

Book Review

CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW.
By Curtis R. Reitz.¹ St. Paul: West Publishing Co. 1975. Pp. XXXI,
763. \$16.00.

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Given the number and diversity of teaching materials available for a contracts course, one is inclined to be skeptical whether any new materials in the area are sufficiently unique to justify consideration. Professor Curtis R. Reitz' *Cases and Materials on Contracts as Basic Commercial Law* clearly meets this challenge. The book's purpose, as stated in the Introduction, is to organize the law of contracts by commercial context rather than by legal doctrine (p. XXIII). Thus, after an initial presentation of materials concerning contract "meaning"³ (pp. 1-153), the materials are organized according to the time of breakdown in the contractual relationship. Problems arising after performance are treated first (pt. II), followed by mid-performance and preperformance problems (pts. III, IV).

In addition to its atypical organization, the book is unique in its nearly complete failure to discuss traditional contract doctrine. There is little treatment of the bases for enforcement of promises generally, or of the reasons for enforcement of some promises and nonenforcement of others. In evaluating the effect of this omission on the book's utility as a teaching tool and as a statement of what the law either is or ought to be, the theses of this reviewer are that contract doctrine is important to an understanding of promise-based liability, and that contract doctrine is essential to the proper functioning, in this society, of contract law as the creator and regulator of promise-based liability. Contract law is primarily the law of the counselor and the planner; it is not merely the law of the advocate. Contract doctrine is, therefore, essential to the predictability required by the counselor or planner. Without this predictability, contract law will be relegated solely

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³The term "meaning" is used to cover both interpretation and construction (p. 65).

to a curative function, and its vitally important regulatory and dispute prevention functions will not be accomplished.

In keeping with his express purpose of stressing contract context over doctrine, Professor Reitz provides very little treatment of contract doctrine.⁴ The only direct discussion of enforceability comes near the end, in Part IV, Section 1 (The Wholly Executory Contract) (pp. 561-628). The presentation suggests that reliance is the primary basis for finding contractual liability in a wholly executory contract. Thus "The Supposed Heresy of *Cook v. Oxley*"⁵ (p. 568) is stressed with *Storch v. Duhnke*⁶ (pp. 568-70). Similarly, *Paramount Pictures Distributing Corp. v. Gehring*⁷ (pp. 572-81) apparently is disapproved of because it does not make reliance the basis of enforcement. The presentation concludes with a brief textual discussion of the doctrine of consideration (pp. 602-07). Taken as a whole, the section does not give the student sufficient substance or emphasis to discover the bases for enforcement of promises in our theory of contract law.

It is axiomatic that in the American legal system not all promises are enforced and not all promises should be enforced.⁸ The reason given most frequently for this principle has been perhaps best stated by Morris Cohen:

It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.⁹

The problem of deciding which promises to enforce is, presumably, a problem of developed legal systems generally.¹⁰ To decide which

⁴For purposes of this review, "contract doctrine" means the reasons for enforcement of promises and the requirements for their enforcement. Promissory estoppel and quasi contract will be treated as part of contract doctrine.

⁵100 Eng. Rep. 785 (K.B. 1790).

⁶76 Minn. 521, 79 N.W. 533 (1899).

⁷283 Ill. App. 581 (1936).

⁸Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969); Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 58 (1936); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 942 (1958).

⁹Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1932), in LAW AND SOCIAL ORDER 90 (1933).

¹⁰For example, this problem is one faced by the French and German civil

promises are to be enforced, one must know the bases for enforcing any promise. For this reason, the budding contracts scholar should first understand the presently articulated bases for enforcing contracts. He may then question whether those bases are correct and whether they are sufficient for the needs of society.¹¹

Something more than the bare existence of a promise is required for enforceability.

To be enforceable, the promise must be accompanied by some other factor. This seems to be true of all systems of law. The question . . . is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?¹²

Most authorities agree that there are three bases for enforcement—three different groups of facts which will make a promise enforceable. First, there is the orthodox but controversial theory of consideration, which focuses on enforcing a promise because the promise was bargained for and given in exchange for another promise or a performance.¹³ Second, promises customarily are enforced when there has been justifiable reliance on the promise and “injustice can be avoided only by enforcement of the promise.”¹⁴ Recovery is granted in “recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled.”¹⁵ Many authorities in the area clearly recognize that enforcement of promises because of detrimental reliance upon them is a basis of promissory liability different from the bargained for exchange doctrine.¹⁶ Professor Reitz seems implicitly to recognize this distinction with his treatment of what is traditionally labeled “promissory estoppel” (pt. IV, § 2). The classic promissory estoppel cases of *Drennan v. Star Paving Co.*¹⁷ (pp. 628-33) and *Goodman v.*

law systems. Von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1073-74 (1959).

¹¹This writer does not mean to suggest that the presently articulated bases for enforcing promises are necessarily correct, nor that the present power of articulation is either correct or accurate. See Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938). But the question of basis for enforcement is one which should be presented.

¹²1 A. CORBIN, CORBIN ON CONTRACTS § 110, at 490 (1963).

¹³See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 75, 76 (Tent. Draft No. 2, 1965); Patterson, *supra* note 8, at 933. As used in this review, “consideration” means bargained for exchange.

¹⁴RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

¹⁵Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941).

¹⁶Farnsworth, *supra* note 8, at 595; Fuller, *supra* note 15, at 819; Fuller & Perdue, *supra* note 8, at 73.

¹⁷51 Cal. 2d 409, 333 P.2d 757 (1958).

*Dicker*¹⁸ (pp. 635-37) are treated at some length; the rest of the section then discusses promissory estoppel as a defense to the Statute of Frauds and related matters. This treatment is separate from that which briefly covers consideration. It is submitted that a student cannot understand this treatment of promissory estoppel without having been given a treatment of the traditional consideration doctrine to which it is an exception. Third, promises may be enforced if nonenforcement would result in unjust enrichment; this basis customarily is labeled quasi contract.¹⁹ Professor Reitz does not treat quasi contract as a separate basis for enforcement of promises; this causes the same difficulties as discussed above concerning promissory estoppel.

In fairness it must be pointed out that many of the cases used presume knowledge of consideration theory. For example, in *Fairfield Lease Corp. v. Radio Shack Corp.*²⁰ (pp. 42-46), the opinion goes beyond the simple knowledge of bargained for exchange theory, used to determine if there was an agreement, to evaluate whether an agent had apparent or implied authority to enter into an agreement. In defense of the book, one must remember that consideration theory is so well accepted that it is rarely litigated except in the truly borderline case. Yet, the theory is important to contract law as a planner's tool even if the theory is not the sanction most often resorted to in contract dispute settlement.

In short, . . . the area of principal applicability of contract law is one in which the significance of legal sanctions is likely to be comparatively slight, and where, in consequence, disputes are brought before the courts relatively infrequently. This is borne out by the fact that the typical contracts casebook draws heavily upon disputes that arise outside of established markets, such as those that stem from family transactions, and upon those that arise when an established market suffers an abnormal dislocation, such as those that are occasioned by outbreak of war.²¹

¹⁸169 F.2d 684 (D.C. Cir. 1948).

¹⁹See generally Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966).

²⁰5 Conn. Cir. 460, 256 A.2d 690 (1968). See also *General Elec. Co. v. United States Dynamics, Inc.*, 403 F.2d 933 (1st Cir. 1968) (pp. 212-14) (concerning whether agreement was based on prior sample or later express warranty); *Hardware Wholesalers, Inc. v. Heath*, 10 Ill. App. 3d 337, 293 N.E.2d 721 (1973) (pp. 35-41) (concerning whether an agreement of guaranty existed).

²¹Farnsworth, *supra* note 8, at 605-06. But, as Farnsworth points out, one function of contract law is to decide the difficult disputes.

It is true that values of our society, particularly our commercial society, dictate that most people should be bound by their promises, whether legal liability attaches or not. However, it is submitted that a study of the bases of legal enforcement of promises is essential to an understanding of both when the law will enforce promises and when the law ought to enforce promises. The study of legal sanctions is, in the final analysis, what the law of contracts is all about.

As discussed above, the bases for enforcement of promises in our legal system should be studied directly for an understanding of them. In addition, most of the doctrines of our present-day contract law can best be understood as extensions of or exceptions to contract doctrine. This is illustrated by an examination of the cases and doctrines used by Professor Reitz. In Part I, the "meaning" of contract terms is presented. Section 1 stresses methods of interpretation; Section 2 discusses factors beyond the intention of the parties. It is submitted that students cannot understand the importance of the distinction—that some terms are enforced by courts because the parties have agreed to them, and other terms are simply added by courts as a matter of public policy—without an understanding of the reasons for enforcing the terms agreed upon in the first place.²² The problem is compounded by the presentation of implied warranties (pt. II, § 1). In *Vlases v. Montgomery Ward & Co.*²³ (pp. 155-61), the student must understand that an implied warranty of quality for 1-day-old chickens exists as an implicit term of the agreement without understanding why the court focuses upon the terms of the agreement. Similarly, in *Webster v. Blue Ship Tea Room, Inc.*²⁴ (pp. 172-76), one is confronted with the question of what constitutes merchantable quality without a sound theoretical understanding of the court's concern with merchantable quality as a term implicit in the agreement. The same problem exists with the discussions of disclaimers of liability and remedies created by contract.²⁵ The student has no theoretical background to understand that the public policy

²²In *Stern Enterprises v. Penn State Mut. Ins. Co.*, 223 Pa. Super. 410, 302 A.2d 511 (1973) (pp. 76-77), the court was concerned with whether to enforce standard form provisions of an insurance contract. Without an understanding that the theoretical basis for enforcing agreements is bargained for exchange, one cannot understand why courts object to enforcing standard form documents which are not truly bargained for.

²³377 F.2d 846 (3d Cir. 1967).

²⁴347 Mass. 421, 198 N.E.2d 309 (1964).

²⁵Part II, Section 5B deals with disclaimers of liability which the court will not enforce on policy grounds. That is contrasted with liquidated damages, covered in Section 5C, which the courts will enforce, subject to certain qualifications.

underpinnings of *Henningsen v. Bloomfield Motors, Inc.*²⁶ (pp. 253-71) provide exceptions to the general rule that parties are permitted to limit their liability by contract, as stated in *Hungerford Construction Co. v. Florida Citrus Exposition, Inc.*²⁷ (pp. 292-95).

Much the same difficulty exists with the treatment afforded the parol evidence rule and the pre-existing duty rule (pt. 1, § 3). The parol evidence rule is designed to accomplish certain evidentiary functions; the underlying purpose is to bind the parties to the agreement which they made.²⁸ The cases presented show the willingness of many courts to avoid application of the parol evidence rule when the situation or particular case demands;²⁹ these numerous exceptions and their apparent inconsistencies can be understood only with the realization that the court is trying to decide what agreement the parties actually made. Similarly, the failure to present reasons for enforcing promises also results in the very brief treatment given the pre-existing duty rule.³⁰ While the rule is justifiably criticized, it can only be understood as an extension of the doctrine of consideration based on strict logic alone, which does not comport with the policies behind the doctrine.³¹

An understanding of the reasons promises are enforced is important not only to the comprehension of specific doctrines, but

²⁶32 N.J. 358, 161 A.2d 69 (1960).

²⁷410 F.2d 1299 (5th Cir.), *cert. denied*, 396 U.S. 928 (1969).

²⁸3 A. CORBIN, CORBIN ON CONTRACTS §§ 573, 576 (1960).

²⁹*Compare* *Universal Film Exchanges, Inc. v. Viking Theater Corp.*, 400 Pa. 27, 161 A.2d 610 (1960) (pp. 104-10) (upholding the traditional parol evidence rule), *with* *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (pp. 95-99); *United States v. Clementon Sewerage Authority*, 365 F.2d 609 (3d Cir. 1966) (pp. 111-19); *Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 189 A.2d 448 (App. Div. 1963) (pp. 124-34); *and* *International Milling Co. v. Hachmeister, Inc.*, 380 Pa. 407, 110 A.2d 186 (1955) (pp. 134-40) (courts were able to circumvent application of the rule).

³⁰The only two cases even touching on the rule are *Nicolella v. Palmer*, 432 Pa. 502, 248 A.2d 20 (1968) (pp. 141-44), and *Bollinger v. Central Pa. Quarry Stripping & Constr. Co.*, 425 Pa. 430, 229 A.2d 741 (1967) (pp. 144-46).

³¹Patterson, *supra* note 8, at 936-38. Professor Patterson does not defend the rule. See Brody, *Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENVER L.J. 433 (1975) (arguing that judicial concern with duress is at the heart of the rule and should be articulated as the reason for the decision in those circumstances).

The same problem exists in the treatment of conditions in Part III, Section 1B. Due to the lack of theoretical explanation, the student cannot determine that occurrence of the condition is different from performance of the promise. This is also true in materials dealing with contractual warranty obligations in Part II, Section 3. The real problem in this section is determining what the parties agreed to do. Yet, without the theoretical explanation, one cannot determine why this is important.

also is essential to an understanding of many of the specific cases used throughout the book. In *Stewart v. Newbury*³² (pp. 385-89), the student must evaluate a negotiated contract to determine whether there was an agreement as to the time of payment, yet he has been given no theoretical basis for an understanding of the importance of an agreement to such a term. *Courtin v. Sharp*³³ (pp. 432-38) deals with the question of whether the risk of loss had passed under pre-Uniform Commercial Code (UCC) law; to understand whether there was an "agreement" as to the risk—the determinative issue—one must have a sufficient background to know what an agreement is and why it is important. Similar problems arise with assignment of contract rights and delegation of contract duties. Cases presented deal with the doctrine that a promise to pay by the assignee is necessary for a novation,³⁴ and with the question of whether an agreement to accept a substitute promisor can be implied from the facts.³⁵ A finding of exchanged promises between the two parties is critically important in the cases: it is important to prove an agreement, which is essential to the establishment of contractual liability. However, Professor Reitz neither discusses what an agreement is nor clearly explains its importance—omissions which are likely to interfere with a student's understanding of these cases. The same difficulties are presented in the cases dealing with option contracts,³⁶ offer and acceptance problems,³⁷ and pre-contractual liability.³⁸

These examples demonstrate that Professor Reitz' presentation implicitly assumes knowledge of the reasons for enforcement of promises generally and for consideration theory specifically. The state of knowledge of contracts students does not justify that assumption. A comprehensive treatment of the law governing legal enforcement of promissory obligations demands direct discussions of the reasons for enforcement and the problems encountered with the traditional reasons. The present bases for promise-based liability are being questioned; they should be discussed directly. This discussion will not be provoked by Professor Reitz'

³²220 N.Y. 379, 115 N.E. 984 (1917).

³³280 F.2d 345 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

³⁴*Everlasting Memorial Works v. Huyck Memorial Works*, 128 Vt. 103, 258 A.2d 845 (1969) (pp. 525-29).

³⁵*Homer v. Shaw*, 212 Mass. 113, 98 N.E. 697 (1912) (pp. 545-46).

³⁶*People ex rel. Dep't of Pub. Works & Bldgs. v. Southeast Nat'l Bank*, 131 Ill. App. 2d 238, 266 N.E.2d 778 (1971) (pp. 596-600).

³⁷*Guerrieri v. Severini*, 132 Cal. App. 2d 269, 281 P.2d 879 (1955) (pp. 608-11).

³⁸*Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958) (pp. 628-33); *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971) (pp. 645-57).

book. His failure to include materials on the reasons for enforcing promises also deprives the student of this basic doctrine as an organizing principle for all related rules as examples of or exceptions to the doctrine.

One other atypical characteristic of this book is its almost complete disregard of the process of manifestation of assent. Manifestation of assent problems do arise occasionally throughout the book,³⁹ but the only direct treatment of them (pt. IV, § 1A) focuses on problems of acceptance and revocation crossing the offer. While these certainly are important questions, direct treatment of why manifestation of assent is important and of some of the typical problems of what constitutes manifestation of assent and what is revocation also would be helpful. If one reason for enforcement of a promise is that it was bargained for and given in exchange, some discussion of the bargaining process is necessary. The materials on precontractual liability (pt. IV, § 2) only partially meet this need.

Presumably Professor Reitz does not discuss directly the bases for enforcement of promises because he does not now consider these to be important. Certainly, eminent authority may be cited for the proposition that "what is happening is that 'contract' is being reabsorbed into the main stream of 'tort.'"⁴⁰ This "death" of contract is coming about, we are told, through the expansion of concepts of quasi contract and promissory estoppel.

Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. The dykes which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. With the growth of the ideas of quasi-contract and unjust enrichment, classical consideration theory was breached on the benefit side. With the growth of the promissory estoppel ideal, it was breached on the detriment side. We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a de-

³⁹See, e.g., *Hardware Wholesalers, Inc. v. Heath*, 10 Ill. App. 3d 337, 293 N.E.2d 721 (1973) (pp. 35-41); *Wat Henry Pontiac Co. v. Bradley*, 202 Okla. 82, 210 P.2d 348 (1949) (pp. 206-11); *General Elec. Co. v. United States Dynamics, Inc.*, 403 F.2d 933 (1st Cir. 1968) (pp. 212-14); *The Heron II*, [1969] A.C. 350 (pp. 236-44); *Keystone Diesel Engine Co. v. Irwin*, 411 Pa. 222, 191 A.2d 376 (1960) (pp. 245-47).

⁴⁰G. GILMORE, *THE DEATH OF CONTRACT* 87 (1974), reviewed Gordley, 89 HARV. L. REV. 452 (1975). For an excellent discussion disputing this "death" of contract, see Milhollin, *More on the Death of Contract*, 24 CATH. U.L. REV. 29 (1974). This reviewer assumes that the omission of a discussion of the bases for promise enforcement is caused by Professor Reitz' acceptance of Professor Gilmore's "death" theory.

fendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed.⁴¹

To the extent that this theory recognizes the growth of these new doctrines as an expansion of promise-based liability, it is very useful. Enforcement of promises on bases other than the traditional consideration theory has been predicted for some time.⁴²

The problem arises when promissory estoppel and quasi contract are not treated as alternative bases of promissory liability but as the sole bases of promissory liability, replacing conventional consideration theory. Even the defenders of consideration have noted that it is not and need not be the sole basis of promissory liability.⁴³ To recognize the growth of alternative bases is not necessarily to imply either that courts are abrogating traditional consideration doctrine or that they should do so. Clearly, courts do use conventional consideration doctrine in deciding cases.⁴⁴ Enforcement of a promise for this reason is different from enforcement based on reliance or unjust enrichment.⁴⁵

Professor Reitz' thesis is that our concern with contract law is as businessman's law. If one accepts this thesis, the primary aim of contract law must be to manage promissory relations of businessmen in order to maximize their legitimate expectations, consistent with other values of this society. Obviously, many businessmen do not plan all their transactions with an eye toward future legal liability;⁴⁶ however, many others do consider the legal relationships involved when planning business transactions.⁴⁷ These businessmen are entitled to the protections of contract law. In many commercial transactions, predictability, if not certainty, of legal result is necessary and worth the cost.⁴⁸ To the extent that

⁴¹G. GILMORE, *supra* note 40, at 87-88.

⁴²Fuller, *supra* note 15, at 823.

⁴³Patterson, *supra* note 8, at 934.

⁴⁴Fuller, *supra* note 15, at 823-24; Patterson, *supra* note 8, at 930.

⁴⁵Patterson, *supra* note 8, at 945. Cf. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 173 (1917).

⁴⁶Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

⁴⁷*Id.* at 60. The fact that any documents, standard form or otherwise, are used indicates some level of planning.

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In a society like ours, people live not by birds in the hand but by promises [Ours is a promissory society]. A promissory society, by definition, is one energized and bound together by the institution of contract. That may seem a very remote consideration when you are reading an ordinary contract case, but it is a perspective not to be forgotten altogether when you are trying to arrange the de-

contract law can function as the businessman's and legal planner's law, it must provide the tools for assuring that predictability.⁴⁹

Promises made by parties create an expectation that they will be kept, often called the "expectation interest." When courts enforce promises simply because these were given in exchange for other promises or for performance, they are protecting the expectation interests of the promisee.⁵⁰ This protection must be provided or parties would be unable to rely on promises because there would be no predictability of legal result for promise-based commercial transactions. If parties were unable to rely on promises, then contract would not serve as the orderer of future conduct so necessary to the needs of our commercial society.⁵¹ If markets are to exist and complex transactions are to take place, then expectation interests must be protected to encourage reliance.

In seeking justifications for the rule granting the value of the expectancy there is no need, however, to restrict ourselves by the assumption, hitherto made, that the rule can only be intended to cure or prevent the losses caused by reliance. A justification can be developed from a less negative point of view. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic. Agreements can accomplish little, either for their

tails of contract law into a form that makes practical working sense. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 47-48 (1975).

⁴⁹As a business planner's law, contract law may be litigated less frequently. Farnsworth, *supra* note 8, at 605. This does not necessarily mean that it does not govern the relations of businessmen; it may mean they do not need a court to tell them the law.

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That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.

1 A. CORBIN, CORBIN ON CONTRACTS § 1, at 2 (1963). For an expanded discussion of reasons for protecting the expectation interest, see Fuller & Perdue, *supra* note 8, at 57-66.

⁵¹Patterson, *supra* note 8, at 945. For a brief discussion of the historical origin of the doctrine of consideration and the importance of viewing it in historical context, see Farnsworth, *supra* note 8, at 576-78.

makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened by any rule which limited legal protection to the reliance interest. Such a rule would in practice tend to discourage reliance. The difficulties in proving reliance and subjecting it to the pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof. For this reason it has been found wise to make recovery on a promise independent of reliance, both in the sense that in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance.⁵²

The needs of our commercial society demand, then, that there be a basis of promissory liability which protects the expectation interest and encourages reliance by affording a degree of predictability to the promising parties. Without such a basis for promissory liability, contract law would be useless to the planning businessman or his legal counselor because it would be impossible to plan for a legal result. Contract law which does not make such planning possible will not meet the needs of this society.

This predictability demanded by our commercial society would not be supplied by contract law if promissory estoppel and quasi contract were made the sole bases of promissory liability. When promissory liability is based upon reliance alone, the reliance normally must be foreseeable and justifiable.⁵³ Promissory estoppel is used to provide flexibility needed in traditional contract law; relief is customarily granted only when injustice can be avoided in no other way.⁵⁴ This flexibility is necessary to the proper resolution of many disputes; however, it does not provide the predictability needed in many commercial transactions.⁵⁵ The same criti-

⁵²Fuller & Perdue, *supra* note 8, at 61-62. The statement was made in discussing measure of damages; it is equally applicable to the reasons for protecting an expectation interest in the first place.

⁵³RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

⁵⁴*Id.* See Patterson, *supra* note 8, at 960-61.

⁵⁵Fuller and Perdue reject reliance as the sole basis of promissory liability.

cism must be made of quasi contract. While both of these theories are useful, and both most certainly have a place in the overall scheme of promise-based liability, these theories do not meet the needs of our commercial society as the sole bases for promissory liability.

Although our present theory of consideration as bargained for exchange is not perfect, it appears to be the best available alternative. If the doctrine of consideration, expressed as bargained for exchange, were abolished, the problems with which it deals still would be present.⁵⁶ Professor Patterson, after an extensive study, concluded that "[i]n the United States the bargain test leaves unenforceable very few business agreements that satisfy the other requirements, definiteness of mutual assent and of terms."⁵⁷ He points out that "the draftsmen of the *Uniform Commercial Code* not only adopted a definition of contract as a bargain, but also found it necessary to make only a few types of promises enforceable without consideration."⁵⁸ This relatively recent reaffirmation of the doctrine, after in-depth study and analysis, supports the conclusion that the present doctrine of consideration serves legitimate purposes and should not be abolished.

This is not to say that the doctrine could not be improved.⁵⁹ Even Professor Patterson found it necessary to dispense with "correlaries which need not be defended"⁶⁰ and criticized the doctrine for attempting to cover too many ideas and to accomplish too many basic social policies. While a re-examination of the literature and rules concerning consideration is beyond the scope of this review, a few tentative ideas are offered. First, courts should articulate the purposes behind our requirement of consideration and focus on those purposes to evaluate all existing and future applications of the doctrine.⁶¹ Secondly, courts should focus on the

They point out that if reliance were the sole basis, the courts would have to make bilateral business agreements an exception. Fuller & Perdue, *supra* note 8, at 70. If this is true, presumably all bilateral agreements would have to be included in the exception. If so, has not the basis of promissory liability changed from reliance to bilateral agreement?

⁵⁶Fuller, *supra* note 15, at 823-24. "As a cornerstone for the law of contract, the doctrine of consideration has been widely criticized, and it would be foolhardy to attempt to defend it through an exercise in logic. It can be understood only in the light of its history and of the society that produced it." Farnsworth, *supra* note 8, at 599.

⁵⁷Patterson, *supra* note 8, at 947.

⁵⁸*Id.*

⁵⁹Promissory estoppel has expanded beyond even the limits discussed by Professor Patterson. *Id.* See *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

⁶⁰Patterson, *supra* note 8, at 935-41.

⁶¹For an analysis of the purposes of consideration and its relation to

fact that bargained for exchange either is or ought to be the heart of the present doctrine and should remove rules based solely on ideas of "legal detriment" or "legal benefit."⁶² Thirdly, courts should understand that consideration is a label for a finding that, for social policy reasons, bargains of a certain type or made in certain factual contexts ought to be enforced. Courts should then be willing to enforce those bargains demonstrating a need for enforcement, regardless of whether the bargain is of a type or made in a factual context which would have made it enforceable in previous decisions.⁶³ In short, consideration should be stripped of its magic immunity to analysis and, as with other common law doctrines, should be developed and modified to meet the needs of the society it was developed to serve.

As stated in the Introduction, Professor Reitz' organizational purpose is to present contract rules in their commercial context rather than their doctrinal context. (P. XXIII). In many instances this organization makes the specific contract doctrines much more comprehensible to the student, allowing him to place himself in the position of a contract maker or performer likely confronted with the application of a rule and to better understand what is motivating conduct at a given point in the contractual relation.⁶⁴

The book begins with a discussion of "the meaning" of contracts, which includes construction as well as interpretation. Professor Reitz states his reason in the Introduction:

First, I believe that the most significant questions in Contracts deal with the meaning of a bargain and the scope of contractual obligations. . . . Thus in Part I, we take up standards and procedures whereby the courts (judges and juries) attempt after-the-fact and in the midst of controversy to decide what the provisions of a contract mean. (P. XXIII).

Part I, Section 1 deals with methods of contract interpretation and construction to ascertain the meaning of the words and conduct of the parties in deciding disputes. Placement of the section early in a contracts course emphasizes that difficulties with contract interpretation usually will arise after the bulk of performance has been rendered and certainly after the contractual rela-

form, see 1 A. CORBIN, CORBIN ON CONTRACTS §§ 109-16 (1963); Fuller, *supra* note 15.

⁶²Farnsworth, *supra* note 8, at 598. See generally Corbin, *supra* note 45.

⁶³See 1 A. CORBIN, CORBIN ON CONTRACTS §§ 109-16 (1963). See also Fuller, *supra* note 15, at 807 & 823; Patterson, *supra* note 8, at 952-56.

⁶⁴This organization is more useful to the student as future contracts litigator than to the student as future contracts planner. However, it is an aid to planning and, at times, stresses the planning part of transactions.

tionship of the parties has broken down. Contract interpretation is more comprehensible with the realization that it is largely accomplished after-the-fact; the actual intention of contracting parties, often nonexistent on the point in question, is less essential to after-the-fact dispute settlement. One criticism of most contracts courses is the lack of emphasis on draftsmanship; early treatment of this section stresses the need for careful draftsmanship. Early treatment of parol evidence rule problems (pt. I, § 3) also emphasizes that these problems arise only in situations where contractual relations have broken down, usually after most performance has been rendered.⁶⁵

The approach to contracts as basic commercial law is continued by organizing the remaining materials in the book according to time of breakdown of the contractual relationship.⁶⁶ This organization clearly helps the student place the contract doctrines discussed in their litigated commercial context. For example, Part II, Sections 1 through 3 treat warranty problems and reinforce the idea that warranty problems typically arise only after some degree of performance. Similarly, Part III, Sections 1 and 2 treat conditions on promises; this organization emphasizes that the happening of conditions is normally a mid-performance contract problem. As a final example, the treatment of anticipatory repudiation and its peculiar damage problems is placed in the section dealing with immediate cancellation.⁶⁷ Anticipatory repudiation and mitigation of damages ideas are more easily understood as early performance problems.

A potential problem with this commercial context organization results from the fact that many of the legal doctrines are applicable to performance stages other than those at which they are

⁶⁵The materials presented do not themselves focus on contract draftsmanship and planning, but they lend themselves very well to this emphasis by the instructor. This organization does exclude treatment of the Statute of Frauds under the section concerned with "The Effect of a Writing." However, there appears to be no serious disadvantage to this arrangement as long as the instructor makes appropriate cross-reference.

⁶⁶

My second overarching principle of organization of the materials is novel. We will look at contract controversies grouped according to the extent of performance prior to rupture of the relationship. Virtually none of the traditional law of contracts takes cognizance of the performance phase at this point of litigation. (Pp. XXIII-XXIV).

⁶⁷For other examples of how the contextual organization contributes to an understanding of doctrine, see the treatment of "Conduct of the 'Injured' Party" affecting performance as a mid-performance contract problem (pt. III, § 4); "Disruptions Caused by Undermining the Expectations of the Party About to Perform" as a mid-performance contract problem (pt. III, § 7; and assignment of rights and delegation of duties, also as a mid-performance contracts problem (pt. III, § 8).

discussed. Specifically, many of the doctrines are generally applicable across the range of contract problems and, in this organization, the only thing they have in common with the doctrines preceding or following them in the book is the accident of timing of the breakdown of contractual relations. In contract litigation, typically all legal doctrines in support of a party's position are used, not only those which are unique to the stage of breakdown of performance. Thus, problems of consequential damages, although treated as post-performance problems (pt. II, § 4), can arise in breakdowns throughout most stages of the contract relationship. Similarly, the policy restrictions on disclaimers of liability and remedies created by contract, treated as post-performance problems (pt. II, § 5), can arise at any time during performance. Legal problems associated with mistake, anticipatory repudiation, and assignment and delegation are treated as mid-performance problems (pt. III, §§ 6-8). While these problems do most typically arise at this point, they can arise in litigation concerning a breakdown at any performance stage. On balance, the emphasis achieved by Professor Reitz' organization appears to more than outweigh the potential confusion in the student's mind; in any case, the confusion can be cured with appropriate guidance from the instructor.

The mixing of different legal theories and doctrines within the same section of material is a more serious but less frequent problem resulting from the organization. For example, in *Embry v. Hargadine, McKittrick Dry Goods Co.*⁶⁸ (pp. 18-23), the court was concerned with whether a contract had been formed. Due to the unusual fact situation, this question arose after partial performance by one of the parties which, presumably, is why the case is placed in the section dealing with contract meaning (pt. I, § 1). However, the case more basically concerns contract formation and should be placed with materials treating that subject; the accident of partial performance should not control placement of a case dealing with a different legal problem. A second example will suffice to make the point. In *Feld v. Henry S. Levy & Sons*⁶⁹ (pp. 493-97), the court was concerned with the promise of output implicit in an output contract. The case is placed in a subsection entitled "Announced Change of Mind by One Party: Suspension of Performance and Recovery of Damages by the Other" (pt. III,

⁶⁸127 Mo. App. 383, 105 S.W. 777 (1907). Professor Reitz may seek to use this case as an example of how courts sometimes treat contract interpretation problems as contract formation problems. If this is the point sought to be made, the case should be placed after a systematic treatment of contract formation problems.

⁶⁹45 App. Div. 720, 356 N.Y.S.2d 336 (1974).

§ 7A), which deals primarily with problems of anticipatory repudiation and irregular or late payments on installment contracts.⁷⁰ Here again it is demonstrated that the accident of time of breakdown of performance causes a mixing of legal theories and should not be the prevailing organizational principle in this situation. Overall, this problem occurs infrequently⁷¹ and can certainly be corrected or avoided without doing violence to the author's basic organizational scheme.

The book's unique organization has inherent advantages in its use as a teaching tool. These advantages appear to clearly outweigh the disadvantages discussed above. In any event, most of the resulting difficulties can be cured by the instructor. Certainly, this new organizational approach merits serious consideration by contracts teachers.

Professor Reitz' case selection, editing, and case placement within sections is for the most part excellent and contributes to the conclusion that the book is a very good teaching tool. Case placement gives an orderly development to the particular doctrine under consideration. For example, the sequence of cases in Part I, Section 3 present the topic of the effect of the writing on the "meaning" of a contract. After an introductory case dealing with interpretation of a writing, the section proceeds as follows: (1) The modern trend toward restriction of the parol evidence rule is presented in a case interpreting an indemnity provision to be limited to liability of third parties; (2) the traditional parol evidence rule and the policy supporting it are presented; and (3) techniques available for avoiding the application of the parol evidence rule are provided in cases involving interpretation, interpretation in spite of an apparently complete integration and merger clause, and the use of a fraud theory. In the course of development of the section, the Uniform Commercial Code is presented and discussed in the context of the later cases. Finally, this section concludes with a good case on the UCC Statute of Frauds, section 2-201.

⁷⁰The other cases in the section deal with integration, anticipatory repudiation, and payment problems in installment sales.

⁷¹This writer has found only three other instances in addition to the two cited. First, in Part IV, Section 1B, the last two cases deal with anticipatory repudiation and mitigation of damages while the first case deals with traditional offer and acceptance problems. Second, Part III, Section 3 (Disruptions Nearer the Midpoint in the Performance State) involves problems of payment terms, installment contracts, and the right to an adequate assurance of performance. These problems are treated elsewhere, which indicates that the section is not a useful organizational grouping. Third, in dealing with "The Substantive Content of Conditions" in Part III, Section 2, the materials do not clearly distinguish between performance of the promise and performance of conditions.

A second example, Part III, Section 6, deals with problems of mistake as a change in the perception of the parties. This section begins with the leading case of *Sherwood v. Walker*⁷² (pp. 454-60). The cases following discuss the traditional rule requiring mutual mistake, the more modern rule concerning relief for unilateral mistake under certain circumstances, and the concept of risk of mistake presented in *Restatement (Second) of Contracts* section 296. This presentation orients the student to the history and development process of the more modern doctrines, and further, discusses the substance of both the older and more modern doctrines.

Case selection and editing is also very good. The opinions generally discuss reasons for the holdings, rather than simply stating the fact of the holding and reciting "black letter" rules. The editing leaves enough of each opinion in the book to permit the student to grasp the facts of the case and the entire reasoning of the court. Other casebooks, including contracts casebooks, are subject to the justifiable criticism that they only contain squibs of opinions, which makes the learning experience of deducing principles from cases more difficult and much less complete. Professor Reitz' book is a decided improvement over many in this respect.

The book also deals well with the UCC dilemma of the modern contracts course. As a basic part of the first year curriculum, contracts is both a course in common law legal method and a course in substantive law. However, the substantive doctrines that are presented often require some discussion of the UCC to avoid misleading by omission. The dilemma is compounded by the fact that, for the most part, the UCC can better be taught as a unified whole through problems or other non-case-method teaching materials.⁷³ Professor Reitz' solution to this dilemma is to stay primarily with a case method presentation, and to supplement the cases presented with note material concerning the UCC, using good Code cases where available.⁷⁴ Problems requiring analysis of the UCC sections are also used, although less frequently than either cases or note material discussions.⁷⁵ While problems are a useful teaching tool for the UCC, it is advisable that their use be limited. The

⁷²66 Mich. 568, 33 N.W. 919 (1887).

⁷³*E.g.*, J. MURRAY, *COMMERCIAL LAW PROBLEMS AND MATERIALS* (1975); R. NORDSTROM & N. LATTIN, *PROBLEMS AND MATERIALS ON SALES AND SECURED TRANSACTIONS* (1968); R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* (1974).

⁷⁴A "good" case is one that either is substantively correct in its application of the Code or is a useful teaching tool due to its misapplication of the Code.

⁷⁵Problems are used throughout the book in the note material following specific cases.

legal method in working directly with the Code to solve problems is different from the common law legal method stressed in first year contracts courses. To the extent that the book is designed primarily for teaching a first year course in contracts, more introduction to specific sections of the UCC is needed in a few places.⁷⁶ Of course, introductions can be made by the instructor or through outside reading materials.

In keeping with his purpose of presenting contracts as basic commercial law, Professor Reitz has cured two of the problems that exist with other contracts casebooks. First, he has avoided using as teaching tools obscure cases with atypical and noncommercial fact situations. This contributes to student interest and to the focus of the course on contract as an organizer of commercial relations. Secondly, the book avoids a narrow focus on traditional contract doctrine only and, where necessary, treats the whole legal problem by extending into problems which normally are not classified as contract problems.

This book is a well prepared addition to the existing teaching materials for a first year course in contracts. It presents the material in a comprehensible manner and achieves a workable compromise with the UCC while maintaining a focus on the more traditional common law methodology. Unfortunately, the book does not deal with reasons for enforcement of promises. This omission raises serious questions about its suitability as the sole teaching material for such a course. However, the book should receive serious consideration from the teacher who is willing either to prepare such materials or to use those available from other sources to cover this omission.

⁷⁶For example, more introduction is needed to presentation of warranty provisions (pt. II, § 1), disclaimer of warranty and the unconscionability provision of the UCC (pt. II, § 5), acceptance and revocation of acceptance (p. 359 *et seq.*), remedy and performance provisions (p. 368 *et seq.*), and whether continued use of consumer goods is wrongful after revocation of acceptance (p. 507 *et seq.*).