43.

59. Not only did Blackstone divide contract and contract remedies, but he also split his discussion of contract between service contracts and property contracts. As Simpson has pointed out, this was an unfortunate but inevitable consequence of the larger, structural division in Blackstone's *Commentaries* between the rights of persons and those of things. 2 BLACKSTONE, *COMMENTARIES* xiv (A. W. B. Simpson ed. 1979). For a general analysis of the structure of Blackstone's *Commentaries*, see Lobban, *Blackstone and the Science of Law*, 30 *HIST. J.* 311 (1987).

Finch's *Nomotechnia* has been claimed to be superior to his *Law* on account of its better organization and fuller detail. Prest, *The Dialectical Origins of Finch's Law*, 36 *CAMBRIDGE L.J.* 326, 345-46 (1977). There was a reason, however, why Finch's *Law* was by far the more popular and influential book: Its organization was clearer. In

*Nomotechnia*, Finch discussed possessions and things in the same book as the wrongs concerning them; in his *Law*, he dealt with those subjects in separate books. Neither organization was entirely felicitous, but one arrangement—the separation of things and wrongs—had the virtue of clarity. It also had the virtue, fully exploited only in Blackstone's *Commentaries*, of more completely liberating contract from the artificial categories of common law remedies and thereby providing a place in surveys of the common law in which to discuss contract. In Finch's *Law*, contract appeared in the book on things, and the forms of action were in the book on wrongs. Consequently, the treatment of contract and the discussion of the remedies for contract had to be quite separate from one another. *Nomotechnia*, however, discussed things and wrongs together in one book and thereby failed to reveal as clearly in its organization the difference between contract and the remedies for contract.

60. Richard, Earl of Clanrickard v. Robert Sidney, Viscount Lilse, Hobart 273, 275, 80 Eng. Rep. 418, 420 (C.P. 1615). As Simpson has shown, some late-medieval discussions contain statements that are more similar to a consensus theory. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* at 188.

61. Civilian ideas probably contributed to the survival and new importance of the abstract notion of contract, but the degree of such influence is unclear.

62. Simpson, *Innovation* at 252–57.

63. *Id.* at 253–57 & 277.

64. Horwitz, *Transformation*, ch. 6.

65. *Id.*

66. *Id.*

67. R. H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* (1987); *idem*, *Assumpsit and Fidei Laesio*.

68. Coquillette, *Legal Ideology and Incorporation, Part I: The Early Civilian Writers*, 1529–1607, 61 B.U.L. REV. 1 (1981). But see note 82 *infra*.

69. Simpson, *Innovation*; *idem*, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 672–74 (1981); Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719; Pound, *The Place of Justice Story in the Making of American Law*, 1 MASS. L.Q. 121 (1916); *idem*, *The Influence of French Law in America*, 3 U. ILL. L. REV. 354 (1909).

70. Coquillette, *Legal Ideology*.

71. 1 W. WEST, *SYMBOLEOGRAPHY* § 30, signature B5 (1647). West relied greatly on Vultejus. T. WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW* 86 (1730) (1st pub. 1704).

72. 1 WEST, *SYMBOLEOGRAPHY*, signature B1 (1647).

73. WOOD, *A NEW INSTITUTE* at 86 (1730).

74. The influence of *Symboleography* went beyond its many editions. Cowell's *Interpreter* (1607), a law dictionary, borrowed West's language for the definition of contract, as did Blount in his dictionary (1656). Another civilian treatise published in England in the sixteenth century was *Principia Quaedam, et Axiomata jure Civili Sparsam Collecta* (1581). It did not, however, apply civilian principles to English law. Alas, I have only seen a microfilm of the Huntington copy, which is missing the pages on contract.

75. W. FULBECKE, *A PARALLELE OR A CONFERENCE OF THE CIVILL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND. WHEREIN THE AGREEMENT AND DISAGREEMENT OF THESE THREE LAWES, AND THE CAUSES AND REASONS OF THE SAID AGREEMENT AND DISAGREEMENT, ARE OPENED AND DISCUSSED* (1602).

76. *Id.* at 18 *verso*.

77. *Id.* at 1.

78. J. COWELL, *THE INSTITUTES OF THE LAWES OF ENGLAND, DIGESTED INTO THE METHOD OF THE CIVILL OR IMPERIAL INSTITUTIONS* (1651) (1st pub. 1605).

79. WOOD, *A NEW INSTITUTE* at 88 (1704). Cowell's *Interpreter* (1607) was the chief source of displeasure.

80. COWELL, *THE INSTITUTES OF THE LAWES OF ENGLAND* at 167 & 169. Under the title "Of void and unprofitable Covenants," Cowell explained that "[h]e who answers not according to demand, nor according to what he is asked, (as if one covenant to pay me tenne pounds, and another promiseth five pounds, or if one covenant absolutely, and another conditionally) makes the covenant nothing." *Id.* at 172. Cowell also wrote that "[i]f the Covenantor thinketh and supposeth one thing and the Obliger another, the Covenant is no more valid then if there had been no answer at all to the question." *Id.* at 175.

81. The ambitions of these early English civilians and their intellectual relationship with Bartholus is discussed by B. P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641*, at 136-37 (1973), and Coquillette, *Legal Ideology*.

82. Coquillette argues that the attempts to apply civilian law directly to common law were abandoned following 1607, when Cowell's statements in support of the prerogative caused a political controversy in Parliament. Coquillette, *Legal Ideology* at 84. Prior to 1660 and especially during the Interregnum, however, civil law continued to provoke interest as a model for the common law, leading, ironically, to the translation of Cowell's *Institutes* by order of Parliament. The civilian-inspired attempts at reform were unsuccessful.

83. Simpson, *The Rise and Fall of the Legal Treatise* at 641-51; P. STEIN, *REGULAE JURIS* (1966). See also J. DODDRIDGE, *THE ENGLISH LAWYER* 158-59 (1631). For maxims relating to contracts, see *id.* at 164.

84. In the preface to his frequently reprinted lecture outline on civil law, Samuel Halifax noted that on the Continent "the connection between the Imperial and Municipal laws is much more visible than in England." He asserted the necessity of studying civil law to acquire "skill in the grounds and theory" of law. Although a student who did not study civil law could attain "a certain mechanical readiness" in the law, he could not "comprehend that enlarged and general idea of it, by which it is connected with the great system of Universal Jurisprudence." S. HALIFAX, *AN ANALYSIS OF THE ROMAN CIVIL LAW* xi & xxii (1795) (1st pub. 1774). This jurisprudential role of civil law was greatly influenced by and shared by natural law.

85. T. Bever, a civilian, appears to have been the only writer sufficiently self-conscious and candid to explain not only why civil law was a source of jurisprudence but also why it had to be so treated. It was the fact that civilian doctrine was not an authority in England that made it necessary for Bever to "represent it to your view under the more enlarged character of jurisprudence." T. BEVER, *A DISCOURSE ON THE STUDY OF JURISPRUDENCE AND THE CIVIL LAW* 23 (1766).

86. English civilians and common lawyers thus had special reason to describe and study civil and related natural law as "universal law" or "jurisprudence": these labels identified civil law as being safely incapable of direct application. It is not a coincidence that the first publication of Domat's work in England was T. WOOD, *TREATISE OF FIRST PRINCIPLES OF LAWS IN GENERAL* (1705) (republished in the 1721 and 1730 editions of Wood's *New Institute*). Emphasis on the role of civil law as a source of jurisprudence or underlying principles may be found in most English treatises on such law and increasingly in surveys of common law.

Civil law and related natural law were not, of course, the only possible sources of jurisprudence, but they clearly were more popular among common lawyers than the alternatives. Thus, for example, Adam Smith's lectures on jurisprudence, given in the 1760s at Glasgow, probably reached relatively few English or American lawyers and certainly had little effect upon them. Even Smith began his course by noting that Grotius was the first to attempt to provide a regular system of jurisprudence and that his remained the most complete. A. SMITH, *LECTURES ON JURISPRUDENCE* 397 (R. L. Meek, D. D. Raphael, P. G. Stein eds. 1982). William Jones relied on the laws of many nations to elucidate bailments, taking an approach more explicitly based on natural law than did the Englishmen who referred only to civil law for their jurisprudence. Jones did much to develop and popularize the eclectic natural law approach, yet he emphasized the importance of Roman law.

87. Simpson, *Rise and Fall of the Legal Treatise* at 656.

88. Coquillette, *Justinian in Braintree; John Adams, Civilian Learning and Legal Elitism, 1758-1775*, in *LAW IN COLONIAL MASSACHUSETTS* 359.

89. For the information about the seven editions of Pufendorf, see P. STEIN, *LEGAL EVOLUTION* 3 (1980).

90. WOOD, *A NEW INSTITUTE* (1704).

91. J. AYLIFFE, *A NEW PANDECT OF ROMAN LAW* (1734). Other English civilian works include R. EDEN, *JURISPRUDENTIA; PHILOLOGICA SIVE ELEMENTA JURIS CIVILIS* . . . (1744), and J. TAYLOR, *ELEMENTS OF THE CIVIL LAW* (1755, 1756 & 1786). For attempts to present natural law and civilian ideas on topical subjects, see: J. AYLIFFE, *LAW OF PAWNS* (1732); R. LEVAYER DE BOUTIGNEY, *A DISSERTATION SHOWING THE INVALIDITY OF ALL PROOF BY SIMILITUDE OF HANDS IN CRIMINAL CASES* (1744); and H. STEBBING, *A DISSERTATION ON THE POWER OF STATES TO DENY CIVIL PROTECTION TO THE MARRIAGES OF MINORS MADE WITHOUT THE CONSENT OF THEIR PARENTS OR GUARDIANS* (1755).

92. A. DUCK, *DE USU ET AUTHORITY JURIS CIVILIS ROMANARUM IN DOMINIIS PRINCIPUM CHRISTIANORUM* (1653, 1679, and 1689) and, in translation, appended to C. J. DE FERRIERE, *HISTORY OF THE ROMAN OR CIVIL LAW* (1724); J. Ayliffe, *A Preliminary Discourse Touching the Rise and Progress of the Roman Civil Law*, in *A NEW PANDECT OF ROMAN LAW* (1734); T. BEVER, *THE HISTORY OF THE LEGAL POLITY OF THE ROMAN STATE; AND OF THE RISE, PROGRESS, AND EXTENT OF THE ROMAN LAWS* (1781); A. C. SCHOMBERG, *HISTORICAL AND CHRONOLOGICAL VIEW OF THE ROMAN LAW* (1785). See also W. WYNNE, *LIFE OF . . . JENKINS* (1724), and J. L. DE BURIGNY, *THE LIFE OF THE TRULY EMINENT AND LEARNED HUGO GROTIUS* (1754).

93. T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* (1754-56) (the lectures were given in Cambridge); BEVER, *A DISCOURSE ON THE STUDY OF JURISPRUDENCE AND THE CIVIL LAW* (1766) (the lectures began in 1762 in Oxford); S. HALIFAX, *AN ANALYSIS OF THE ROMAN CIVIL LAW; IN WHICH A COMPARISON IS OCCASIONALLY MADE BETWEEN THE ROMAN LAWS AND THOSE OF ENGLAND* (1774, 1775, 1779, 1795, 1818 & 1836) (the lectures were given in Cambridge). Although Paley's lectures, given in about 1770, were not on civil law, they reflected the civilian jurisprudence, including that on contracts. W. PALEY, *LECTURES ON MORAL AND POLITICAL PHILOSOPHY* (1785 and frequently thereafter in both England and the U.S.). For Paley's influence, see Simpson, *Innovation* at 260.

94. J. WILDE, *PRELIMINARY LECTURE TO THE COURSE OF LECTURES ON THE INSTITUTIONS OF JUSTINIAN* (1794).

95. Simpson, *The Rise and Fall of the Legal Treatise* at 655-56. Note that the late seventeenth- and eighteenth-century civilian jurisprudence contributed much to the

rise of the treatise and was closely related to the eighteenth- and nineteenth-century interest in principles of substantive law.

96. Paulisch, *Sir John Davies, the Ancient Constitution, and Civil Law*, 23 *HIST. J.* 689, 690 (1980).

97. In 1687, Lincoln's Inn accepted "a present of a considerable number of bookes of the Civell Law." 3 *RECORDS OF . . . LINCOLN'S INN. THE BLACK BOOKS* 159 (1899). In 1708, when given 50 pounds for books, the Council of Lincoln's Inn "decided to expend the same on books of the Civil, Canon, and Feudal Law," and the librarian applied to "the most learned civilian, Mr. Alexander Cunningham . . . for his recommendation." *Id.* at 234. In 1744, on the recommendation of the Inn's Committee on the Library, the Council ordered purchase of a list of books, almost all relating to common law, except a few reference volumes and "Puffendorf [sic]" and "Grotius by Barbeyrac." *Id.* at 333.

In 1755, Gray's Inn ordered purchase of "Fitzherbert's *Natura Brevium*," "The *Parliamentary History*" and "Taylor's *Elements of the Civil Law*." 2 *THE PENSION BOOK OF GRAY'S INN* 282 (1910). In 1769, the Inn ordered purchase of a variety of volumes, including "Harris' translation of Justinian." *Id.* at 311. The accounts of the Inn reveal that in 1760-61 just over sixty-six pounds was paid to the Inn's regular supplier of books, "Osborne for civil law books." *Id.* at 410. (For purposes of comparison, note that in 1760-61, the Inn paid Osborne about 117 pounds for other, unidentified books; in 1761-62, it paid him nothing; in the three following years it paid him, respectively, about 85, 64, and 108 pounds for unidentified books.)

In 1723, the Inner Temple bought fifty books, most concerning common law. Of the others, several were reference works, several concerned history, a few dealt with natural history, and some concerned civil law, namely: "Corpus Juris Civilis 2 Vols. . . 1663," "Domat's Civil Law per Dr. Strahan . . . 1722," and "Pufendorf's Law of Nature and Nations . . . 1717." 4 *A CALENDAR OF INNER TEMPLE RECORDS* 98-99 (1933). In 1737-38, the Inn paid "for one set of Grevi and Gronovi in 25 vols." *Id.* at 384. In 1750-51, the Inn bought "Grotius' *De Jure Belli et Pacis* . . . by Barbeyrac [sic]." 5 *Id.* at 9. In 1758, the Inn's library received "Harris' *Justinian's Institutions in English and Latin*." *Id.* at 99. In 1772, the Inn ordered its librarian to catalogue the books in the library under various headings, including "Civil law." *Id.* at 276.

The 1734 library catalogue of the Middle Temple reveals volumes by Cujas, Grotius, Pufendorf, and Domat. *CATALOGUS LIBRARIUM BIBLIOTHECAE HONORABILIS SOCIETAS MEDII TEMPLI LONDINI* 109, 191, 231 & 335 (1734).

This note about civilian books in the eighteenth-century Inns of Court is necessarily incomplete. The printed calendars of the Inns' records cover varying periods, they are at times poorly indexed, and in places they deliberately omit information.

98. Chief Justice Lee's library included "Cumberland's Law of Nature," "Domat" in two volumes (probably the translation), and "Pufendorf," which were interspersed among a large number of books on common law and some on related history. W. LEE, *CATALOGUE OF LIBRARY*, Beineke Library, Yale University, Osborne Shelves, Lee Family Box 18, Folder 7. Lee took notes on his reading of Domat, Ayliffe, and Wiseman. His notes also indicate that he had read Wood's *New Institutes*. Some of his notes reveal an interest in the authority of civil law in England. Lee, *Notes on Reading: Legal*, Beineke Library, Osborne Shelves, Lee Family Box 18. Lee cited civilian sources in several reported cases. See note 99 *infra*.

99. Early and mid-eighteenth-century citations to civilians appear in a variety of English legal sources. Reports of cases at law occasionally contain references to civilians. Chief Justice Holt cited Justinian's *Institutes* and Vinnius's *Commentary*. *Coggs v.*

Bernard, 2 *Ld. Raymond* 909, 92 *Eng. Rep.* 107 (K.B. 1703); *Rex v. Bear*, British Library, Add. 35981, page 16 of case (K.B. 1699). For Holt's extensive use of civil law, see Pound, *The Influence of French Law in America*, 356 & n.11. Chief Justice Lee cited the *Digest* in *Brown v. Best*, 1 *Wils. K.B.* 174, 95 *Eng. Rep.* 557 (K.B. 1747), and cited both the *Digest* and the *Code* in *Holdfast v. Dowsing*, 2 *Strange* 1253, 93 *Eng. Rep.* 1164 (K.B. 1746). In *Pillans v. Van Mierop*, 3 *Burrow* 1663, 97 *Eng. Rep.* 1035 (K.B. 1765), *Wilmut* (J.K.B. 1755-66) cited *Vinnius*, *Justinian*, *Grotius*, and *Pufendorf*. Elsewhere, Mansfield cited, *inter alia*, the *Institutes*, the *Code*, the *Digest*, and Dr. Cowell. *Windham v. Chetwynd*, 1 *Burrow* 414, 97 *Eng. Rep.* 377 (K.B. 1757); and *Menetone v. Athawes*, 3 *Burrow* 1592, 97 *Eng. Rep.* 998 (K.B. 1764). Mansfield cited *Huberus* and *Voet* in *Robinson v. Bland*, 2 *Burr.* 1077, 97 *Eng. Rep.* 717 (K.B. 1760).

Citations to civil law appear relatively frequently in the reports of cases in Chancery. H. MAINE, *ANCIENT LAW*, ch. 3 (1861). The editor of the equity reports known as "Temp. Finch" (1725) added notes comparing the cases to civil law (as explained by Domat). For the use of civil law in cases see, e.g. LORD NOTTINGHAM'S *CHANCERY CASES* 26 (D.E.C. Yale ed., Selden Soc. Vol. 79) (citing civil law on conditions restraining marriage); *Anon.*, 1 *P. Wms.* 267, 24 *Eng. Rep.* 384 (Ch. 1714) (Chancellor Cowper discussed *bona mobilia* and *immobilia*); *Cook v. Oakley*, 1 *P. Wms.* 302, 24 *Eng. Rep.* 399 (Ch. 1715) (Joseph Jekyll cited Cicero and the *Digest*); *Peyton v. Bury*, 2 *P. Wms.* 626, 24 *Eng. Rep.* 889 (Ch. 1731) (Jekyll cited the *Institutes*); *Harvey v. Aston*, 1 *Atk.* 361, 26 *Eng. Rep.* 230, 2 *Comyns* 726, 92 *Eng. Rep.* 1287, British Library Add. 36180, fol. 72 (Ch. 1737) (Chief Baron Comyns cited the *Digest*, *Ulpian*, *Grotius*, *Pufendorf*, and others; Chief Justice Willes of Common Pleas apparently did not cite civilian sources; Chief Justice Lee of King's Bench cited *Pufendorf*; Chancellor Hardwicke cited *Justinian's Institutes*, *Gravina*, and others); *Omychund v. Barker*, 1 *Atkins* 21, 26 *Eng. Rep.* 15 (Ch. 1744) (Tracy Atkins, counsel for defendant, cited *Grotius* and *Voet*; Murray, for the plaintiffs, cited the *Decretals*, *Grotius*, *Pufendorf*, the *Digest*, and *Stair's Institutes*; Clarke, for the defendant, cited *Voet* and others; Mr. Chute for the defendants cited *Grotius* and *Pufendorf*; Chief Justice Willes cited *Grotius*; Chancellor Hardwicke cited *Pufendorf* and *Stair*); *Milner v. Milner*, 1 *Ves. Sen.* 106, 27 *Eng. Rep.* 921 (Ch. 1748) (Hardwicke cited *Baldus*, the *Digest*, and *Cujas*); *LeNeve v. LeNeve*, 3 *Atkins* 646, 26 *Eng. Rep.* 1172 (Ch. 1748) (Hardwicke cited the *Digest*); *Baldwin & Adler v. Rochford*, 1 *Wils. K.B.* 229, 95 *Eng. Rep.* 589 (Ch. 1748) (Hardwicke cited Roman law); *Chesterfield v. Jansen*, 1 *Atkins* 301, 26 *Eng. Rep.* 191 (Ch. 1750) (Clarke, counsel for plaintiffs, cited the *Digest*; Chief Justice Lee of King's Bench cited *Domat*); *Taylor v. Rochfort*, 2 *Ves. Sen.* 281, 28 *Eng. Rep.* 182 (Ch. 1751) (citing *Domat*); *How v. Weldon & Edwards*, 2 *Ves. Sen.* 516, 28 *Eng. Rep.* 330 (*Rolls* 1754) (Clarke, Master of the *Rolls*, cited civil law generally); *Evelyn v. Evelyn*, *Amb.* 191, 27 *Eng. Rep.* 130, 3 *Atkins* 762, 26 *Eng. Rep.* 1237 (Ch. 1754) (Hardwicke cited the *Novels* and *Vinnius*).

Further examples of citations in cases may be found in J. RAM, *THE SCIENCE OF LEGAL JUDGEMENT* \*69-76.

Common lawyers also occasionally cited civilians in pamphlets and treatises. West, who became Chancellor of Ireland in 1725, could cite *Cujas' Commentaries*. R. WEST, *AN INQUIRY INTO THE MANNER OF CREATING PEERS* 10 (1719). Baron Gilbert cited civil law in great detail in his treatise on contract. Among the sources he cited were *Justinian's Institutes*, *Vinnius*, *Pufendorf*, and "Lexicon Juridicati." G. Gilbert, *Of Contracts*. M. Wright cited *Corpus Juris Civilis*, *Pufendorf*, and Zouch in his *AN INTRODUCTION TO THE LAW OF TENURES* 22, 26 (1750) (1st pub. 1730). Blackstone, who was trained in civil law, cited *Gravina* on contract. 2 W. BLACKSTONE, *COMMEN-*

TARIES at \*444. Note that the translator of Barbeyrac's notes and preface to Pufendorf was a Mr. Carew of Lincoln's Inn.

100. For Chief Justice Lee's extensive reading notes, see note 98 *supra*. Chancellor Henley cited Grotius on property and discussed the law of nature in his commonplace book. British Library, Add. 26060, fols. 6 & 14. He also took notes on the civilian consensus theory of contract. See note 149 *infra*. An early eighteenth-century notebook that suggests study of civil law by students of common law is that of a John Wainwright, which contains both civilian and common law materials. The Exchequer cases from "Dodd's Mss." and the treatise on Crown debts indicate that Wainwright was studying to be a common lawyer. The notebook begins, however, with notes about, and definitions from, the civil law. British Library, Hargrave 71, fols. 15-34. The definitions include several relating to civilian contract law. *Id.* at fol. 18. The book also contains reading notes from Duck and "Domat's Civil Law translated by Dr. Strahan." *Id.* at fols. 21-31. Another notebook, Hargrave 78, similarly contains, in an early eighteenth-century hand, "Quaedam de Studio Juris recte instuendo," Everadus Bronchorst's "Oratio de Studio Juris recte instuendo," and various law reports, chiefly from common pleas, as well as a portion of Gilbert's *Tenures*. British Library, Hargrave 78. The late Mr. Francis Norman once offered for sale two early or mid-eighteenth-century volumes of manuscript "reports," one of which he described as organized according to the plan of Justinian's *Institutes*. For early seventeenth-century notebooks containing both common law and civilian materials, see Folger Library MS, V.b.186 & V.a.117. See also 1 J. H. BAKER, *ENGLISH LEGAL MANUSCRIPTS* 59 (1975).

The British Library contains a proposal for a systematic account of English law. Although it reflects some notions of the civilian jurisprudence, it is a singularly eclectic and incoherent effort. Add. 25595, fols. 177-78.

101. Simpson, *The Rise and Fall of the Legal Treatise* at 656. Locke stressed the importance of studying "the general part of civil law." J. Locke, *Some Thoughts Concerning Education* §186, in 9 *WORKS OF JOHN LOCKE* 176 (1801). According to Blackstone, "Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman." 1 BLACKSTONE, *COMMENTARIES* at \*5. Sir George Mackenzie's *Discourse on the Four First Chapters of the Digest to show the Excellence and Usefulness of the Civil Law* was said to have been "occasioned by some Discourse with Sir Robert Southwell about the Education of his Son." British Library, Add. 38231, fol. 124. Thomas Wood wrote that "young Men [destined for the clergy] think themselves obliged to read an *Institute* of the *Imperial Law*, and a *Comment* upon the Title *De Regulis Juris*; and then to study Grotius and Pufendorf." T. WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 3. Just how general the acquaintance with civil law was meant to be for future clergymen was spelled out in a seventeenth-century manuscript study guide designed "[f]or the obtaining [of] some convenient knowledg[e] in the Civil Law, so far as it may be necessary for a divine." *Analecta seu Miscellanea de Studio Juris caesarici & pontificii, amico Juris candidata transmissa*, British Library, Harleian 5758 & 6049.

102. For an illustration of how the civilian doctrine thereby was reduced to a very generalized consensus theory, see F. HUTCHENSON, *A SHORT INTRODUCTION TO MORAL PHILOSOPHY*, ch. 9 ("Of Contracts in General") (1747).

103. After 1762, however, the Inns of Court permitted Oxford and Cambridge graduates to be called to the bar after three rather than the normal five years. D. DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727-1875*, at 34 (1982).

104. Lemmings, *The Student Body at the Inns of Court Under the Later Stuarts*, 58



BULL. INST. HIST. RES. 158 (1985). Of course, not all students at the Inns became lawyers. *Id.* at 156.

105. D. DUMAN, *THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY* 24 (1983); DUMAN, *THE JUDICIAL BENCH IN ENGLAND* at 43. According to Dame Lucy Sutherland, "about 70 percent of the practicing lawyers who were members of Parliament in the 18th century had attended Oxford or Cambridge." 1 *THE UNIVERSITY IN SOCIETY* 51 (L. Stone ed. 1974).

106. Chancellor Talbot is said to have studied "Roman Civil Law" at Oxford at the beginning of the eighteenth century. 6 J. CAMPBELL, *THE LIVES OF THE LORD CHANCELLORS* 128 (1856). Wilmot was said to be "well versed in the Civil Law, which he studied when at Trinity Hall, Cambridge, and frequently affirmed that he had derived great advantage from it in the course of his Profession. He considered an acquaintance with the principles of the Civil Law as the best introduction to the knowledge of Law in general, as well as a leading feature in the Laws of most nations of Europe." *MEMOIRS OF . . . SIR JOHN EARDLEY WILMOT, KNT.* 75 (1802). Incidentally, he cited civilians in King's Bench. See note 99 *supra*. Mansfield is said to have attended lectures on the *Pandects* at Oxford. J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 219 (1873). When Lord Abinger began his study of common law, he "was already familiar with . . . some portions of Grotius 'De Jure Belli atque pacis' " probably as a result of his years at Trinity College, Cambridge. P. C. SCARLETT, *A MEMOIR OF THE RIGHT HONORABLE FIRST LORD ABINGER* 44 (1877). Blackstone studied civil law at Oxford and took a degree. An account of the lectures of Halifax and Symonds may be found in the correspondence of the second Earl of Hardwicke with his nephew Philip Yorke. British Library, Add. 35377, fols. 131-43 (Nov.-Dec. 1774).

Much earlier, in 1594, Whitelocke—a future justice of King's Bench—was presented as a bachelor of civil law by Gentilis. According to Whitelocke, he "ever had a purpose to ayme at the study of the common law" even when he was only a student of civil law, and therefore he "began to joyne the study of the common law with the civill . . ." J. WHITELOCKE, *LIBER FAMELICUS* 13-14 (1858).

Some English lawyers studied civil law on the Continent. Peter King, who was Chief Justice of King's Bench and then Lord Chancellor, "attended at Leyden a course of lectures on the *Pandects*." 5 CAMPBELL, *LIVES OF THE LORD CHANCELLORS* at 417 (1874). Later, in the mid-eighteenth century, Blackstone said that "a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities . . . which . . . have been looked upon as better nurseries of the civil . . . law." 1 BLACKSTONE, *COMMENTARIES* at \*5.

107. G. BURNET, *LIFE OF HALE* 24 (1680) (referring to Hale's comment that the *Digest* was not studied); J. EVELYN, *MEMOIRS* 728 (n.d.) (letter of March 1, 1698 to Henshaw). By the mid-eighteenth century, Blackstone had a very different complaint.

108. Roger North noted that law students could profitably vary their studies,

[f]or there are other studies more pleasant [than common law] w[hi]ch m[ay] be interwoven w[i]th the Study of the Law, w[i]th great Emolument. As for instance History. . . . And besides History there are other sorts of learning mos[t] reasonable for a Lawyer to have some knowledge of tho ver[y] superficial; as of ye Civil Law, as a man of ye Law wou[ld] ne[ver] be willing to stand mute to ye Question, wh[at] is ye differenc[e] between ye Civil & Common Law[,] What is ye Imperial Law[,] What is ye Cannon[,] What ye *Pandects*, Codes &c. It is not at all needfull to study questions in [those] Laws, but ye rise and Progres[s] of them in Gross, is but a necessary knowledg[e] & so farr taking up butt little time, & had by meer inspection of some books, & peruseing their Introductions, it may w[i]th eas[e] & pleasure be interlac'd w[i]th ye Common Law.

R. North, *Discourse on the Study of the Laws*, British Library, Hargrave 394, fol. 5. North's *Discourse* has conveniently been republished: M. H. HOEFELICH, *THE GLADSOME LIGHT OF JURISPRUDENCE* (1988). Lord Mansfield recommended Gravina, Justinian, Vinnius, and the Pandects. He suggested Grotius, Pufendorf, and Burlamaqui for natural law. MANSFIELD, ASHBURTON, AND THURLOW, *A TREATISE ON THE STUDY OF THE LAW* 49-50 (1797). Thurlow wrote that a law student should read Fernier's history of the civil law and then should acquire "a cursory view of Justinian's code and digest, and civil law." *Id.* at 68-69. See also, E. WYNNE, *EUNOMUS* 145 (1822) (1st pub. 1774). In *Harvey v. Aston*, Judge Comyns said, "As to the Civil Law it is a Com[m]endable Study and may be of use to the Students of the Com[m]on Law but ought not to interfere with, much less supsede [sic: supercede] the Rules of the Com[m]on Law." Copy of the Argument of Mr. Justice Comyns, British Library, Add. 36180, fol. 59 (Ch. 1737).

Some recommendations did not encourage the study of civil law. See Ashburton's recommendation in MANSFIELD, ASHBURTON AND THURLOW, *A TREATISE ON THE STUDY OF THE LAW*. Note also that most recommendations to study civil law did not expressly state why such study would be useful. They did, however, explain that students who limited themselves to mere technical knowledge were thereby limiting their opportunities for advancement and that civil law was one of the non-technical subjects they should pursue, the chief other such subject being history.

109. E.g., Mansfield's recommendations, *A TREATISE ON THE STUDY OF THE LAW* at 56 (1797). See also Coquille, *Justinian in Braintree* at 359.

110. North, *Discourse on the Study of the Laws*, fol. 5.

111. MANSFIELD, ASHBURTON AND THURLOW, *A TREATISE ON THE STUDY OF THE LAW* at 68 (1797).

112. *Id.* at 50.

113. T. Wood, *Some Thoughts Concerning the Study of the Laws of England*, in *AN INSTITUTE OF THE LAWS OF ENGLAND* at 2-4.

114. G. JUDD, *MEMBERS OF PARLIAMENT 1734-1832* 45 (1955). Blackstone complained of the practice of sending English and Scottish students abroad to study. 1 BLACKSTONE, *COMMENTARIES* at \*5.

115. Among the English judges with a Scottish legal or educational background were Ryder and Hardwicke. Dudley Ryder studied at Leiden. CAMPBELL, *LIVES OF THE CHIEF JUSTICES* at 123 (1857). Hardwicke does not appear to have been formally educated in civil law but is said to have studied the subject to prepare himself for arguing or deciding Scottish appeals. 6 CAMPBELL, *LIVES OF THE LORD CHANCELLORS* at 192-93 (1857). Mansfield also argued Scottish cases but had studied civil law at Oxford. For Mansfield's career, see J. OLDHAM, *UNPUBLISHED LEGAL PAPERS OF LORD MANSFIELD* (forthcoming, Studies in Legal History, U. of N.C. Press). I am grateful to Professor Oldham for generously allowing me to read and cite portions of his manuscript.

Scottish books were influential. Stair's writings were cited occasionally in the reports of eighteenth-century Chancery cases. Nottingham's citations to Bartholus in his *Prolegomena* came from Mackenzie's *Scotch Pleadings*. LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGEMENA OF CHANCERY AND EQUITY" 167 & 200 (D. E. C. Yale ed. 1965).

116. It was not only the learning of counsel and the other Delegates to which judges were exposed. J. Oldham has found that in 1782 the opinion of four French lawyers was solicited about a prize case. In prize cases, the law applied to contracts was said to be natural law. See OLDHAM, *UNPUBLISHED LEGAL PAPERS OF LORD MANSFIELD*.

117. Decisions of the Court of Delegates occasionally appeared in the printed

Chancery reports and, more rarely, were cited in arguments and opinions in Chancery. Judge Fortesque Aland of King's Bench took notes of some cases before the Court of Delegates in the 1720s. Fortesque Aland's *Commonplace Book*, British Library, Stowe 403, fol. 39.

118. See note 99 *supra*.

119. In *Wallis v. Hodson*, 2 Atkins 114, 26 Eng. Rep. 472 (Ch. 1740), Hardwicke held that the Statute of Distributions was to be construed according to the rules of the civil law but delayed making a decree until he had consulted the civilians. 2 P. C. YORKE, *LIFE OF . . . HARDWICKE* 487 (1913). In *Evelyn v. Evelyn* (Ch. 1753), Jekyll spoke "after Advising with a Civilian." M.S. Reports, British Library, Add. 36012, fol. 130; Amb. 192.

120. *Pool v. Whishaw*, cited at 3 Atkins 763, 26 Eng. Rep. 1237 (Ex. 1708); *Harvey v. Aston*, 1 Atkins 361, 26 Eng. Rep. 230, 2 Comyns 726, 92 Eng. Rep. 1287 (Ch. 1737); *Rex v. Simpson*, 3 Burr. 1463, 97 Eng. Rep. 929 (K.B. 1764).

121. Strahan's preface to his translation of Domat was quite explicit:

I must beg leave to consider how far the Reason and Equity [of civil law] may be in Service in . . . Courts where it has not the Force and Authority of Law. And I cannot but think that in all Courts of Equity . . . the knowledge of the Civil Law must be of great Service . . . [W]ould it not be a great Help towards forming a right judgement to inquire into the general Rules of equity. How far therefore these rules of Equity which are collected in the Body of the Civil Law, may be useful in the High Court of Chancery, and Court of Exchequer . . . is what I humbly submit to the great wisdom of the learned Judges, and others who are best acquainted with the practice of those Courts.

DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* at xx. Strahan may have had some success, for he was employed to argue civil law for the plaintiffs in *Harvey v. Aston*, 1 Atkins 361, 26 Eng. Rep. 230 (Ch. 1737). When W. Nelson edited the equity reports known as "Temp. Finch" (1725), he added notes "shewing where those Decrees are founded on the Civil Law," and in his notes he cited Strahan's Domat. Non-civilians also promoted equity's use of civil law. Basil Kennet's translation of Pufendorf's *Law of Nature and Nations* (1703) was dedicated to Lord Keeper Wright, "the Guardian and Dispenser of Publick Equity [and] Patron of the *Law of Nature and Nations*."

122. H. BALLOW, *A TREATISE OF EQUITY* (1737). Note that Lord Macclesfield's 1718 scheme for university reform proposed, among other things, a professorship of the "Law of Nature and Nations." C. WORDSWORTH, *SCHOLAE ACADEMICAЕ* 146 (1877). Note also that the running titles of the two halves of Gilbert's account of Chancery were "Forum Romanum" and "Lex Praetoria." G. GILBERT, *THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY* (1758).

123. Stein, *The Attraction of Civil Law in Post Revolutionary America*, 52 U. VA. L. REV. 403, 404-7 (1966); Radin, *The Rivalry of Common-Law and Civil-Law Ideas in the American Colonies*, in *Law—A Century of Progress* 404, 420 (1937).

124. Coquillette, *Justinian in Braintree* at 359.

125. W. H. BRYSON, *CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* 27-30 (1978). The other colonies are not as well documented. In 1746, the large law library of Ralph Assheton in Philadelphia contained Grotius, Pufendorf, Domat, and Justinian's "Works." E. Wolf II, *The Library of Ralph Assheton*, 58 PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 345 (1964). A Maryland lawyer, George Garnet, possessed Grotius and Justinian's *Institutes*, among other law books. In the late 1730s, Mathias Harris—another Maryland lawyer—read a volume by Pufendorf. Wheeler, *Reading Interests of the Professional Classes in Colonial Maryland, 1700-1776*, 36 MD. HIST. MAG., 184,

281, 286 & 293 (1941). In the 1720s, Maryland's Attorney General, Dulany, cited Grotius and Pufendorf in his argument that English law applied in the Province. In the same controversy, the Rev. J. Eversfield referred to the Scots' use of civil law. By the time of his death, he had acquired Calvin's *Institutes* and two editions of Pufendorf. ST. G. L. SIOUSSAT, *THE ENGLISH STATUTES IN MARYLAND* 54-55 (1901).

In 1760, the New York attorney, William Smith, recommended to a young law student that he read, *inter alia*, Wood's *Institutes of the Civil Law* and Pufendorf's *Whole Duty of Man*. Parrish, *Law Books and Legal Publishing in America, 1760-1840*, 72 LAW LIBRARY J. 355, 356 (1979). Parrish also describes post-Revolutionary legal reading lists that include works on natural or civil law.

126. Waddill v. Chamberlayne, Jefferson 10, 14 (1735); Anderson v. Winston, Jefferson 24, 28-29 (1736); Jones v. Porter, Jefferson 62, 66 (1740); Bradford v. Bradford, Jefferson 86 (1769); Carter v. Webb, Jefferson 123, 130 (1772). These cases are cited and briefly discussed by Hoffman, *Classics in the Courts of the United States, 1790-1800*, 22 AM. J. LEGAL HIST. 55, 69 (1978).

Reports from other colonies are not plentiful, but those from the New York Admiralty Court survive and reveal that the Court cited civil law at least once, in the 1750s. REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715-1788, at 109-10 (1925).

127. In general, see A. HADDOW, *POLITICAL SCIENCE IN AMERICAN COLLEGES AND UNIVERSITIES* 1636-1900, chs. 1-2 & 4-6 (1969). In his proposal for what became the University of Pennsylvania, Franklin suggested that youths study "the Grounds of Law and legal Justice." He quoted Locke's recommendation to read Tully's *Offices*, Pufendorf, and Grotius. B. FRANKLIN, PROPOSALS FOR THE EDUCATION OF YOUTH IN PENNSYLVANIA 25 (1927) (1st pub. 1749). In Donald Robertson's school, Madison read Justinian. I I. BRANT, JAMES MADISON 59 (1941). Note that Hutcheson presented a very generalized version of the civilian consensus theory in what became a standard text for American schools. F. HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY, ch. 9, ("Of Contracts in General") (1747). For Hutcheson's influence in America, see C. Robbins, "When it is that Colonies May Turn Independent:" *An Analysis of the Environment and Politics of Francis Hutcheson*, 11 WM. & MARY Q. 214 (3rd ser. 1954).

128. The evidence that post-Revolutionary Americans read and appreciated civil and natural law is extensive. For discussion of some of it see P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 164-71 (1965); Stein, *The Attraction of the Civil Law*. See also J. WITHERSPOON, AN ANNOTATED EDITION OF LECTURES ON MORAL PHILOSOPHY, Lecture XV (on contract) (1982).

129. Hoeflich, *Roman and Civil Law in American Legal Education and Research*.

130. See note 87 *supra*.

131. Simpson, *Innovation* at 254-56.

132. English civilians were prolix on this subject. Wiseman wrote that the Roman state "reduced [its law] to a perfect and complete Art and Science of Law, whereby the right skill and way of doing the purest and most natural justice, whatsoever the case may be, may be taught and known." R. WISEMAN, *THE LAW OF LAWS; OR, THE EXCELLENCY OF THE CIVIL LAW* . . . 189 (1657). Wood wrote that "there is nothing more necessary in all Sciences, than to understand the first Principles of them . . . [T]hey may serve for a Foundation to all the Particulars which depend upon them." A TREATISE OF THE FIRST PRINCIPLES OF LAW IN GENERAL 2 (1st pub. 1705 and republished in 1721 and 1730 in WOOD, A NEW INSTITUTE). (The *Treatise* was translated from Domat but without acknowledgement. See 12 W. S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 427 (1936), and Simpson, *The Rise and Fall of the Legal Treatise* at 656.) In his

translation of Domat, Strahan wrote that "the Author's Design . . . was to give the World . . . a Collection out of the Body of the Civil Law of all of the Natural Rules of Justice and Equity. . . . It is most certain, that it is in the Body of the Civil Law that we have the most complete, if not the only Collection of the Rules of Natural Reason and Equity, which are to govern the Actions of Mankind." W. Strahan, *Translator's Preface* to J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER TOGETHER WITH THE PUBLICK LAW* ix (1738) (1st pub. 1722). Bever wrote that "those fundamental rules of natural justice and equity . . . are to be found in the writings of the ancient Roman lawyers, from whence they have been copied, with large improvements, by the most eminent civilians. . . ." BEVER, *A DISCOURSE ON THE STUDY OF JURISPRUDENCE* (1766). "[W]e shall now represent it to your view under the more enlarged character of jurisprudence; and as the most complete collection, now extant of the natural rules of justice and reason. . . ." *Id.* at 23. "This plan of education has given a peculiarly scientific cast to the civil law; has naturally fitted it to general use; and has maintained its right to the title of universal law, above any other in the known world." *Id.* at 24. George Turnbull wrote in the Preface to his translation of Heineccius that "every science hath its elements; and this treatise at least well deserves to be called an excellent introduction to the science of laws." Turnbull, *Preface* to J. G. HEINECCIUS, *A METHODICAL SYSTEM OF UNIVERSAL LAW: OR, THE LAWS OF NATURE AND NATIONS DEDUCED FROM CERTAIN PRINCIPLES* . . . (1741). Turnbull hoped to improve the scientific study of law and thus in *A DISCOURSE UPON THE NATURE AND ORIGIN OF MORAL AND CIVIL LAWS* (1740), appended to his translation of Heineccius, he attempted "to introduce the experimental way of reasoning into morals, or to deduce human duties from internal principles and dispositions in the human mind." Turnbull, *Preface* to HEINECCIUS, *A METHODICAL SYSTEM*.

Turning now to common lawyers, Mathew Hale "often said that the true grounds and reasons of Law were so well delivered in the *Digest*, that a man could never understand law as a science so well as by seeking it there; and therefore he lamented much that it was so little studied in England." G. BURNET, *LIFE OF . . . HALE* 24 (1680). When the owner of Hargrave 71, a commonplace book, took notes from Strahan's Domat, he noted that law is a science. British Library, Hargrave 71, fol. 29. Roger North included law among the sciences. North, *Discourse on the Study of the Laws*, fol. 5. Wilmot "often declared his partiality for the study of [the common law] as a science," an attitude that probably was related to the fact that he was "well versed in the Civil Law." MEMOIRS OF . . . SIR JOHN EARDLEY WILMOT, KNT. 75 (1802). *See also* 1 BLACKSTONE, *COMMENTARIES* at \*4. For American examples, *see* MILLER, *THE LIFE OF THE MIND IN AMERICA* at 156-64. *See also* J. SULLIVAN, *HISTORY OF LAND TITLES IN MASSACHUSETTS* (1801).

That civil law was a science was confirmed by Justinian's *Institutes* themselves. *INSTITUTES, Proemium*, §§ 3 & 4.

For a recent and sophisticated discussion of the treatment of law as a science, *see* Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1980). B. Shapiro has shown that the "scientific" study of common law in the seventeenth century had some connections to study of the natural sciences. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727 (1969).

133. In 1705, Thomas Wood wrote that "[T]he Common and Civil Laws had not the same Root or Stock; yet by inoculating and grafting, the Body and Branches do seem at this day to be almost of a piece. . . . A great Part of the Civil Law, is Part of the Law of England, and interwoven with it throughout." WOOD, *A NEW INSTITUTE* at 87 (1730); apparently plagiarized by AYLIFFE, *A NEW PANDECT OF ROMAN LAW* at

xlvi–xlvi (1734). The plagiarism is discussed by Simpson, *The Rise and Fall of the Legal Treatise* at 657. Bever wrote: “Neither can it be any affront to or disparagement to our constitution, to say, that it aims at all possible perfection; which can be effected by no surer means, than by culling the choicest flowers out of every country, in the universe, to adorn its own; and by a new, and more refined art of cultivation, to give them a fresh beauty, to which they were before entire strangers. And as these exotic plants have long taken root, their fruits are as much the property of those who transplanted and nourished them, as if they had been the original natives of the British soil.” BEVER, A DISCOURSE ON THE STUDY OF JURISPRUDENCE AND THE CIVIL LAW at 25 (1766).

134. In 1703, Holt turned to Bracton, Justinian, and Vinnius to reveal “the Law of the World [and] common and natural Justice” as it related to bailments. *Coggs v. Barnard*, British Library, Add. 35981, at fol. 250 (K.B. 1703). Holt’s method is more clearly apparent from this manuscript than from the printed report at 2 Ld. Raymond 909, 92 Eng. Rep. 107. The manuscript version was printed in *THE LIFE OF . . . HOLT* (1764). In another case, Holt said that he was loath to cite civil law but that “inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, [and] therefore [are] grounded upon the same reason in many things.” *Lane v. Sir Robert Cotton*, 12 Modern 472, 482, 88 Eng. Rep. 1458, 1463 (K.B. 1701). For the later use of civil law to elucidate bailments, see G. Gilbert, *Of Contracts*; AYLIFFE, *LAW OF PAWNS* (1732); W. JONES, *AN ESSAY ON THE LAW OF BAILMENTS* (1781).

135. *Ryall v. Rowles*, 1 Ves. Sen. 348, 354, 27 Eng. Rep. 1074, 1078 (Ch. 1750).

136. *Harvey v. Aston*, 2 Comyns 726, 734, 92 Eng. Rep. 1287, 1291 (Ch. 1737).

137. *Harvey v. Aston*, 1 Atkins 361, 375, 26 Eng. Rep. 230, 239. See also the arguments of counsel on this point. Hardwicke concurred with the opinion of Comyns and the other judges but was critical of at least some of the citations to civil law.

138. Copy of the Argument of Mr. Justice Comyns, British Library, Add. 36180, fol. 70.

139. In addition to the examples already cited, the civilian doctrine of equality clearly influenced the Court of Chancery in certain contract cases involving seamen. In *How v. Weldon & Edwards*, 2 Ves. Sen. 516, 28 Eng. Rep. 330 (Ch. 1754), a sailor’s assignment of his prize money in exchange for a very small consideration was set aside for fraud. Thomas Clarke, Master of the Rolls, said, “[T]he price, for which the share was parted with, is about a fourth part. By the rules of the civil law, if half had been paid, it would have been a mere nullity. Our law differs from that; but though the inadequateness of the value will not of itself be sufficient to set aside the contract, yet it is a very material ingredient, and, with other things, will go a great way toward it.” 2 Ves. Sen. at 518, 28 Eng. Rep. at 331. See also *Baldwin & Adler v. Rochford*, 1 Wils. K.B. 229, 95 Eng. Rep. 589 (Ch. 1748); and *Taylor v. Rochford*, 2 Ves. Sen. 281, 28 Eng. Rep. 182 (Ch. 1751).

Civil law usually played a less dramatic role in Chancery. It was used extensively in the traditional area of legacies and in its jurisprudential role as a means of confirming the equitableness of common law rules.

Hardwicke has a reputation for having relied considerably on civil law. He did employ civil law frequently, but he carefully stated that civil law was relevant only to the extent that it had been received in England. Most of his discussions of civil law give fairly narrow justifications for the use of civilian doctrine, such as the tradition of using civil law with respect to wills and the need for uniformity of judgments in

different courts. See 2 P. C. YORKE, *LIFE OF THE EARL OF HARDWICKE* 486–88 (1913). Perhaps this was the product of caution. In this context, it should be noted that Mansfield appears occasionally to have employed civilian ideas, but he was relatively sparing in his references to civil law outside of areas of its traditional use. In light of the criticisms leveled at both judges for endangering common law with civilian doctrine, it is possible that they felt they had to be circumspect in their discussions of civil law. Both judges could, however, be quite critical of certain uses of civil law. In *Harvey v. Aston* (Ch. 1737), Hardwicke was critical of some of the citations to civil law. See Lord Chancellor's Argnt., British Library, Add. 36180, fol. 80. (Given Hardwicke's comment, it is interesting that the printed version of Comyn's opinion did not contain one of Comyn's arguments about the role of civil law, including the passage quoted in the text accompanying note 138 *supra*.)

Various common law writers discussed the use of civilian jurisprudence to supplement common law. Woodeson recalled a remark of Selden that Bracton and other early English authors had borrowed from Roman writings "not because they thought any foreign code could bind the subjects of this realm, but in order, that where the laws of England were silent, they might confirm their own problematical or conjectural position of natural reason, by the doctrines of the Civilians, or, where both laws were consonant to each other, might by such citation illustrate and explain our municipal institutions." R. WOODESON, *ELEMENTS OF JURISPRUDENCE* 85 (1783). (The reference was to John Selden, *Ad Fletam Dissertatio* 39 [1925].) Even while discussing the importance of studying common law, Blackstone said, "Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason." 1 BLACKSTONE, *COMMENTARIES* at \*5. Students at Northampton learned that:

Many of the principles of the Common Law were doubtless derived from the Civil Law so altered as to adapt them to the State of Society in which they were used—a system carried to a degree of conformity with natural reason attained by no other. The study of this system offers a remedy and reasonable solution of all new cases presenting themselves and was resorted to by common consent and practice; not indeed as laws formally established but as a *ratio scripta*, the dictate in all cases of that sound reason, which should constitute the law of every country. For this purpose and in this way ought this code now be studied.

S. Howe and J. H. Ashmun, *Lectures* (notes of lectures given at Northampton Law School 1825–27) in Beineke Library, Yale University, Mss. B, L88, vol. 4, page 25. See also Hoeflich, *Roman and Civil Law in American Legal Education and Research* at 723–28; Hoeflich, *John Austin and Joseph Story: Two Nineteenth-Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 64–71 (1985); J. MACKINTOSH, *A DISCOURSE ON STUDY OF THE LAW OF NATURE AND NATIONS; INTRODUCTORY TO A COURSE OF LECTURES ON THAT SCIENCE* 59 (1799) (citing Holt); D. HOFFMAN, *A COURSE OF LEGAL STUDY* 500–11 (1836).

140. *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, 97 Eng. Rep. 1035 (1765).

141. *Rann v. Hughes*, 4 Brown 27, 2 Eng. Rep. 18, 7 T.R. 350n., 101 Eng. Rep. 1014 (H.L. 1778) (rejecting *Pillans*).

142. Similarly, Foster and Camden disagreed with Mansfield when they thought he was using Roman law to avoid the effect of relatively recent statutes. Camden even opined that Roman law was irrelevant in Westminster Hall. OLDHAM, *UNPUBLISHED LEGAL PAPERS OF LORD MANSFIELD* (forthcoming). At the other end of the spectrum of opinion, Evans wrote:

I am not aware that I have any favorite doctrines or theories to support, except the two propositions that the decisions which result from the principles of substantial justice shall not be sacrificed to the subtleties of artificial reasoning, where the opposite course can be pursued without an improper contravention of legal authority, and the courts of justice should not consider themselves restricted from the correction of erroneous precedents, where the benefit of the correction would be general, and the detriment confined to the parties who in the particular case had been misled by the preceding determination.

Evans, *Introduction* to M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS ON CONTRACTS 98-99 (1853).

143. Simpson, *Innovation* at 247.

144. *Id.* at 254 & 277. In connection with some doctrines—particularly remoteness of damages and frustration of purpose—Simpson suggests that common lawyers modified civilian doctrine. In general, however, he does not argue that common lawyers adapted civilian consensus theory.

145. See the works cited in note 93 *supra* and in the text at note 89 *supra*.

146. Offer and acceptance were not always discussed in terms of "offers." Some civilians dealt with what can be considered essentially the same issue when examining the "acceptance" of promises. *E.g.*, GROTIUS, THE RIGHTS OF WAR AND PEACE, ch. 11.

147. Gilbert, *Of Contracts*, fol. 43. In several places, Gilbert referred to contract as an "act of the mind."

148. H. BALLOW, A TREATISE OF EQUITY (1737).

149. Henley's notes entitled "Of Contracts" began as follows: "A Contract is an Obligation to do some Act under a penalty in Non-performance. [A]n Obligation to do any thing contrary to Law is void for Jus publicum privatorum pactis mutari non potest. In all Contract, we are to Consider ye persons; That either of y'm is not ignorant of what he contracts for. The intention of the parties. The time & the occassion. Contracts are generally expressed in writing [for] facility of proof, tho' they are equally valid w[ithout] it. . . ." Henley's Commonplace Book, British Library, Add. 26060, fol. 14. The commonplace book also contains Henley notes "Of the Law of Nature." *Id.* at fol. 17. See also HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY, ch. 9 ("Of Contracts in General").

150. The general, conceptual nature of the theory also stemmed from the artificiality of the common law remedies for contracts. These were so distinct from the consensual reality that common lawyers felt little temptation to try to relate the two. Thus, they developed the consensus analysis unfettered by practical concerns about remedies.

151. Gilbert wrote that "the Justice of the Demand Arises from the Intention of being Obligated on the Consideration received." Gilbert, *Of Contracts*, fol. 40. He also explained that "Where the Solemnitys of Law are wanting to shew a serious Intention of the partys [such intention] must be Collected from the Consideration." *Id.* at fol. 43.

152. See notes 140 and 141 *supra*.

153. Horwitz has argued that eighteenth-century contract law posed other obstacles to commerce that were abandoned in the early nineteenth century. HORWITZ, TRANSFORMATION, ch. 6. As Simpson shows, however, these arguments are based on a misapprehension of eighteenth-century contract law. Simpson, *The Horwitz Thesis*.

The consideration requirement was, to some degree, abandoned in cases of so-called moral consideration—a doctrine that probably reflected some civilian influence. Wen-



nall v. Adney, 3 B. & P. 249, 127 Eng. Rep. 138 (1802), reporter's note. T. F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 654-55 (1956).

154. In contrast, some historians have suggested that consensus and fairness were inconsistent with one another. *E.g.*, ATIYAH, *RISE AND FALL* at 167-84.

155. English equity lawyers appropriated the civilian name and concept of "equality" for a variety of singularly English or equitable purposes. They clearly used the doctrine of equality in certain cases of the 1740s involving seamen and probably also in others concerning expectant heirs. *See* note 139 *supra*. Nevertheless, those cases represented relatively minor categories of contracts and referred to the civilian doctrine of equality to protect incompetents rather than to impose fairness generally. *See* note 171 *infra*. English lawyers also appropriated the idea of equality to describe general policies of equity. For example, Francis, in his *Maxims of Equity* (1727), employed the rubric, "equality is equity," but under that heading simply summarized common law cases. Thus, he employed a civilian idea to organize English cases. He thereby popularized a version of equality that was much weaker than the civilian doctrine and that could develop within traditional policies of equity. Similarly, lawyers in equity sometimes used merely the language of equality. A late but interesting example is *Kennedy v. Lee*, in which Eldon stated that each party must have a "fair understanding" of the contract. In the next sentence, however, he held that the defendant's failure to understand that there was a contract did not prevent formation of a contract. *Kennedy v. Lee*, 3 Mer. 441, 447, 36 Eng. Rep. 170, 172 (Ch. 1817). Nevertheless, the use of civilian terms in connection with common law had consequences. By supplying definitions and phrases that were potentially discordant with existing doctrine, civil law may have subtly contributed to later doctrinal developments. *See also* 1 H. BALLOW, *A TREATISE OF EQUITY* 116-23 (Fonblanque ed. 1793).

Turning to courts of law, the doctrine of implied warranty, which reflected civilian ideas, turned up chiefly in connection with sales of horses and slaves, and even in those situations had a mixed reception. *See* Simpson, *The Horwitz Thesis*; Oldham, *Reinterpretations of Eighteenth-Century English Contract Law*, forthcoming article in *GEO. L. REV.* I wish to thank Professor Oldham for generously allowing me to read and cite his article.

The doctrine of equality and other, related civilian thought may have been among the ideas that influenced Mansfield in *Carter v. Boehm* to require disclosure of facts not known to one of the contracting parties. 3 Burrow 1905, 97 Eng. Rep. 1162 (K.B. 1766). Mansfield's language in *Carter* referred to contracts generally, but it is no coincidence that *Carter* was an insurance case and that it was followed only in other insurance cases. Although a similar disclosure requirement was imposed by Lord Kenyon in a case involving sale of a ship with latent defects, *Mellish v. Motteaux*, Peake 156, 170 Eng. Rep. 113 (1792), that requirement was rejected shortly thereafter. *Baglehole V. Walters*, 3 Camp. 154, 170 Eng. Rep. 1338 (1811). Simpson discusses these cases in *The Horwitz Thesis* at 580-85. In America, an obligation to disclose was not widely accepted. It appeared in some early nineteenth-century opinions but not without criticism. *Bowman v. John & James Bates*, 5 Ky. 47 (1810) (Clarke, J., dissenting); *Frazer v. Gervais*, 1 Miss. 72 (1818) (criticized by reporter). In Louisiana, paternalistic, civilian requirements could suffer under the scrutiny of federal courts. *Laidlaw v. Organ*, 15 U.S. 178 (1817).

156. T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 112 (1832) (1st pub. 1754-56). Francis Hutcheson's *Short Introduction to Moral Philosophy* took a position similar to that which Rutherford attributed to his students. In a chapter on "Contracts in

General," Hutcheson propounded an abstract consensus theory drawn from civil law, but he explained that:

[T]ho' a good man would not take any advantage of another's weakness or ignorance in his dealings, nay, would frequently free another from his bargain which became highly inconvenient to him, and not very necessary to himself, provided any loss he sustained were made good; yet there is such a manifest necessity of maintaining faith in commerce, and excluding the cavils which might be made from some smaller inconveniencies to one or other of the parties, that in the proper matters of commerce, the administration of which, the law of nature commits to human prudences, our covenants, tho' rashly made, must be valid and constitute at least such external rights to others, as must for the common utility be maintained, though perhaps a good man would not insist on them. . . . [We] . . . ought to observe our covenant; according to an old rule, that "what ought not to have been done, yet in many cases when done, is obligatory."

HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY at 149 (1788). The *Short Introduction* was a standard text in American schools. In the previous century, Selden wrote:

if we once grant we may recede from Contracts upon any inconvienicy that may afterwards happen, we shall have no Bargain kept. . . . Keep your Contracts, so far a Divine goes, but how to make our Contracts is left to ourselves; and as we agree upon the conveying of this House, or that Land, so it must be. If you offer me a Hundred Pounds for my Glove, I tell you what my Glove is, a plain Glove, pretend no Virtue in it, the Glove is my own, I profess not to sell Gloves, and we agree for an hundred Pounds, I do not know why I may not with a safe Conscience take it. The want of that common Obvious Distinction of *Jus praeceptivum*, and *Jus permissivum*, does much trouble Men.

J. SELDEN, TABLE TALK 140 (1860). See also BALLOW, A TREATISE OF EQUITY 109 n.(x) (1793); G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS 96-97 (1825). Verplanck did not accept all of the civilian doctrine on equality and argued for a milder version of it. Even so, as Simpson has pointed out, his book was largely ignored. Simpson, *The Horwitz Thesis* at 599. For a critical review of Verplanck, see 1 AMER. Q. REV. 106 (1827).

157. W. H. Hamilton has argued that the doctrine of caveat emptor is not very ancient. Hamilton, *The Ancient Doctrine of Caveat Emptor*, 40 YALE L.J. 1133 (1931). He vaguely disparages the early seventeenth-century references to the doctrine and suggests that caveat emptor prevailed in the common law courts because of the influence of late eighteenth- and nineteenth-century individualism. Hamilton may be partially correct as to the use of the phrase "caveat emptor," but with respect to substantive law he is mistaken. Hamilton's attempt to show that common law courts approached contracts with a "paternal solicitude" is based largely on the decisions of local or non-common law jurisdictions and on local and Parliamentary regulation. None of this evidence indicates that common law courts generally took a paternalistic approach to contracts. Indeed, the need for local ordinances and Parliamentary enactments suggests the contrary. The small number of law-merchant cases cited by Hamilton do not support his position. They are cases in which a warranty or promise was made and breached (and are from a period in which most covenants did not have to be in writing). They do not reveal any paternalistic policies of the courts, except to enforce contracts as made. The fact that the buyers in these and other cases contracted for goods of specified quality suggests that the buyers were providing themselves with protections common law courts did not automatically offer. Hamilton does not even

discuss penal bonds or contracts for land. Restraints on freedom of contract in England and America usually did not operate by means of general contract law.

158. See text at note 164 *infra*.

159. See text at notes 151–57 *supra*.

160. J. DOMAT, 1 *THE CIVIL LAW IN ITS NATURAL ORDER TOGETHER WITH THE PUBLIC LAW* 31 (1737). Other natural lawyers and civilians also made such observations and could be more explicit than Domat about the role of contracts in commerce. *E.g.*, 1 HEINECCIUS, *A METHODOICAL SYSTEM OF UNIVERSAL LAW* 250 (1.13.325) (1741). See also note 191 *infra*.

161. *Id.* at 44. Of course, this language is rather vague, and the degree of liberty to which it refers depends on the meaning of “contrary to law” and “good manners.” Nevertheless, these statements suggest considerable freedom in contracting and could have been interpreted by common lawyers to have an even broader meaning than Domat intended. See also Domat’s discussions of how buyers and sellers set prices and of the effects of “plenty or scarcity.” *Id.* at 62 & 67, which drew upon Grotius’s discussion of markets. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, ch. 12, §14.

162. See text at note 272 *infra*.

163. See note 269 *infra*.

164. For example, see the views of Evans and Metcalf discussed, respectively, in notes 142 *supra* and 252 *infra*. See also J. Fonblanque’s note on consideration in 1 H. BALLOW, *A TREATISE OF EQUITY* 326–37, n.(a) (Fonblanque ed. 1793); G. VERPLANCK, *AN ESSAY ON THE DOCTRINE OF CONTRACTS* at 96–97 (1825).

165. See views of Ayliffe and Brown quoted in text at notes 175 and 176 *infra*. After discussing the role of civil law as supplying rational rules where the common law was silent, Hoffman quoted Arthur Brown for confirmation. The quotation concluded: “on the subject of contracts, covenants and obligations, those vast fields of modern controversy; in short, on all things called by some metaphysical writers ‘things purely rational,’ ‘moral entities,’ ‘entia rationis,’ that system was silent.” D. HOFFMAN, *A COURSE OF LEGAL STUDY* 510 (1936). Hoffman wrote that “in the law of Contracts . . . we should appeal to the Civil Law, with as much confidence that we were resorting to an alternative source, (when our own special provisions have failed,) as we now do to the reports of decisions in Westminster Hall, on the law of bills of exchange, policies of insurance, or charter parties.” *Id.* at 508.

166. One may wonder how a theory based on subjective intent could develop without difficulty in an action based on the apparently objective foundation of promise. This question may appear to require particular attention, since the switch from a subjective to an objective theory has at times been portrayed as a rather late and dramatic development. *E.g.*, GILMORE, *THE DEATH OF CONTRACT* at 31 & 41–45. In fact, the problem can be resolved briefly, since the subjectiveness of the subjective theory was rather academic. The civilians themselves acknowledged in places the necessity of some objective indicia of intent. More important, the rules of evidence and construction typically did what substantive law and legal theory sometimes did not. As Chancellor Eldon said of an unfortunate defendant in Chancery, “Mr. Lee, . . . was not aware of the precise effect of this correspondence; but, I am afraid, be that as it may, if the letters amount to a contract, so considered, . . . the Plaintiff has a right to have the contract specifically enforced. . . .” After reargument, Eldon elaborated:

the party seeking specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty—still less, a proposal—for an agreement; but a treaty, with reference to which mutual consent can be clearly demonstrated, . . . I do not mean . . . that I am to see that both parties really meant the

same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument—the only difference . . . being, that a letter, or a correspondence, is generally more loose and inaccurate . . .

Kennedy v. Lee, 3 Mer. 442, 447 & 451, 36 Eng. Rep. 170, 172 & 174 (Ch. 1817). This objective approach was especially likely in courts of law, where parties could not testify.

The Field *Code of Civil Procedure* illustrates the development of the objective theory from the intertwining of civilian jurisprudence with common law rules on evidence and construction. When Field presented his somewhat "objective" analysis of mistake in understanding, he did so in a rule of evidence and noted that he had borrowed his rule from Paley's *Moral Philosophy*. THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK—REPORTED COMPLETE 708–09, §1697 (1850). He thereby revealed his awareness of the interchangeability of evidentiary and substantive rules and acknowledged his indebtedness to eighteenth-century jurisprudence. (Although not an exposition of civil law, Paley's *Moral Philosophy* was closely related to the civilian jurisprudence.) By looking back at the "objective theory" without considering its jurisprudential and evidentiary origins, historians and lawyers have exaggerated the suddenness of the theory's development and the historical importance of the objective-subjective distinction.

For a criticism of Gilmore's account of the objective theory, see Birmingham, *Holmes on "Peerless": Raffles v. Wichelhaus and the Objective Theory of Contract*, 47 U. PITT. L. REV. 183 (1985).

167. To demonstrate that the theory appealed to eighteenth-century common lawyers, it is necessary to delve into the more complicated question of why it was attractive. As explained above, the issue of why the theory appealed to lawyers is not the main focus of this article and therefore is examined here only briefly.

168. ATIYAH, *RISE AND FALL*; HORWITZ, *TRANSFORMATION*, ch. 6.

169. Simpson, *The Horwitz Thesis* at 591.

170. Atiyah identifies consensus theory with contractual freedom and therefore apparently assumes that an "equitable" or restitutionary understanding of contract law was largely inconsistent with consensus analysis. ATIYAH, *RISE AND FALL* at 167–84. In fact, those lawyers and judges who directly advocated an equitable approach to contract typically did so in the context of the civilian jurisprudence. *E.g.*, Ballow, Verplanck, and, to some extent, Mansfield. In other words, the most explicit arguments for an equitable approach to contract were associated with civilian consensus theory. See notes 155 and 156 *supra*. This is not to say that eighteenth-century contract law was restitutionary or equitable. See note 171 *infra*.

171. In response to the argument that consensus analysis appealed to eighteenth-century common lawyers, it may be objected that a restitutionary and equitable notion of contract prevailed in eighteenth-century contract law and precluded the possibility of consensus analysis. Such a response is suggested by the work of Horwitz and Atiyah. Horwitz's views are criticized by Simpson, *The Horwitz Thesis*, which in many respects is also applicable to Atiyah. Atiyah's views, however, have not been discussed in as much detail as Horwitz's and therefore will be briefly examined. Much of Atiyah's argument about the influence of liberal thought on nineteenth-century contract is (like Horwitz's argument) based on a misunderstanding of prior contract law.

If contract law was viewed from a restitutionary perspective, it would be puzzling that any purely executory contracts were even considered enforceable. Yet some cases of special assumpsit, such as cases for wagers dating from the sixteenth century and

later, were purely executory. These points are made by Black, Book Review, 79 MICH. L. REV. 933 (1981), and by Baker, Book Review, 43 MOD. L. REV. 467, 468 (1980). For evidence that executory contracts were enforceable, see Gilbert, *Of Contracts*, fol. 52; 1 MODERN ENTRIES 301-2.

Similarly, the fact that many agreements brought before the courts were already partially performed by one of the parties, does not require, let alone suggest, that lawyers had a restitutionary or equitable understanding of contract. When a party has performed only part of his obligations under an agreement and nevertheless can recover on the agreement, he is unlikely to be making a restitutionary claim. Thus, a "restitutionary" or "equitable" understanding cannot explain any of the cases of special assumpsit in which the plaintiff's consideration was partly executory. Eighteenth-century writers appear to have understood this: although they wrote that actions of indebitatus assumpsit were restitutionary, they described actions of special assumpsit as being on the contract. Eighteenth-century lawyers could talk about restitution when they wished, and clearly they did not consider actions of special assumpsit to be restitutionary. Indeed even indebitatus assumpsit was restitutionary only in a limited sense. See note 55 *supra*.

Atiyah suggests that duress of goods was a defense to a claim for breach of contract prior to the mid-nineteenth century. See, however, note 257 *infra* and accompanying text.

Atiyah's belief that eighteenth-century Chancellors would undo unfair contracts is misfounded. To the extent that Chancellors reformed contracts to make them fair, they typically did so in cases involving questions of free will and competency. Reported cases requiring exchanges to be fair usually concerned persons such as sailors and expectant heirs who apparently were considered incompetent as to certain financial matters. These points are made by Black, Book Review, 79 MICH. L. REV. at 934-35, by Baker, Book Review, 43 MOD. L. REV. at 469, and by Simpson in his discussion of Horwitz. Simpson, *The Horwitz Thesis* at 561-66.

Atiyah's suggestion that juries used their discretion in awarding damages to rectify unfair contracts has already been answered briefly by Black and Baker and indirectly by Simpson's response to Horwitz. *Id.* at 547-61 & 573-80. A more direct discussion of Atiyah's arguments may nevertheless be useful. Atiyah cites only two cases in which juries purportedly reduced damages to the amount of a fair price. ATIYAH, RISE AND FALL at 149. In both cases, the plaintiffs sued in assumpsit on trick contracts, e.g., the sale of a horse for "a barley-corn a nail [in the horse's hooves], doubling it for every nail, . . . which . . . came to five hundred quarters of barley." In that case, the jury was directed to award the value of the horse. *James v. Morgan*, 1 Lev. 111, 83 Eng. Rep. 323 (K.B. 1663). In the other, similar case, the first was cited with approval, although a settlement precluded judgment. *Thornborow v. Whitacre*, 2 Ld. Raymond 1164, 92 Eng. Rep. 270 (K.B. 1705). The fact that the judge in the first case directed the jury to award damages in the amount of the value of the horse is hardly evidence that the jurors would have reduced the damages had the matter been left to the jurors' discretion. Moreover, these cases do not even represent a rule of law applicable to contracts generally. On the contrary, these cases were quite distinctive, since the defendants apparently did not understand the amount of grain they promised. There is no evidence that juries were directed to limit damages in most other cases.

Atiyah also cites two dicta that juries could "mitigate" damages. ATIYAH, RISE AND FALL at 149. Such statements should not be understood, however, to refer to a reduction of damages to produce a fair contract. For example, Atiyah cites a case in which Judge Powell said that a "jury may mitigate the damages." *Mitchell v. Reynolds*, 10 Mod.

27, 29, 88 Eng. Rep. 610, 611 (K.B. 1711). Yet reports of the case suggest that the "mitigation" referred to was the ability of a jury to award "damages" rather than a higher, stated penalty. 1 P. Williams 181, 194, 24 Eng. Rep. 347, 352. Chief Justice Parker even said that "as a jury may give less than the penalty, so they may give more." 10 Mod. at 30, 88 Eng. Rep. 611. Atiyah also cites a reference to "mitigation" of damages in a case in which a vendee of freehold refused to complete his payment when he discovered that part of the land to be conveyed was copyhold. The Court of Chancery refused to grant the vendor's request for specific performance and, instead, ordered the vendor to return the payment already made. The Court added that it was a case in which it would be appropriate for a jury to mitigate damages. Clearly, such mitigation was intended to reflect a failure in performance rather than an inequality or unfairness in what was promised. Hicks & Phillips, 2 Eq. Ca. Abr. 688, 22 Eng. Rep. 579 (Ch. 1721). Also reported in 21 VINER, ABRIDGEMENT 543 (1793), note to pl. 1. See also Gray v. Briscoe, Noy 142, 74 Eng. Rep. 1104.

This is not to say that juries in actions of assumpsit did not have considerable discretion as to damages. As Atiyah points out, juries in most actions of assumpsit could "mitigate" damages without judicial interference. What juries in actions of assumpsit actually did, however, is largely unknown, and what is known strongly suggests that they did not regularly attempt to impose standards of fairness. Washington, *Damages in Contract at Common Law*, 47 L.Q.R. 345 (1931). One early eighteenth-century author observed about actions of "assumpsit" that "the Jury give in Damages regularly, the money promised to be paid." 1 MODERN ENTRIES 286 (1734).

Nelson has drawn conclusions about America somewhat similar to Atiyah's about England. Nelson argues that customary prices were, in effect, imposed upon most parties. He acknowledges, however, that parties could sue on an agreed price in actions of special assumpsit, notwithstanding very low consideration. NELSON, *THE AMERICANIZATION OF COMMON LAW* at 61-62. Indeed, they also could do so in actions of indebitatus assumpsit. Customary prices were not imposed upon parties unless the parties failed to set their own price.

Nelson also suggests that unjust damages could be reduced in equity. *Id.* at 61. These reductions of damages were, however, as Nelson notes, reductions of penalties in bonds. Such cases merely establish American conformity to the English practice of not enforcing penalties. They are not evidence that American courts required "just" damages.

172. See also J. DODDERIDGE, *THE ENGLISH LAWYER* 136 (1631).

173. M. HALE, *AN ANALYSIS OF THE LAW OF ENGLAND* § 41. The term had been used in England already in the early seventeenth century in *Speake v. Richards*, Hob. 206, 80 Eng. Rep. 353 (1617), cited by SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT*. According to a recent article, civilian influence played a major role in prompting the adoption by the common law of an implied-promise theory of quasi-contract, chiefly in the eighteenth century. Birks & McLeod, *The Implied Contract Theory of Quasi-Contract: Civilian Opinion in the Century Before Blackstone*, 6 OXFORD J. LEGAL STUD. 46 (1980). The degree of civilian influence may, however, be questioned or at least difficult to establish because during the seventeenth century in all actions of indebitatus assumpsit it was a convention that a promise was implied.

174. *Thompson v. Leach*, 2 Ventris 198, at 202, 86 Eng. Rep. 391, at 393, (C.P. 1690). Such explicit use of the consensus theory in a case was very unusual at this early date. See also A GENERAL ABRIDGEMENT OF CASES IN EQUITY 17 n.(b) (1734).

175. AYLIFFE, *A NEW PANDECT OF ROMAN LAW* at xlvii (1734). The portion of this quotation that follows the ellipses and the ideas contained in all of the quotation were,

apparently, plagiarized from WOOD, A NEW INSTITUTE at 85 (1730). Ayliffe, however, is more explicit than Wood.

176. 1 A. BROWN, A COMPENDIOUS VIEW OF THE CIVIL LAW 41–42 (1798).

177. JONES, ESSAY ON THE LAW OF BAILMENTS at 29.

178. In 1721, William Strahan observed that the civil law “describes the Nature and Obligation of all manner of private Contracts.” Strahan, *Dedication* to DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER (1737). Evans thought that “most of our law, respecting contracts, is borrowed from, or perhaps is rather upon the general principles of natural justice concurrent with the civil law.” 2 W. D. EVANS, A GENERAL VIEW OF THE DECISIONS OF LORD MANSFIELD, IN CIVIL CAUSES 209 (1803). James Kent wrote that:

The value of the civil law is not to be found in questions which relate to the connexion between the government and the people, or in provisions for personal security in criminal cases. To everything which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law. But upon subjects relating to private rights and personal contracts and the duties which flow from them, there is no system of law in which the principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. . . . [I]t has been the fruitful source of those comprehensive views and solid principles, which have been applied to elevate and adorn the jurisprudence of modern nations.

1 KENT, COMMENTARIES at \*547. In 1801, James Sullivan argued against the application of different laws of contract in the various states on the ground that the United States was one country and, further, that personal contracts depended upon the “*jus gentium*” and ought to be the subject of “those principles of the general law of nations which are acknowledged by the world.” To ensure such a result, Congress, he thought, should enact a law regulating construction of “all personal contracts.” J. SULLIVAN, HISTORY OF LAND TITLES IN MASSACHUSETTS (1801), cited and put in the context of the debate over congressional power in 2 W. W. CROSSKY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 573–74 (1953). Hoffman wrote: “On the important subject of *contracts* the Civil Law is peculiarly rich, and accurate; and, did our limits admit, it would be no difficult task to point out how largely indebted, though silently and furtively, is the English law, to this *magnus parens* of all modern law.” HOFFMAN, A COURSE OF LEGAL STUDY at 508 (1836). It is no coincidence that the first common law treatises on contract were based on civil law or that one of the first American treatises on jurisprudence was based on civilian ideas and concerned contract. G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS (1825).

179. Finch, citing Justinian, referred to contract as a “mutual agreement.” 2 FINCH, LAW, OR A DISCOURSE THEREOF, ch. 18. Blackstone defined contract as “an agreement, upon sufficient consideration, to do or not to do a particular thing.” 2 BLACKSTONE, COMMENTARIES at \*442. The promise upon which an action of *assumpsit* was based was not, for Blackstone, merely half a contract but was “in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same,” the remedy alone being different. 3 BLACKSTONE, COMMENTARIES at \*157. Similar language was used in *Hunt’s Case*, Owen 42, 74 Eng. Rep. 886 (C.P. 1588).

180. In England, Ballow’s *Equity* went through nine editions from 1737 to 1820, Powell’s *Contracts* went through three editions from 1790 to 1796, and Jones’s *Bailments* went through four editions from 1781 to 1834. In the United States, Ballow had four editions by 1835, Powell had six by 1825, and Jones had seven by 1836. The American

editions probably were smaller than the English. For a late eighteenth-century American treatise that gives prominence to the role of consensus in contract law, see Z. SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* (1795-96).

181. BALLOW, *A TREATISE OF EQUITY* (1737).

182. 1 BALLOW, *A TREATISE OF EQUITY* at 40 (1793).

183. 1 J. POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* (1790).

184. JONES, *ESSAY ON THE LAW OF BAILMENTS* at 11 (1781).

185. ATIYAH, *RISE AND FALL* at 297; Simpson, *Introduction to CHESHIRE & FIFOOT, LAW OF CONTRACT* 11 (1981).

186. This language is from Domat. See note 160 *supra*.

187. 1 BALLOW, *A TREATISE OF EQUITY* at 24 (1793).

188. 1 POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* at 3 (1790).

189. JONES, *ESSAY ON THE LAW OF BAILMENTS* at 2 (1781).

190. F. BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (1817) (1st pub. 1772, and based on an earlier work).

191. Adam Smith also drew ideas from this tradition. The exact lineage and nature of the tradition need not be pursued here. Note, however, the antiquity of similar analysis. CICERO, *DE OFFICIIS* Bk. 1, §22 (who in turn cited the Stoics). See also 1 HEINECCIUS, *A METHODOICAL SYSTEM OF UNIVERSAL LAW* at 250 & 252 and classical authors cited in note at 251-52.

Although Baron Gilbert's contribution to the tradition remained in manuscript and therefore was less widely read than the passages quoted in the text, it was more sophisticated. Writing before 1726, Gilbert began his essay on contract:

... no doubt as the Notion of Propriety [*i.e.*, property] was begotten from humane necessity so was also this of Contract. A man no doubt by diligence in any one affair over wrought what was necessary for himself & then it became requisite to Change the superfluity for what Abounded to another[.] [T]hus the fruits of the Earth might be bartered, for the Wooll of the Sheep[.] & as Com[m]erce Encreased & the Severall Ornam[en]ts of life were brought to light the ways of Exchange became the more Enlarged & Extended.

Gilbert, *Of Contract*, fol. 39.

192. Civil law appealed to common lawyers not because it provided better rules, but because it described the underlying natural law with greater truth and accuracy. Hoffman wrote: "on the important subject of contracts the Civil Law is peculiarly rich, and accurate." HOFFMAN, *A COURSE OF LEGAL STUDY* at 508 (1836).

193. Thus Evans began the *Introduction* to his translation with an extensive discussion of the "science of jurisprudence."

194. Baker, Book Review, 43 MOD. L. REV. 467, 469 (1980) (reviewing ATIYAH, *RISE AND FALL*). For other examples of this argument, see Baker, *From Sanctity of Contract to Reasonable Expectation?*, 1979 CURRENT LEGAL PROB. 17, 20; Simpson, *The Horwitz Thesis* at 600. Baker has also argued that "What is usually represented as the rise of a particular species of contractual theory was . . . no more than the first attempt to state and analyse the English law of contract in detail." Baker, *From Sanctity of Contract* at 21. Arguably, some areas of English contract law had already been elaborated in considerable detail. What was new was that contract was now elaborated in terms of consensus. For more on this subject, see text at note 210 *infra*.

195. For cases that used consensus ideas at a relatively early date, see text at notes 32 and 174 *supra*.

196. See text at notes 212 and 213 *infra*.



197. See text accompanying note 201 *infra*.

198. The appearance of various issues of consensus in nineteenth-century cases has been discussed by Simpson. Simpson, *Innovation*. His contributions are addressed in this article in connection with each of the relevant issues of consensus.

199. *Id.* at 277.

200. For the frequency of written opinions, see Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 55–56 (1981); *American Reports and Reporters*, 22 AM. JURIST 108 (1839).

201. American courts frequently cited civil law. For citations to civilians in American contract cases, see *Mowatt v. Wright*, 1 Wend. 355, 360 (N.Y. 1828) (citing Pothier on ignorance of law); *Mactier v. Frith*, 6 Wend. 103, 114–15 (N.Y. Ct. of Errors, app. from Ch., 1830) (citing, in French editions, Delvincourt and especially Pothier); *Hazard v. New England Marine Ins. Co.*, 1 Sumn. 218, Fed. Cas. No. 6,282 (Cir. Ct. D. Mass. 1832) (Story, J.) (citing Pothier for holding on mutual mistake); *Allen v. Hammond*, 36 U.S. 63 (1837) (citing Pufendorf on mutual mistake); *Wheaton v. Olds*, 20 Wend. 174 (N.Y. 1838) (citing *Mowatt* and its borrowings “from the civil law” and also citing Domat). In *McCulloch v. The Eagle Ins. Co.*, 1 Pick. Rep. 278, 283 (Mass. 1822), the Court cited Heineccius to correct a mistaken interpretation of civil law discussed by plaintiff’s counsel. For obvious reasons, Louisiana cases are not cited as evidence here.

202. The clearest line of cases concerned flowing or percolating water: *Brown v. Best*, 1 Wils. K.B. 174, 95 Eng. Rep. 557 (K.B. 1747); *Liggins v. Inge*, 7 Bing. 682, 131 Eng. Rep. 263 (C.P. 1831); *Mason v. Hill*, 5 B. & Ad. 1, 110 Eng. Rep. 692 (K.B. 1833); *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. Ch. 1843).

Early nineteenth-century cases on commercial and maritime law frequently cited the civilians but cannot provide clear evidence of a general willingness to rely on civilian ideas to supplement common law, since such cases could adopt civilian notions as custom or the law of nations. Nevertheless, it should be noted that some early nineteenth-century cases involving insurance and bills of exchange employed jurisprudential language to justify their use of civil law. For insurance cases, see *Lucena v. Craufurd*, 2 Bos. & Pul. (N.R.) 269, 127 Eng. Rep. 630 (H.L. 1807) (Grotius, Pothier, and Blackstone cited as to “the general nature of a contract of insurance,” 2 Bos. & Pul. [N.R.] at 300); *Butler v. Wildman*, 3 B. & Ald. 398, 106 Eng. Rep. 708 (K.B. 1820) (“In the absence of all authority, we must put that construction upon the contract of assurance which is most agreeable to justice. . . . we may avail ourselves of [French] opinions and decisions, to assist us . . .,” 3 B. & Ald. at 405). For a case concerning bills of exchange, see *Cox v. Troy*, 5 B. & Ald. 474, 106 Eng. Rep. 1264 (K.B. 1822) (“in the absence of [English] authorities, we may with great advantage take into our consideration the opinion of learned writers,” 5 B. & Ald. at 480).

203. *Adams v. Lindsell*, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

204. Simpson, *Innovation* at 261. Simpson makes similar and equally important observations about a number of contract cases. *Adams*, however, was a relatively early case and therefore is especially pertinent to the argument here.

205. A number of American decisions support Simpson’s theory that common law treatises facilitated the reception of consensus theory into common law cases. See *Hartford & New Haven R.R. Co. v. Jackson*, 24 Conn. 514, 517 (1856) (citing Parsons for holding on mistake in interpretation), and *Miles v. Stevens*, 3 Pa. St. 21, 37 (1846) (citing Story’s *Equity Jurisprudence* for holding on mutual mistake). This is not to say, however, that reception through common law treatises was necessary. See notes 99, 201, and 202 *supra*. Nevertheless, for certain civilian doctrines that were not well

introduced into England and the United States in the eighteenth century, nineteenth-century treatises may have played a more important role. See text at note 269 *infra*.

206. This was especially true because, in certain cases of contract, the new law was being applied to issues on which there appeared to be little or no common law doctrine.

207. ATIYAH, *RISE AND FALL*, *passim*.

208. See text at note 157 *supra*.

209. Rather than plead specially, defendants in cases of assumpsit or debt on simple contract could (prior to the Hilary Rules) plead generally and present any evidence that disaffirmed their obligation on the contract at the time when the action was commenced. 1 J. & T. CHITTY, *A TREATISE ON THE PARTIES TO ACTIONS AND ON PLEADING* 472 (1837). The general issue was attractive, because it allowed defendants to surprise plaintiffs and to defend on the facts while preserving most issues of law.

210. Baker, *From Sanctity of Contract* at 20; Baker, Book Review, 43 MOD. L. REV. 467 (1980). Simpson also makes this argument, but less emphatically. Simpson, *The Horwitz Thesis* at 600.

211. Baker, *From Sanctity of Contract* at 20.

212. See notes 240 and 248 *infra*.

213. Another appealing explanation of the slow appearance of cases applying consensus theory is that cases at nisi prius were not reported until the early nineteenth century. It is true that judicial discussion of consensus theory may have occurred in unreported instructions to juries. Yet the absence of reports of cases at nisi prius would obscure only some rather than all judicial use of the consensus theory in cases at law. Moreover, it should be recalled that suits in equity had long been reported and that issues of consensus nevertheless were not reported in equity before they were reported at law. Thus, the absence of reports of cases at nisi prius until the early nineteenth century does not explain the delay in the appearance of the consensus theory.

Horwitz's arguments about contract law cannot be used to explain why some parts of the consensus theory entered case law in the first half of the nineteenth century and other parts did so only later. According to Horwitz, the innovation in nineteenth-century contract law was complete by the middle of the century, yet parts of the consensus theory appeared in cases only in the decades thereafter.

214. By the term "mistake in understanding," I mean the *Peerless* problem: a mistake or misunderstanding as to the subject matter of a contract as a result of which the parties have different intentions and fail to reach a consensus. I refer to such a failure of consensus as a "mistake" because that is the rubric under which this and other types of mistake were discussed in the first half of the nineteenth century.

Some types of "mistake" did not always involve problems of consensus. For example, although mistaken payments were occasionally discussed by treatises together with other types of mistake under the rubric of "assent," they do not necessarily raise problems of consensus and therefore will be largely ignored here. For similar reasons, this article will not examine mistakes in drafting whereby a writing does not accurately reflect the consensus of the parties.

For the sake of simplicity, some problems of mistake that do involve issues of consensus will not be addressed in the text of this article. For example, certain cases of deeds signed by mistake were capable of consensus analysis but are relegated to note 253 *infra*.

215. For the history of the indebitatus counts, see SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* at 489-99.

216. See note 52 *supra*.

217. The irrelevance of questions of consensus to actions of indebitatus assumpsit

is illustrated by *Bruce v. Pearson*, 3 Johns. 534 (N.Y. Sup. Ct. 1808). In *Bruce*—an offer-and-acceptance case—the Court held that the plaintiff could not succeed on a special assumpsit, since there was no “*aggregatio mentium*.” It held further that “there can be no *implied assumpsit* to pay, as the goods sent never came into his [the defendant’s] hands.” 3 Johns. at 535–36. *See also* *Peltier v. Collins*, 3 Wend. 459, 467 (N.Y. 1830).

218. Baker has noted that as a result of the nature of bonds “many of the problems of the later law of contract never came into the open” in cases of debt on obligation. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY at 270.

219. In *Kyle v. Kavanagh*, 103 Mass. 356 (1869), an action to recover the price of land sold and conveyed, sloppy drafting and the existence of two Prospect Streets in Waltham generated a mistake in understanding. The agreement in question was, however, only a written agreement to convey, not the deed conveying the land.

By interpreting contractual language so as to avoid ambiguities, courts could, perhaps, have delayed the appearance of mistake in understanding in cases not involving deeds. Informal contracts, however, appear to have been unaffected by any such trend, perhaps because, among other reasons, informality in contracts made courts less confident of their ability to interpret and resolve ambiguities (and more willing to permit evidence of, e.g., mistake).

220. 1 CHITTY, A TREATISE ON THE PARTIES TO ACTIONS at 305 (1837).

221. The variance rule was said to apply to all actions for contracts, including all actions of debt. 5 M. BACON, A NEW ABRIDGEMENT 350, “Pleas & Pleading,” B (5) (6) (1813) (notes by H. G. William and B. Wilson). J. CHITTY, THE PRACTICE RESPECTING AMENDMENTS OF VARIANCES 28 (1835).

Although the English courts and Parliament in the early nineteenth century attempted to ameliorate the effect of the variance rule, they produced weak palliatives that curbed only the rule’s most outrageous effects. *Id.*, *passim*; 1 CHITTY, TREATISE ON THE PARTIES TO ACTIONS at 343–49 (1837). *See also* note 228 *infra*. The variance rule existed unameliorated in America too. *See, e.g.*, the cases cited in 39 CENTURY DIGEST, Pleading §1300. *See also* E. COWEN, A TREATISE ON THE CIVIL JURISDICTION OF A JUSTICE OF THE PEACE IN THE STATE OF NEW YORK 51–53, 73, 335 & 369 (1821).

Although oral pleading in New York justices’ courts and carelessness in drafting written pleadings allowed many cases in which a variance might have been established to proceed undisturbed, *id.* at 52–53, such informality and laxity did nothing to prevent questions of mistake in understanding from being treated as variances whenever such issues were pursued. Moreover, though courts increasingly claimed to be less strict about variances than they had been, the cases in which the variance rule was supposedly ameliorated reveal that the rule was hardly thereby endangered. For example, *see* *Allen v. Jarvis*, 20 Conn. 38 (1849) (no variance where plaintiff alleged agreement to make surgical instruments, and the evidence showed that the parts, although largely prepared, were not completely assembled). Judging by the extraordinary attention that treatises on pleading devoted to the subject of variances, the fear of variances must have haunted plaintiffs.

222. Of course, many plaintiffs would not want to amend. Note also that even in New York justices’ courts, which were somewhat tolerant of deviations from niceties of procedure, “the evidence must correspond *strictly*, with the statement in the declaration, or the plaintiff will be nonsuited upon the trial.” COWEN, TREATISE ON THE CIVIL JURISDICTION OF A JUSTICE OF THE PEACE at 51 (1821).

223. *See* note 233 *infra*.

224. Baldwin & Forbes ads. Mildeberger, 2 N.Y. Cty. Supr. Ct. 176 (1829). (Note

the defendant's contention in motion for new trial that "[n]either party did, in the present case, by evidence, attempt to show any such misunderstanding, nor was there any evidence thereof . . ." 2 N.Y. Cty. Supr. Ct. at 180.) *Hazard v. New England Marine Ins. Co.*, 1 Sumn. 218, Fed. Cas. No. 6,282 (Cir. Ct. D. Mass. 1832). (Plaintiff's declaration stated the insurance policy's legal effect, and the defendant made a general denial. National Archives—Boston, Records of Cir. Ct. D. Mass., Final Record Books, Vol. 20, p. 271ff. The reporter's outline of arguments at trial reveals that counsel discussed the meaning of the misunderstood term, "coppered ship." They did so, however, only to determine the proper interpretation of those words and to establish whether plaintiff had misrepresented the condition of the ship. Fed. Cas. No. 6,282.) *Rice v. Dwight Mfg. Co.*, 56 Mass. 80 (1848) (trial judge's instructions on mistake in understanding held erroneous). *Saltus v. Pruyn*, 18 How. N.Y. Pr. 512 (1859). Note that all of these were American cases. Note also that in a few other American cases, judges briefly referred to mistake in understanding, even though the doctrine was not really relevant.

See also *Greene v. Bateman*, 2 Woodb. & M. 359, Fed. Cas. No. 5,762 (Cir. Ct. D. R.I. 1846). (The report does not preserve the arguments at trial, and therefore it is conceivable that counsel raised the issue of consensus before the judge did so. The parties appear to have argued about their different understandings, but this by itself does not mean that they addressed the issue of consensus. Although the interrogatories are hardly revealing, they do not suggest arguments about consensus. National Archives—Boston, Record Group 21, Records of Cir. Ct. D. R.I., Case Files, Nov. 1846 term.)

225. *E.g.*, *Sheldon & Barton v. Capron*, 3 R.I. 171 (1855) (unclear whether plaintiff raised issue prior to court); *Hartford & New Haven R.R. Co. v. Jackson*, 24 Conn. 514 (1856); *Fullerton v. Dalton*, 58 Barb. 236 (1870); *Rovegno v. Defferari*, 40 Calif. 459 (1871); *Repley v. Dagget*, 74 Ill. 351 (1874) (unclear whether plaintiff raised issue prior to court); *Kennedy v. Panama, New Zealand, & Australian Royal Mail Co.*, L.R. 2 Q.B. 580 (1867); and *Cundy v. Lindsay*, 3 Ap. Cas. 459 (H.L. 1878). See also *Pearson v. Lord*, 6 Mass. 81 (1809) (court probably raised consensus analysis first).

226. *E.g.*, in *Suydam, Reed & Co. & Coleman*, 4 N.Y. Super. Ct. 133 (1848), a broker distributed different notes to the two parties. At trial, defendant successfully moved for a nonsuit on various grounds, including that the notes "did not constitute a contract and none had been proven by the plaintiffs." This argument was somewhat similar to mistake in understanding, although it was closer to offer and acceptance. See also *Thornton v. Kempster*, discussed in note 230 *infra*.

227. It is conceivable but not probable that *Greene v. Bateman*, cited in note 224 *supra*, is a case in which the defendant first raised the issue.

228. The variance rule survived the procedural reforms of 1834. The so-called Hilary Rules, adopted by the English judges upon authorization by Parliament, were designed to reduce the incidence of general denials and thereby increase decisions upon points of law. With respect to actions of special assumpsit and debt on simple contract, the Rules required special pleas in connection with defenses that confessed existence of a contract but avoided its effect. However, the Rules did nothing to discourage general pleading where a defendant disputed the very existence of the contract declared upon by the plaintiff—precisely the situation in which the variance defense was available. Other reforms sought to prevent nonsuits for certain trivial variances, but even these timid reforms were vitiated by the bench. CHITTY, THE PRACTICE RESPECTING AMENDMENTS OF VARIANCES, *passim*. Thus, the variance rule and its consequences survived the reforms of the 1830s unscathed.

Although further reforms introduced in mid-century offered plaintiffs the opportunity to amend their declarations at trial and thereby avoid being nonsuited, these reforms do not appear to have encouraged defendants to abandon their variance defense. Prior to the reforms, if a plaintiff thought the defendant's version of the contract was better than no contract, the plaintiff had to bring a new action; after the reforms, the plaintiff could amend. The reforms thereby saved time and money for some plaintiffs who, but for the right to amend, would have been nonsuited. However, they hardly altered the effectiveness of a defense based on a variance. The variance rule was a better-established defense than mistake in understanding, and it could still be made under a general denial, which delayed disclosure of the defense and allowed evidence to be put to the jury before the question of law was discussed.

229. 1 CHITTY, A TREATISE ON THE PARTIES TO ACTIONS at 334 (1837).

230. *Ross, Administrator de bonis non v. Parker*, 1 B. & C. 358, 107 Eng. Rep. 133 (K.B. 1823). This was an action of covenant, but its holding affected all actions on contract.

Another tactic by which plaintiffs could avoid a variance was to claim that the indeterminate language of the contract was an accurate statement of the contract's legal effect. Even if successful, however, this argument was not always attractive to the plaintiff. More important, it was hardly convincing. For a plaintiff who found this out the hard way, see *Thornton v. Kempster*, 5 Taunt. 786, 128 Eng. Rep. 901 (C.P. 1814). In *Thornton*, a broker distributed a note for St. Petersburg hemp to the seller and a note for Riga Rhine hemp to the buyer. At trial, when the plaintiff-seller pursued his count on a contract for St. Petersburg hemp, the defendant-buyer claimed a variance. Having been frustrated in his first line of attack, the plaintiff turned to an additional count on a contract for hemp of any description. The Court held for the defendant on the ground that there was no contract.

231. 1 CHITTY, A TREATISE ON THE PARTIES TO ACTIONS at 336 (1837).

232. *Raffles v. Wichelhaus*. 36 L. J. Ex. 160, 2 H. & C. 906, 159 Eng. Rep. 375 (1864). For a fascinating discussion of the case, see Birmingham, *Holmes on "Peerless."*

Parenthetically, it should be noted that, although the defendants' counsel claimed a mistake in understanding, it is not clear whether the Court decided in favor of the defendants on the basis of that argument. Simpson, *Innovation* at 268 n.99. Simpson points out that the court simply upheld the validity of the defendants' plea and that it did so because, had the issue gone to trial, the defendants could have prevailed by introducing parole evidence concerning the latent ambiguity in the contract. According to Simpson, the defendants could have prevailed at trial either by showing that "Peerless" meant October *Peerless* or by revealing that the parties had different understandings as to the ship. We cannot, concludes Simpson, be certain that the Court had the latter theory in mind.

Another point of view is possible, however. The defendants' plea asserted that the defendants intended the October *Peerless* and that the plaintiff delivered cotton on the December *Peerless*. This probably was enough to establish an assertion of differing intentions; it was not enough to show that "Peerless" meant the October *Peerless*. Since the question before the Court was the sufficiency of the plea rather than the sufficiency of any possible argument on behalf of the defendants, it appears likely that the Court based its decision on the ground of mistake in understanding. This conclusion is consistent with the fact that the defendants relied on mistake in understanding when arguing in support of their plea. It should not be surprising that the defendants argued mistake in understanding rather than their own interpretation. Mistake was by far the easier claim.

233. The change in tactics did not go unnoticed. Fredrick Pollock (grandson of one of the judges in *Raffles*) questioned whether the special plea in *Raffles* was really necessary. In such a case, according to Pollock, "the facts might be a good defense under a plea denying the contract." F. POLLOCK, *PRINCIPLES OF CONTRACT AND EQUITY* 404 n.(c) (1876). Looking back at the earlier cases in which "defendants at law" had asserted "fundamental error," he observed that the defense "was properly done under the forms of Common Law by a general traverse rather than by special pleading." *Id.* at 404. What he apparently did not perceive was that *Raffles* had protected himself against a general denial and that therefore Wichelhaus had little choice but to raise the issue of law.

234. The cases in which the mistake-in-understanding defense was considered include: *Smith v. Hughes*, L.R. 6 Q.B. 597 (1871); *Smidt v. Tiden*, L.R. 9 Q.B. 446 (1874); *Falck v. Williams*, A.C. 176, P.C. (1900); *Scriven Bros. & Co. v. Hindley & Co.*, 3 K.B. 564 (1913); *Kyle v. Kavanagh*, 103 Mass. 356 (1869); *Oldham v. Kerchner*, 79 N.C. 106 (1878); *Brant v. Gallup*, 5 Ill. App. 262 (1879).

235. *E.g.*, *Lansdown v. Lansdown*, Mos. 364, 25 Eng. Rep. 441 (Ch. 1730); *Bingham v. Bingham*, 1 Ves. Sen. 126, 27 Eng. Rep. 934 (Ch. 1748); *Gee v. Spenser*, 1 Vern. 32, 23 Eng. Rep. 286 (1681) (reporter's note).

236. *See*, for example, the cases cited in note 238 *infra*. Some of these are very cryptic. Occasionally, however, they briefly explain the reasons for the doctrine.

237. *E.g.*, in cases of reformation.

238. A consensual element (at times faint, at times strong) can be found in many of the cases that used the equitable analysis. For examples from before 1850, *see Calverley v. Williams*, 1 Ves. Jun. 210, 30 Eng. Rep. 306 (Ch. 1790); *Marquis of Townshend v. Stangroom*, 6 Ves. Jun. 328, 31 Eng. Rep. 1076 (Ch. 1801); *Higginson v. Clowes*, 15 Ves. Jun. 516, 33 Eng. Rep. 850 (Rolls 1808); *Hodges v. Horsfall*, 1 Russ. & M. 116, 39 Eng. Rep. 45 (Ch. 1829); *Clowes v. Higginson*, 1 V. & B. 524, 35 Eng. Rep. 204 (Ch. 1813); *Malins v. Freeman*, 2 Keen 25, 48 Eng. Rep. 537 (Rolls 1837); *Coles v. Bowne*, 10 Paige 526 (N.Y. Ch. 1844). The consensual element is strongest in the report of *Higginson v. Clowes*. Note that in *Calverley* the mistake apparently was mutual, but mistake in understanding was briefly discussed.

After about 1850, courts often employed an unadulterated consensus theory. *E.g.*: *Fowler v. The Scottish Equitable Life Ins. Soc. & Ritchie*, 28 Ch. (N.S.) 225 (1858); *Paget v. Marshall*, 28 Ch. D. 255 (Ch. 1884); *Hickman v. Berens*, 2 Ch. D. 638 C.A. (1895); *Wilding v. Sanderson*, 2 Ch. D. 534 C.A. (1897); *Van Praagh v. Everidge*, 1 Ch. 434 C.A. (1903); *Braeutigam v. Edwards*, 38 N.J. Eq. 542 (1884). Of course, the equitable approach continued to be used in some cases after mid-century.

239. When a plaintiff based his claim on a defendant's offer, the defendant could not simply deny that he had made the alleged promise. He had to assert that his offer no longer had legal significance, and to do this he usually had to refer to consensus theory. *E.g.*, in *Symmans v. Want*, S sued on W's offer to guarantee an obligation of W's brother. Being unable to deny that he had made the alleged offer, the defendant raised other objections, including the absence of an acceptance. 2 Stark. 371, 171 Eng. Rep. 676 (K.B. 1818).

240. Most of the early reported cases were at law. The earliest cases in which the issue was reported to have been raised by defendants include: *Heyman v. Neale*, 2 Camp. 337, 170 Eng. Rep. 1176 (1809); *Dunkin v. Wilford* (1814), cited at 5 M. & W. 538, 151 Eng. Rep. 228; *Cumming v. Roebuck*, Holt N.P. 172, 171 Eng. Rep. 203 (N.P. 1816) (not clearly consensus analysis); *Symmans v. Want*, 2 Stark 371, 171 Eng. Rep. 676 (K.B. 1818); *Eliason v. Henshaw*, 17 U.S. 225 (1819). Many other such cases

occurred after 1820. The reports of some cases reveal that the judges discussed the question but fail to indicate whether counsel did so first—and it may be suspected that counsel often did. *Payne v. Cave*, 1 T.R. 148, 100 Eng. Rep. 502 (K.B. 1789); *Humphries v. Carvalho*, 16 East 45, 104 Eng. Rep. 1006 (1812); *M'Iver v. Richardson*, 1 M. & S. 557, 105 Eng. Rep. 208 (1813); *Thornton v. Kempster*, 5 Taunt 786, 128 Eng. Rep. 901 (1814); *Gaunt v. Hill*, 1 Stark. 10, 171 Eng. Rep. 386 (1815); *Kennedy v. Lee*, 3 Mer. 442, 36 Eng. Rep. 170 (Ch. 1817); *Bruce & Bruce v. Pearson*, 3 Johns. 534 (N.Y. Sup. Ct. 1808); *Tuttle v. Love*, 7 Johns. 470 (N.Y. Sup. Ct. 1811). In contrast, Simpson says that, “[s]o far as bilateral contracts are concerned,” *Adam v. Lindsell*, 1 B. & Ald. 681 (K.B. 1818), was “the first case clearly evidencing a reception of the civilian doctrine.” Simpson, *Innovation* at 260.

*Payne v. Cave*, 1 T.R. 148, 100 Eng. Rep. 502 (K.B. 1789) may be the earliest reported case of offer and acceptance. According to Simpson, however, it does not refer to the consensus theory. He writes, “the use of the terms ‘offer’ and ‘assent’ in that case do not apply artificial legal concepts . . . but are merely unspecialized descriptive terms.” Simpson, *Innovation* at 260. Nevertheless, another point of view should be considered. The bulk of the Court’s reported opinion is here reproduced: “the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to.” 1 T. R. at 149. The words “offer” and “assented” appear to be more than “merely unspecialized descriptive terms.” The Court used these words to make generalizations about consensus theory and bidding rather than to describe the facts of the case. It is significant that such language appears only in the reporter’s paragraph relating the Court’s opinion; the reporter did not use the language of consensus in the detailed description of the facts.

Note that “acceptance” could be discussed independently of the consensus theory, e.g., in cases of *indebitatus assumpsit* and cases concerning the Statute of Frauds.

241. Note that common lawyers typically applied the doctrine of mutual mistake only to mistakes about the existence or nature of the subject matter of a contract. Although some civilians applied the doctrine to mistakes respecting the quality of the subject matter, common lawyers could not normally go so far without undermining accepted notions of consideration, warranties, and, more generally, freedom of contract. This is another example of the selectivity with which common lawyers adopted civilian ideas on contract.

242. E.g., PUFENDORF, *THE WHOLE DUTY OF MAN* (1.9.10); RUTHERFORTH, *INSTITUTES OF NATURAL LAW* at 111–114 (1832).

243. E.g., PUFENDORF, *THE WHOLE DUTY OF MAN* (1.9.12); 1 DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* at 237 (1.18.1.11) (1737); RUTHERFORTH, *INSTITUTES OF NATURAL LAW* at 114–15 (1832). The insufficiency of the parties’ understanding was discussed both in terms of mistake and in terms of conditions.

244. See text at notes 155 and 156 *supra*.

245. One solution was to emphasize the notion of conditional assent. It could be implied that the parties assented to the contract on the assumption or condition that the subject matter of the contract existed. This approach had a basis in continental writings. E.g., PUFENDORF, *THE WHOLE DUTY OF MAN* at 114 (1.9.12) (1735). Barbeyrac even required an express condition. *Id.*

246. E.g., *Ramsden v. Hilton*, 2 Ves. Sen. 304, 28 Eng. Rep. 196 (Ch. 1751).

247. The gradual transition from the equitable approach to some use of a purely

consensual analysis is apparent in the following cases: *Lansdown v. Lansdown*, Mosely 364, 25 Eng. Rep. 441 (Ch. 1730); *Bingham v. Bingham*, 1 Ves. Sen. 126, 27 Eng. Rep. 934 (Ch. 1748); *Calverley v. Williams*, 1 Ves. Jun. 210, 30 Eng. Rep. 306 (Ch. 1790); *Stapylton v. Scott*, 13 Ves. Jun. 424, 33 Eng. Rep. 353 (Ch. 1807); *Hitchcock v. Giddings*, 4 Price 135, 146 Eng. Rep. 418 (Ex. 1817); *Robinson v. Dickenson*, 3 Russ. 397, 38 Eng. Rep. 625 (Ch. 1828); *Baxendale v. Seale*, 19 Beav. 601, 52 Eng. Rep. 484 (Rolls 1855); *Allen v. Hammond*, 36 U.S. 63 (1837); *Daniel v. Mitchell*, Fed. Cas. No. 3,562 (Cir. Ct. D. Me. 1840); *Harrell v. DeNormandie*, 26 Tex. 120 (1861); *Taylor v. Fleet & Taylor*, 1 Barb. Ch. 471 (N.Y. Ch. 1847); *Hurd v. Hall*, 12 Wisc. 125 (1860); *Spurr v. Benedict*, 99 Mass. 463 (1868). In some cases, in which the parties were mutually mistaken about the amount of land they had bought and sold, courts would simply reduce the amount to be paid for the land. *E.g.*, *Quesnal v. Woodlief*, 10 Va. 218 (Ct. App. 1796).

248. *E.g.*, *Cox and others v. Prentice*, 3 M. & S. 344, 105 Eng. Rep. 641 (K.B. 1815); *Perkins v. Gay*, 3 Serg. & R. 327, 8 Am. Dec. 653 (Penn. 1817); *Mowatt v. Wright*, 9 N.Y. Rep. 355 (1828); *Wheadon v. Olds*, 20 Wend. 174 (N.Y. 1838); *Ketchum v. Catlin*, 21 Vt. 191 (1849).

249. Plaintiffs seeking rescission could also use the non-consensus analysis.

250. *E.g.*, *Hardman v. Booth*, 1 H. & C. 803, 158 Eng. Rep. 1107 (Ex. 1863); *Smith v. Wheatcroft*, 9 Ch. D. 223 (1878) (defendants claimed fraud and court treated issue as one of consensus). *Winchester v. Howard*, 97 Mass. 304 (1867); *Roof v. Morrisson, Plummer & Co.*, 37 Ill. App. 37 (1890); *Consumers' Ice Co. of Buffalo v. Webster, Son & Co.*, 53 N.Y. Supp. 56 (Sup. Ct. 1898); *Brighton Packing Co. v. Butchers' Slaughtering & Melting Ass'n.*, 211 Mass. 398 (1912). *See also Cundy v. Lindsay*, 3 App. Cas. 459 (H.L. 1878). Of course, in many other cases non-consensus analysis continued to be used.

251. BACON, A NEW ABRIDGEMENT OF THE COMMON LAW, *Duress* (1st pub. 1736-70) ("Every legal contract must be the act of the understanding, which they are incapable of using, who are under restraints and terrors; and therefore the law requires the free assent of the parties as essential to every contract, and that they be not under any force or violence."); 1 BALLOW, A TREATISE OF EQUITY at 47-56, 67-76 (1793); 1 POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS at 21 (1790); 1 SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT at 358 (1795).

252. With respect to duress (as well as mistake), Theron Metcalf admitted that the holdings of some common law cases did not fit within the consensus model of natural and civil law. He wrote, "On a retrospect of the common law of duress, it will occur to every mind, that its operation is confined within very narrow and somewhat arbitrary limits, and is by no means co-extensive with the principles of natural law, as expounded by the most approved writers." 20 AM. JURIST, 29 (1838). *See also W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* § 92 (1844).

On questions of mental incapacity, *see* 1 BALLOW, A TREATISE OF EQUITY, ch. 2, § 1, n.(c) (Fonblanque ed. 1793); 2 POTHIER, ON OBLIGATIONS, app. 3 (Evans ed.); STORY, A TREATISE ON THE LAW OF CONTRACTS at § 23 (1844).

253. In contrast to duress and mental incompetence, the minor doctrine relating to deeds signed by mistake had been the subject of precedent already in the sixteenth century but was not clearly limited by such precedent. In *Thoroughgood v. Cole*, 2 Coke 9, 76 Eng. Rep. 408 (C.P. 1582), a person who could not read signed a deed after it was read to him incorrectly, and the court held that it was not his deed. In the nineteenth century, this doctrine was extended to persons who could read but were



misled into signing documents. *Foster v. Mackinnon*, L.R. 4 C.P. 704 (1869). Discussed in 8 HOLDSWORTH, *HISTORY OF ENGLISH LAW* at 50 (1936).

254. 2 COKE, *INSTITUTES* at 483. The only printed evidence to the contrary is a case in Rolle's *Abridgement* that allowed a claim of duress of goods. Rolle, however, apparently regarded the case as atypical, for he wrote that duress of goods permitted avoidance of a deed "comment que ne soit aucun dures fait al son person." ROLLE, *ABRIDGEMENT* at 687, *Duress* No. 3.

255. *E.g.*, *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1731); *Irving v. Wilson*, 4 T.R. 485, 100 Eng. Rep. 1132 (K.B. 1791). cited by Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 256 (1947).

256. When an American court explained that it might allow duress of goods as a defense to a claim on contract, it acknowledged that it was making an exception to what was considered the general rule. *Sasportas v. Jennings & Woodrop*, 1 Bay 70 (S.C. 1795).

257. *E.g.*, *Sasportas v. Jennings & Woodrop*, 1 Bay 470 (S.C. 1795); *Collins v. Westbury & Brown*, 2 Bay 211 (S.C. 1799); *Chamberlain v. Reed*, 13 Me. 357 (1836); *Dwinel v. Barnard*, 28 Me. 554 (1848) (dissent); *Lovejoy v. Lee*, 35 Vt. 430 (1862); *Buford v. Louisville & Nashville R.R. Co.*, 82 Ky. 286 (1884); *Adams v. Schiffer*, 11 Colo. 15 (1887).

This account of duress of goods largely follows that of Dawson. Dawson, *Economic Duress* at 256. Atiyah states that duress of goods was "whittled away in the nineteenth century as [a] defense . . . to actions on executory contracts" but provides no evidence that such a defense existed earlier. ATIYAH, *RISE AND FALL* at 435.

258. H. M. R. POPE, *A TREATISE ON THE LAW AND PRACTICE OF LUNACY*, 227-29 (1877).

259. *Lang v. Whidden*, 2 N.H. 435 (1822); *Mitchell v. Kingman*, 22 Mass. 431 (1827).

260. *Gore v. Gibson*, 13 M. & W. 623, 153 Eng. Rep. 260 (Ex. 1845) (citing Kent's *Commentaries*); *Molton v. Camroux*, 2 Ex. 487, 154 Eng. Rep. 584 (1848).

261. The consensus theory could not directly explain the incapacity of mature children, married women, slaves, and certain seamen. STORY, *A TREATISE ON THE LAW OF CONTRACTS* at §§ 35-79 (1844). A consensus analysis would have required the assumption that these persons were in fact incapable of contracting.

262. See text at notes 255 and 256 *supra*.

263. Washington, *Damages in Contract at Common Law*, 47 L.Q.R. 345, 363 (1931).

264. Barton, *Contractual Damages and the Rise of Industry*, 7 OXFORD J. LEGAL STUD. 40 (1987). According to Barton, "If, after *Hadley v. Baxendale*, remoteness of damages was a question of law in all cases, the decision merely completed a development which had begun long before." *Id.* at 52.

265. *Id.* Foreseeability of damages was discussed in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (Ex. 1854).

266. *Paradin v. Jane*, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647) (act of war); *Williams v. Hide*, Palmer 548, 81 Eng. Rep. 1214 (K.B. 1628) (death).

267. See text at note 218 *supra*.

268. In *Armstrong v. McGhee*, Add. 261 (Pa. C.P. 1795), the Court held a joke sale of a horse to be binding and did not clearly analyze the issue in terms of intention or consensus, although the court viewed contract as a product of "an agreement of mind." An American case more suggestive of consensus theory was *Keller v. Holderman*, 11 Mich. 248 (1863), holding no contract where a transaction was entered into as a frolic and banter. In England, the issue of intention to create legally binding relations was

addressed in *Carlill v. Carbolic Smoke Ball Co.*, 2 Q.B. 484 (1892), 1 Q.B. 256 C.A. (1893). See Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEGAL STUD. 345 (1985). Baron Gilbert discussed a version of intention to create legally binding relations: "[I]f there be any words whatsoever that shew an Intention to be Obligated, our Law will Create an Assumpsit[.] But if the words do not import an Intention to Contract they will not be Obligatory." Gilbert, *Of Contracts*, fol. 65. In connection with the doctrine of consideration, he wrote that "the Justice of the Demand Arises from the Intention of being Obligated on the Consideration received . . ." *Id.* at fol. 40. Moreover, "[w]here the solemnities of Law [a deed and seal] are wanting to show a serious intention of the partys [such intention] must be collected from the Consideration." *Id.* at fol. 43.

269. Simpson, *Innovation* at 264 & 275. Note that intention to create legally binding relations was discussed by Pufendorf but not prominently. *Id.* at 264.

270. The development of frustration of purpose in England, from early hints in the 1830s to full exposition in about 1900, is traced by Simpson, *Innovation* at 269-73.

271. *James Miles v. Thaddeus Stevens*, 3 Pa. 21 (1846), aff'g. 3 Clarke 513 (1845). See also *Quick v. Stuyvesant*, 2 Paige Ch. 84 (N.Y. Ch. 1830). Gilmore was unaware of the American version. GILMORE, *THE DEATH OF CONTRACT* at 139 n.214.

272. The development of a rule on foreseeability of damages has been discussed by R. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 68 (1978). Danzig's conclusions are called into doubt by Barton, *Contractual Damages*.

