

## REMEDIES FOR BREACH OF CONTRACT

- A. Specific Performance – an order from a court to a party to perform as promised
- B. Damages – an award of money
  - a. Goals of Contract Damages
    - i. **Restitution Interest** (quasi-contract damages) – the interest of a party in recovering the value conferred on the other party through efforts to perform a contract. Requires the DD to give the money value of the benefit that the DD received from partial performance of the contract. Ordinarily, no enforceable contract exists at the time the suit is brought (either rescinded or never existed) or it is a losing contract (where the victim of the breach would have lost money had the contract been performed). Two elements of restitution: benefit conferred on DD. Retention of benefit w/o compensation would be unjust
    - ii. **Reliance Interest** – a party's interest in recovering losses suffered by virtue of reliance on the contract, whether or not there was a corresponding gain to the opposite party. If expectation damages cannot be ascertained. Puts nonbreaching party back in the position they were in when the contract was made...makes the party 'whole' again. = costs incurred by the nonbreaching party in partial performance of the contract.
    - iii. **Expectancy Principle** – give the nonbreaching party what he was promised so far as money damages can satisfy; compensation for nonbreaching party, not punishment for breaching party. Aim is to put promisee "in as good a position as he would have occupied had the defendant performed his promise." Limited to reasonably foreseeable damages. There is also a "duty to mitigate damages."
  - o **Groves v. John Wunder (MN)** – leased land and wanted it leveled on return.
    - **Objective: Expectancy**
    - In a breach of contract by defendant, the PP is entitled to the cost of completing the work/ remedying the defect, which the DD failed to complete, even if the cost of completion exceeds the increase in the fair market value that the work would bring (backward looking)
      - First restatement...the aggrieved party can get judgment for: the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste (say it's not economic waste bc it's not wrecking a completed physical structure)
    - **The dissent argues for the diminution in value**...difference in the value of the property as it is and what it would have been worth if it had been built in conformity with the contract (give the mkt/economic value). They believe there would be economic waste here. They want to award the cost of completion only when it is not disproportionate to the value of the property or when changes are aesthetic in nature. (economic waste applies when a structure already exists and would have to be torn down and rebuilt at a cost that would be imprudent and unreasonable). (forward looking)
      - First restatement...the aggrieved party can get judgment for: the difference btwn the value that the product contracted for would have had and the value of the performance that has been received by the PP, if construction and completion in accordance with the contract would involve **unreasonable economic waste**
    - In both cases, **replacement cost** is the upper level of what PP can recover
      - i.e., if cost of completion was \$8,000 and it added a value of \$12,000, then the damages awarded would be \$8,000
    - Measure gives expectancy and deters breach
  - o **Peevyhouse v. Garland Coal & Mining Co. (Note)** - PP leased DD farm to mine as long as they filled in all pits and smoothed the surface.
    - Courts granted only the diminution in value of the land, not the cost of completion (Restatement Second)
    - No person can recover a greater amount of damages for breach of an obligation that he would have gained from full performance
    - Remedial work was incidental...primary object of contract was economic
  - o **Advanced, Inc. v. Wilks (Note)** – suit by homeowners dissatisfied with a contractor's work, court gave a cost-of-repair figure far higher than the probable diminution in mkt value of the house

- If property is held for economic value, damages should not exceed change in fair mkt value
- However, if property is held for other reasons (special significance) or if court is confident that the money will be used to complete the contract, cost of completion can be awarded even if it exceeds the diminution in value.
- Restatement Second
  - §347, 348
    - the reasonable cost of completing performance OR of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him (no talk about economic waste)
  - **Acme Mills Elevator Co. v. Johnson** – contracted to sell grain to PP, then sold to a 3<sup>rd</sup> party at a higher contract price and thus failed to deliver goods to PP
    - In a breach of contract for the delivery of goods, the damages formula is mkt price of the goods at the time and place of delivery minus the contract price, even when the breach occurs because the party contracts to a 3<sup>rd</sup> party at a higher price than the mkt value of the original contract.
      - This formula may result in a negative number, in which case, the damages would be zero. This is true even if the breaching party benefits
      - Under the UCC, If buyer covers, he can recover: cover price – contract price.
    - Efficient breach – when the detriment to the nonbreaching party is smaller than the gains to the breaching party, then the breach is efficient. Breaching party compensate and no one loses. No party is made worse off by nonperformance and at least one party is better off. (Restatement, 2<sup>nd</sup>, of Contracts)
    - Looks to replacement costs to put PP in expectancy position
      - Gives expectancy, but doesn't deter breach
  - **Laurin v. DeCarlis** (Note) – PP bought land from DD and prior to the closing of the transaction, DD took gravel and PP sued for the FMV of the gravel
    - With a willful breach, PP can collect from the benefit the breacher received. If value of taken property outweighs change in value to real property, cost of taken property is the measure.
    - Even though it was economically efficient, they must pay
      - Removal of gravel did not diminish value of land
    - public policy, fairness

#### Limitations on Expectation Damages

- There are times where the court will not award the expectancy damages that the PP claims. Expectancy awards are limited to reasonable (account for what the nonbreaching party could have/should have done), foreseeable (includes essential and special, but communicated), and measurable (excludes intangibles).
  - **Rockingham County v. Luten Bridge** – PP broke contract partway through, but DD completed bridge anyway
    - If DD rescinds a construction contract, but PP continues construction, the PP is not entitled to damages incurred from the work done past the date of the breach; only entitled to compensation that resulted up until the date of the breach and any profit that would have been made.
    - Measure of damages – **expenses (including labor and material) plus profit on the contract.** Only expenses up to notification of breach and total profit expected from the contract. **Alternative measure is contract price – expenses saved.** This puts them in expectancy position
    - Doctrine of avoidable consequences – injured party may recover for breach of contract only those losses/expenses which could not have reasonably been avoided. Burden of proof is on breacher to show how much of the loss could've been avoided.
  - **Leingang v. City of Mandan Weed Board** – contract to cut weeds, weed board breaches
    - PP can recover constant overhead expenses because the PP must pay them whether or not the contract was breached
  - **Kearsarge Computer, Inc. v. Acme Staple Co.** – contract for computer service for a year, DD breaches
    - PP wants contract price (expectancy), but DD says savings realized and money made by PP after breach from other jobs should be deducted....full contract price given

- Gains made by the injured party on other transactions after the breach are not to be deducted from the damages that are otherwise recoverable, unless such gains could not have been made had their been no breach.
- Collect the contribution toward fixed expenses that it would have received but for the breach
- **Parker v. Twentieth Century-Fox** – Film studio broke a contract with actress to star in a musical set in L.A. She declined the offer to star in a Western in Australia and sued for contract salary.
  - In a breach of an employment contract when alternative employment is different and inferior (not comparable and substantially similar) to that which PP has been deprived, the doctrine of avoidable consequences cannot be applied to mitigate the damages awarded PP when the PP rejects this alternative employment (put her in her expectancy)
  - Claim for lost wages will be reduced by whatever wages the employee did earn or could reasonably have earned from other employment that is similar in kind/location/conditions. When employee doesn't obtain other employment, the court must determine whether the employee could reasonably have found or should have reasonably accepted another position
    - Rule for recovery: contract salary – amt employer affirmatively proves employee has earned or might have earned from other employment.
  - Puts PP in expectancy, but doesn't encourage productivity
  - If employee had breached...replacement costs – contracted salary
- **Billetter v. Posell (Note)** – PP employed to work in retail store, DD fires and offers her another job for lower salary
  - DDs aren't entitled to credit for unemployment compensation PP received ... benefits of this character are intended to alleviate the distress of unemployment and not diminish the amount an employer must pay as damages for the wrongful discharge of an employee...since PP paid, PP should get the benefit of it
  - If she could get the same job in another company, but for a lower salary, she can take the job and get the difference. If she doesn't take the job, the lower salary will be deducted anyway.
  - If she accepts the same job for less pay at the same company, it replaces the previous contract and she can't sue...would modify her original contract.
  - Collateral Source Rule – tort rule that denies to tortfeasor a reduction in damages for compensation received by the injured PP from other sources (insurance, unemployment compensation). This is often applied in contract cases.
- **United Protective Workers. Local No. 2 v. Ford Motor Co.**, - forced PP into early retirement
  - Deducted social security and retirement annuity payments from his damages
  - Otherwise he receives more in damages than if the contract had not been breached
- **Missouri Furnace Co. v. Cochran** – DD stops delivery on coke, PP has to get new contract
  - In a breach of a delivery contract with delivery dates set in installments and the PP enters in a new forward contract, the PP is entitled to damages calculated by the formula: mkt price at time and place of delivery – contract price (same as Acme Mills)
    - Breach doesn't occur until time and place of delivery
    - Not: New contract – old contract
  - Future contracts to mitigate damages are entered into at the risk of the nonbreaching party
  - If UCC had been around, it may have changed things
    - measure of damages is contract price – market price of the goods at the time the buyer learned of the breach (or reasonable time)
  - In mitigating damages, the nonbreaching party must act reasonably. But the problem is in determining reasonableness...the nonbreaching party has to act before it knows the consequences (Luten may have thought he was acting reasonably).
- **Reliance Cooperage Corp. V. Treat (Note)** – oak bourbon staves to be delivered in December, but DD repudiates in August.
  - Court says there is no need to mitigate damages until there are damages to mitigate, and this does not occur until delivery date.
  - Anticipatory breach – repudiation of a party's contract duties before the time has come for performance

- Nonbreaching party can sue when breach occurs or wait until time of contract, but is discharged from any duties to the other party
- Oloffson v Coomer – farmer agreed to sell corn and then anticipatorily repudiated, PP covered
  - Must cover on date of repudiation, not on date of delivery according to the contract
  - UCC – await performance by the repudiating party for a commercially reasonable time expires on date you learn of repudiation
- Cargill, Inc. v. Stafford – PP was to sell wheat to Cargill
  - A buyer may urge performance for a reasonable time
  - If a buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time (when he learned of repudiation) rather than on the price when performance is due.
- **Neri v. Retail Marine Corp** – Contract to sell boat breached by buyer, who had paid a deposit. Retailer later resold the goods.
  - If a buyer breaches a contract for the sale of goods and later the retailer sells the goods in question, the retailer is still entitled to recover lost profit (and any incidental damages, but not attorney's fees) if there's an expandable inventory. Thus contract price – mkt price at time and place of delivery + any incidental damages. But if this doesn't put the seller in expectancy, then he gets profit + incidental expenses. This is because he would have had both the sales had the contract been fulfilled. This is in line with the UCC. Put him in expectancy position.
  - If there is no expandable inventory, if they sell at the same price, no recovery, but if it is sold at a lower price, he gets the contract price – resell price (contract price – mkt price), and can recover additional expenses incurred in trying to sell it.
- **Hadley v. Baxendale** – vital mill part broken and sent for repairs. Delivery delayed by neglect and thus shaft was delayed by several days and the mill lost profits.
  - In a breach of contract to transport goods, when the injured party doesn't communicate special circumstances regarding the contract, if the breacher's actions result in unforeseeable, unnatural consequences, the breacher is not liable for damages that result from these consequences. Breacher doesn't have to pay for damages that couldn't have been reasonably foreseen, those not communicated; only responsible for those arising naturally because of the breach.
  - The injured party can recover only those damages that should reasonably be considered as arising naturally (according to the usual order of things) from the breach or might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, as the probable result of the breach of it.
    - General damages – those arising naturally out of the breach...always give (ex. Contract price – mkt price or price of cover).
    - Special or consequential damages – arising out of special circumstances (usually lost profits due to not having the item) – only recoverable if the seller had reason to foresee that the consequential damages were the probably result of the breach.
  - Tacit agreement test – extent of breaching party's liability should be within contemplation. Would party have entered into agreement knowing about extent of liability expected/inferred by nonbreaching party? Did the party actually foresee the damages? It is not fair to assume that the party would have agreed to be liable for special damages if it had been part of the contract.
    - Permits consequential damages only if the seller specifically contemplated or actually assumed the risk of such damages
    - *Not shown in these case???*
- Lamkins v. International Harvester – lights for tractor to farm at night were delayed for a year
  - When damages arise from special circumstances and are so large as to be out of proportion to the consideration agreed to be paid for the services rendered under the contract, it raises a doubt as to whether the party would have assented to such liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to correspond in some respect to liability assumed. (no tacit consent...would not have)
  - The damages may have been foreseeable, but that's not enough because damages are way too out-of-proportion to contract price
  - UCC would overturn this

- Victoria Laundry Ltd. V. Newman Industries Ltd. – DD fails to deliver laundry boiler
  - In cases of breach of contract, the aggrieved party is only entitled to such part of the loss actually resulting, which at the time of the contract was reasonably foreseeable as a likely result of the breach.
  - What is reasonably foreseeable depends on the knowledge possessed by breaching party. Here DD would've known what the boiler would have been used for.
  - Not everything has to be communicated, can just be reasonably foreseeable – there can be more than one foreseeable possibility.
- Prutch v. Ford Motor Co. (note) – defective equipment caused damages to crop
  - Std. for foreseeability is not actually what is foreseen, but what is foreseeable
    - UCC/this case – rejects the tacit agreement test (that permits consequential damages only if the seller specifically contemplated or actually assumed the risk of such damages).

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#### - Restatement Second

- § 351. Unforeseeability and Related Limitations on Damages
  - Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
  - Loss may be foreseeable as a probable result of the a breach because it follows from the breach
    - In the ordinary course of events, or
    - As a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know
  - A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation
- **Valentine v. General American Credit, Inc.** – lost job and sought mental distress damages
  - In a breach of an employment contract, discharged employee cannot recover mental distress damages resulting from the breach on the basis that the damages were foreseeable because there is a mkt standard by which damages can be adequately determined

### Reliance

- **Chicago Coliseum Club v. Dempsey** – boxer breached contract to perform
  - PP can only recover expenses that were recovered btwn date of K and date of breach and were incurred as a necessary expense in furtherance of the performance.
  - In a breach of a performance contract, the DD is not liable for lost profits that are purely speculative and cannot be calculated to a reasonable degree of certainty.
  - DD not liable for expenses incurred by PP prior to the signing of the agreement...action is based on written agreement...*Greenfield says its wrong*
  - DD not liable for damages incurred by PP attempting to force PP to comply with contract...took steps at own risk
  - DD IS liable for damages incurred by PP after signing the agreement but before the date of breach...only those that are special (including employees) and in furtherance of the contract (put in reliance position)
- Security Stove & Mfg. Co. v American Ry. Express Co. – failed to deliver the entire oil and gas burner for an exhibition
  - Party may recover expenses incurred in relying upon the contract even though the expenses would have been incurred even if contract had not been breached. This includes permanent employee's time and costs as well as those of booth rental.
    - This is because PP knew DD would deliver (common law duty) and all its losses were caused by DD's breach
- Anglia v. Reed – actor repudiates, cannot find substitute, cannot produce play
  - Where lost profits cannot be proved, PP is entitled to recover wasted expenditure and isn't limited to that incurred after the contract was made

- Aggrieved party cannot recover both lost profits and wasted expenditures; must choose btwn them....Greenfield says wrong....Luten Bridge right...they get both....to put in expectancy

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- L. Albert & Son v. Armstrong Rubber Co. – buyer agreed to buy four machines for reconditioning old rubber. Two were delivered two years late.
  - Buyer was allowed to recover his reliance expenses – any loss the buyer would have had if the contract had been performed

- Restatement of Contracts, Second

- §349 Damages based on Reliance Interest
  - alternative to expectation interest
  - injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

### Restitution

- **United States v. Algernon Blair, Inc.** – subcontractor ceases work because of contractor's breach and wants to recover the value of labor already furnished
  - A subcontractor who justifiably ceases work under a contract because of a prime contractor's breach may recover the value of labor and equipment already furnished pursuant to the contract regardless of whether he would have been entitled to recover in a suit on the contract.
  - Where std. expectancy damages produce no recovery for the PP, the PP can recover for benefit conferred on PP (option to sue for either breach of contract or restitution)
  - He can collect the fair value of goods or services he has conferred even though such a recovery would put him in a better position than the expectancy measures would....put him where he was if the contract had never happened.
  - PP has conveyed a benefit on DD and retention of that benefit w/o compensation would be unjust
  - Contract price does not limit recovery...since it's not based on contract..... mkt price of what that work
- Oliver v. Campbell – PP agreed to represent DD for a divorce, but was later fired
  - Where an employment contract is terminated by wrongful discharge before performance is complete, the contract doesn't operate as a limit to recovery (can treat contract as rescinded).
  - However, in this case the contract in effect completed and thus he was limited to that contract price and restitution was not permitted under Restatement, Contracts §350 .
- Noyes v. Pugin – PP had only partially performed when DD breached the contract.
  - PP can't get more compensation than the contract price
  - The parties agreed to a rate/contract...the court should fulfill that...court should not provide a new contract
- Kearns v. Andree – PP made requested changes to a house so that DD would pay for it
  - Although the contract itself was unenforceable, he can still get restitution
  - If the changes were done in good faith and in the honest belief that the agreement was sufficiently definite to be enforced, the Pp is entitled to recover reasonable compensation therefore.
- **Britton v. Turner** – PP cut short his work on the farm and wants recover for his 9.5 months of work
  - A party who has breached a contract is entitled to recover the value of his performance even though he obviously couldn't recover damages upon the contract itself.
  - Prevent unjust enrichment of DD.
  - Breaching party can collect restitution for benefit conferred, but damages are limited to the contract price (not mkt value) and replacement costs
  - Measure of damages: contract price – cost of completion.
    - However, this formula is fundamentally flawed – shouldn't start with the contract price because that is the **employer's** expectancy.
    - Formula should be: value of benefit conferred (can't be greater than contract) – injury to employer (damages and cost of replacement labor)

## Enforcement in Equity

- **Van Wagner Advertising Corp. v. S&M Enterprises** – has billboard lease...wants specific performance
  - Physical uniqueness isn't used to grant specific performance if the court can determine with certainty the value of the damage and those damages are an adequate remedy
  - Specific performance will not be enforced when there is an adequate remedy at law. According to Restatement of Contracts Second, damages are inadequate when:
    - Damages are too speculative
    - Can't attain a substitute
    - Damages can't be collected from the breaching party
  - Specific performance will also not be granted when damages are an adequate remedy to compensate the tenant and equitable relief would impose a disproportionate burden on the defaulting party.
- **Curtice Bros. Co. v. Catts** (note) – farmer agreed but failed to sell entire tomato crop to a canning plant
  - Inability to attain substitute at time and quantity needed would cause serious harm (needs of business are extraordinary), so specific performance will be enforced
  - Most efficient...affect business rep and break other contracts
- **Paloukos v. Intermountain Chevrolet Co.** – dealership was unable to deliver car because of product shortage
  - Mkt value was readily ascertainable
  - Courts will not order the impossible such as ordering the seller to sell to the buyer that which the seller doesn't have
- **Fitzpatrick v. Michael** – nurse agrees to care for man for life, he kicks her out, she wants specific performance
  - Specific performance will not be granted in a contract for personal services even if there is no adequate remedy at law
  - contracts that can't be performed in less than a year must be in writing (but not the case here).
  - Even though a remedy in contract may not be available, a remedy in restitution may be
- **Pingley v. Brunson** (note) – organ player who wouldn't play at restaurant for his 3 years contract
  - When others can substitute (no exceptional skill or ability), specific performance isn't available
- **Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co.** – contract in which DD agreed to furnish labor and materials to modernize a plant, didn't go as fast as agreed, PP wants DD to use more employees as stated in contract
  - Court is reluctant to enforce specific performance, especially in anticipatory breaches and where they'd have to keep enforcing the performance
  - Contract of personal services, even of a unique nature, will not be affirmatively and directly enforced.
  - Relief in equity is discretionary with the court

### I. Court's objective is expectancy in a breach of contract

- valuation to non-breaching party
  - replacement costs (upper limit)
  - may be less (PV House)

### II. Limitations to Expectancy

- has to establish that loss was caused by conduct of DD
- has to be Foreseeable (Hadley)
  - Lamkins...loss not disproportionate to contract
- doctrine of avoidable consequences
  - deduct savings (note case)
  - expenses of mitigation
- Damages must be proved to a reasonable degree of certainty
  - Higher std than anything else PP has to prove
  - Includes emotional distress

- Breach by owner
  - After the builder has completed...contract price
  - Before completion...expenses incurred + profit

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- Contract price – expenses saved (note cases)
- Sales of goods
  - Breach by seller
    - Mkt price at t&p – contract price
    - Doctrine of avoidable consequences is built in
  - Breach by buyer
    - Contract price – mkt price at t&p
    - Unless it causes one to lose a sale..then lost profits is the measure
- Employment contract
- Breach by employee
  - m/d excess cost of replacement costs

#### IV. When expectancy isn't available

- Reliance losses
  - Dempsey
  - Post/Pre Formation (Anglia takes opposite view)
  - Limited if it's a losing contract (note...Armstrong Rubber)
- Equitable
  - Remedy at law must be inadequate
    - often for land contracts...and specific performance is routinely granted...
    - unique goods or mkt isn't available for the good
    - if one can't put a valuation on the product
    - it is discretionary with the court
      - Compare benefit to PP and harm to DD if relief granted (Van Wagner)
      - Employment contract (not often available...equity)
        - Difficulty of supervising performance
        - Involuntarily servitude
        - Injunctive relief is often available
      - Construction contracts (rarely available)
        - Hard to oversee

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#### V. Restitution

- Independent of contract
  - Non breaching party
    - available when there is a contract and nonbreaching party seeks to look to restitution instead of contract measure of damages (m/d)
- breaching party
  - m/d recovery can't exceed the contract price
  - subject to dd's contract rights

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Put in outline why one is better than the other...pros and cons

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### Grounds for Enforcing Promises

#### Formality

- **Congregation Kadimah Toras-Moshe v. DeLeo** – oral promise of decedent to donate \$25,000
  - Oral contract cannot be enforced when the court determines that there's neither reliance nor consideration
  - Consideration – benefit to promisor OR detriment to promisee
    - A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.



- Hope or expectation isn't equivalent to either legal detriment or reliance

### Exchange Through Bargain

#### Bargain Theory of Consideration

- an exchange of promises, acts, or both, in which each party views what she gives as the price of what she gets.

- **promisor – person who makes the promise and whose enforceability is in issue**

- **Hamer v. Sidway** – uncle would give nephew \$500 at 21 if he stopped certain bad habits
  - A contract in which the promise gives up some legal right or freedom (legal detriment) for money is consideration and therefore the promise is entitled to what the contract stipulates (even though promisor has not benefited from the promise).
  - Detriment is forbearance of a legal right..doing something not legally required to do...not necessarily physical detriment
  - Uncle was benefited in the legal sense....price uncle was willing to pay for nephew's abstention.
  - Mutual reciprocal inducement (for uncle it was love and affection of nephew)
- **Earle v. Angell** – aunt promised nephew \$500 if he attended her funeral
  - There is a promise for a promise
  - This is valid
- **Whitten v. Greeley-Shaw** – parties engaged in extra-marital affair and signed a contract make by DD
  - The contract was neither bargained for by PP nor given in exchange for his promises
  - Cannot constitute consideration
- Restatement of Contracts, Second
  - *Requirement of Exchange; Types of Exchange*
    - To constitute consideration, a performance or a return promise must be bargained for
    - A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise
      - The performance may consist of:
        - An act other than a promise, or
        - A forbearance, or
        - The creation, modification, or destruction of a legal relation
      - The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person
  - *Consideration as Motive or Inducing Cause*
    - The fact that what's bargained for doesn't itself induce the making of a promise does not prevent it from being consideration for the promise
    - Fact that a promise itself does not itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise
  - **Fischer v. Union Trust Co.** – land given to handicapped daughter with promise to pay mortgage
    - In a conveyance of property by gift, with no consideration, the grantor isn't liable for promises made along with the conveyance (promise to pay mortgage).
    - Mutual reciprocal inducement – two promises that don't induce each other don't constitute consideration – the promise must be induced by each other; bargained for
    - Writing doesn't matter
    - Courts won't inquire into adequacy of consideration – thus size of consideration doesn't matter as long as it's bargained for
    - Purported consideration or consideration for land only?
  - **Simmons v. United States (note)** – guy won \$25,000 from a fishing contest
    - So long as an outstanding offer was known to one, a person may accept an offer by rendering performance, even if he does so primarily for reasons unrelated to the offer (not a gift)
  - **Schnell v. Nell** – promised three people \$100 for one cent
    - Courts will consider the adequacy of consideration where the exchange is for unequal sums of money

- Embola v. Tuppela – insane man promised \$10,000 if PP gave him \$50 to get his mine back
  - There was consideration since there was an uncertain event conditioning getting the \$10,000
  - The DD considered the exchange fair and to his advantage
- **Duncan v. Black** – sells land and cotton allotment
  - Forbearance of a claim may be consideration as long as such a claim is made in good faith and has some foundation.
  - It must not be against public morals, public policy, or inherently illegal
    - Here, the claim was invalid. When a claim is invalid, surrender of it in exchange for money isn't enforced because the surrender of an invalid claim isn't a detriment
- Restatement of Contracts, Second
  - *Section 74. Settlements of Claims*
    - Forbearance to assert or the surrender of a claim or defense which proves to be invalid isn't consideration, unless
      - The claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
      - The forbearing or surrendering party believes the claim or defense may be fairly determined to be valid.
    - The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he isn't asserting the claim or defense and believes that no valid claim or defense exists

### Promises Grounded in the Past

- **Mills v. Wyman** – son nursed away from home, father promised to pay expenses, but didn't
  - Moral obligation is not consideration to enforce a promise made after services were rendered but not requested.
  - No mutual reciprocal inducement.
- **Webb v. McGowin** – PP fell with pine block and became crippled to avoid injuring DD, who paid for his upkeep
  - Moral obligation is consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor
  - Material benefit = valid consideration for his promise...valid because he saved life
  - When a substantial material benefit is conferred upon a party without being requested, but the party promises something in exchange for it after the fact, the contract is enforceable. It's implied that he would've made the promise beforehand.
- Harrington v. Taylor – took ax blow on hand to avoid it hitting DD in head. Promised to pay her damages, but paid small sum and stopped
  - A humanitarian act voluntarily performed is not such consideration as would entitle her to recovery at law.
- Edson v. Poppe – PP drilled a well and installed casing
  - Since the circumstances do not indicate that the PP's drilling was gratuitous or an act of voluntary courtesy to the DD, the subsequent promise was therefore supported by consideration.

### Give them what they didn't ask for

#### No consideration

#### Fairness/morality

- Restatement of Contracts, Second
  - Section 86. Promise for Benefit Received.
    - A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
    - A promise is not binding under Subsection (1)

- If the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
- To the extent that its value is disproportionate to the benefit

### Reliance on a Promise

- **Kirksey v. Kirksey** (former rule)– brother-in-law promised PP place to raise her family, but kicked her out two years later
  - Rule at one time was that reliance was irrelevant and a promise is unenforceable even if relied upon
  - No mutual reciprocal inducement
- **Ricketts v. Scothorn** (note) – grandfather promised PP that she wouldn't have to work anymore and gave her a note worth \$2,000
  - Promise without a bargain is enforceable where it would be grossly inequitable not to enforce.
- **Prescott v. Jones** (note) – policy not renewed automatically as expected
  - Letter to renew insurance policy unless notified otherwise is only an intention of purpose; estoppel is not available for a promise
  - Not a statement of fact, just an intention
  - Without acceptance (some type of words or over action), there is no contract
  - Promise of future action is distinguishable from factual representations about the past or present
- **Seavey v. Drake** – PP orally given land by father and spent \$3000 improving it
  - **Specific performance can be awarded to the promisee when the only proof of consideration of the oral promise is part performance induced by the donor's promise...Greenfield says its wrong**
    - Displaces statute of frauds
  - Reliance on a promise is a substitute for consideration if a party relies on the promise reasonably and to its detriment....restatement induces action/forbearance
- Restatement, Second Contracts
  - §90 / §139
    - A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
    - In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
      - The availability and adequacy of other remedies, particularly cancellation and restitution
      - The definite and substantial character of the action or forbearance in relation to the remedy sought
      - The extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence
      - The reasonableness of the action or forbearance
      - The extent to which the action or forbearance was foreseeable by the promisor
  - **East Providence Credit Union v. Geremia** – ranch wagon was used to secure payment of the note for a mortgage. Insurance was required to be kept on the wagon.
    - Reliance by promisee to his detriment is a substitute for consideration
    - Promissory estoppel can be applied to enforce a promise when the injury results from promisee's reliance on the promisor's fulfillment of promise
    - To invoke a doctrine of promissory estoppel, we must ask:
      - Was there a promise which the promisor reasonably expects to induce action or forbearance of definite and substantial character on the part of the promisee?
      - Did the promise induce such action or forbearance
      - Can injustice be avoided only by enforcement of the promise?

- **Forrer v. Sears, Roebuck, & Co.** – promised permanent employment and thus gave up farming operation...sues on promissory estoppel
  - A permanent employment contract is terminable at will unless there is additional consideration (additional to the services of employment) in the form of an economic or financial benefit to the employer. Mere detriment to the employee isn't enough
  - Without mutuality of obligation (both parties must be bound), reliance is not enforceable. Employee was not bound to keep working and employer was not bound to keep him employed.
  - Reliance was fulfilled
- **Hunter v. Hayes** – (note) DD quit her employment with phone company to work as a flagger, which was promised her, but DD failed to employ her
  - PP proved her detrimental reliance on DD's promise in regards to §90

#### **Promises of Limited Commitment (Bilateral contract...requires acceptance by promise)**

- **Davis v. General Foods Corp.** – PP sent cookie recipe which company said it would consider, but compensation, if any, would be paid later and at their discretion
  - Promises too indefinite for legal enforcement where the promisor retains an unlimited right to decide later the nature or extent of his performance
  - PP did not rely on it as a contractual obligation
- **Nat Nal Service Stations v. Wolf** (note) – sued DD to recover a discount on 900,000 gallons of gas
  - A contract that doesn't bind either party does not fulfill the mutuality of obligation requirement (both must be bound or neither is bound)
  - Neither party is obligated to deal with the other until offer is placed and accepted
  - Mutuality of consideration if the performance promised, either act or forbearance, would be consideration if they alone were bargained for.
  - Requirements contract – buyer promises to purchase all he needs
  - Output contract – seller promises to sell to buyer all he produces
    - Here there is no problem with enforceability or lack of mutuality
    - However, if one party can terminate at any time, the other's promise is not enforceable
- **Obering v. Swain-Roach Lumber Co.** – DD pays for land and takes log and sells land to PP who reneges
  - In a contract contingent on a future even controlled by the promise, mutuality exists at inception, therefore making the contract enforceable
  - Limiting future performance is a detriment to the promisor.
- **Paul v. Rosen** (note) – to sell liquor business, DD promised to do inventory and PP would then get new lease
  - Since the contract made the securing of the lease a condition to its effectiveness but placed no duty on plaintiff to secure it, the entire contract was void for want of mutuality and DD owed no duty to perform it.
  - Wrong: there is mutuality, but court said there isn't
  - Car example
- **Wood v. Lucy, Lady Duff-Gordon** – dressmaker who was sued when she broke her contract to give the PP exclusive rights to her designs
  - If there's an implied promise to make reasonable efforts to do your part of the agreement, then there is an obligation
  - The implication of a promise, if it assigns some duty, is enforceable
  - (implied promise is consideration)
- **Sheets v. Teddy's Frosted Foods** – guy fired for complaining about improper standards for food
  - Public Policy issue impose some limits on unbridled discretion to terminate the employment of someone hired at will
  - If termination contravenes a clear mandate of public policy, employee has a claim
  - Employee shouldn't have to risk criminal sanction or jeopardize his continued employment

For a contract to be enforceable, there must be

- Consideration
  - must be a legal detriment to the promisor OR benefit to promisee
  - and
  - must be bargained for...mutual reciprocal inducement
- Mutuality of obligation (restrain future action)
  - Obergering

Substitute for Consideration

- Moral obligation (some courts believe)
  - o Webb v. McGowan and restatement
- Reliance
  - o Ricketts/Seavey
  - o Must rely on it reasonably and to their detriment
  - o It should reasonably be seen to induce action or forbearance which it does and injustice can only be avoided by enforcing the promise
- Duty...Implied promise
  - o The implication of a promise if it enforces some duty is enforceable (Wood)
- Contract/promise is not applicable if it is against public policy
  - o Duncan v. Black
  - o Sheets v. Teddy Frosted Foods

### **Chapter Three: The Making of Agreements**

#### **Mutual Assent**

- o **Embry v. Hargadine, McKittrick Dry Goods Co.** – oral “promise” for one year contract renewal...pp thought there was promise for renewal, DD did not intend that...go ahead get your men out...don’t let that worry you
  - Objective standard...for determination of whether a contract has mutual assent, the court looks to what a reasonable person would believe the intention of the parties to be
  - **If one’s words or acts, as judged by a reasonable std., manifest an intention to agree in regard to the matter in question, that agreement is established and it’s immaterial what may be the real, but unexpressed stat of his mind on the subject.**
    - Limited if one person knows it was fake...fake deed hypo
  - Subjective standard...looks for “meeting of the minds”...point where parties both agree to the same thing in the same sense
- o **New York Trust Co. v. Island Oil & Transport Corp.** (note) – DD had Mexican subsidiary corporations appear to own oil-bearing land to circumvent restrictions
  - In ascertaining what meaning to impute to a party’s utterances, the circumstances in which the words are used are always relevant and usually indispensable
- o **McDonald v. Mobil Coal Producing, Inc.** – PP was forced to resign following rumors of sexual harassment...he claimed the employee handbook’s modified the terms of his at will employment
  - *Restatement Second of Contracts §21*
    - Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract
  - To determine if an employee handbook with no conspicuous disclaimer can modify an at will employment agreement, it is necessary to examine the outward manifestation of a party’s actions that lead to a reasonable reliance by the other party
    - Employer’s course of conduct and statements lead him to believe that that employer would follow handbook

- **If the DD made sufficient intentional, objective manifestations of contractual assent to create reasonable reliance, that is enough.**
- Kari v. General Motors Corp. (note) – PP took an extended leave and wanted separation pay allegedly guaranteed by employee manual
  - Offer must be, “communicated in such a manner...that (the promisee) may justly expect performance and may reasonably rely thereon.”
  - Handbook clearly (italicized and in red) stated that the provisions didn’t create a contractual relationship, so there was no offer
- Pine River State Bank v. Mettillie (note)
  - If the handbook language constitutes an offer and the offer is communicated through dissemination of the handbook to the employee, the employee who retains employment with knowledge of the new/changed conditions may have agreed to a contractual obligation of the new or changed conditions
  - At-will employment is a unilateral contract that is accepted by the employee’s continuing to work
- Altering the terms of at-will employment
  - Employment not governed by an express contract is governed by a implied contract
  - Any terms, including, employment at will can be modified by the parties
  - To find an implied contract including representations made orally by the employer or contained in an employee manual, these must have been offers and it must have been accepted
  - When a manual confers greater rights, the employee’s continuing to work demonstrates acceptance
  - But if a manual substantially interferes with an employee’s legitimate expectations, continuing work can’t be taken as acceptance
- **Moulton v. Kershaw** – salt dealer sends letter containing price and asking for order
  - An offer not addressed specifically to one, is an invitation to deal, not an offer, even if they say the word offer
  - A reasonable person would not perceived this as an offer
  - A quotation of prices is not an offer to sell...a transaction is not completed until the order so made is accepted
  - A party is bound to the offer where the amt of qty is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amt of qty fixed before the offer is withdrawn...not the case here
- **Fairmount Glass Works v. Crunden-Martin Woodenware Co.** – buyer offered fruit jars at certain prices and a date of ship in response to PP’s request
  - The response was to the PP directly
  - Objective intent...courts are looking at what was intended
  - Look at correspondence as a whole...quote...immediate acceptance...was in response to a request
- Wilhelm Lubrication Co. v. Bratrud (note) – DD agreed to buy 11,500 gallons of oil according to a schedule that allowed him to chose the weight of the oil and upon which the price would be determined
  - When a buyer repudiates before placing an order for a specific qty, the seller can recover nothing because there was not meeting of the minds or mutual assent regarding qty
  - The subject matter of the contract must be definite as to qty and price, in order to provide a basis for measuring damages....to take an avg or arbitrary price would remake the contract
- William Whitman & Co. v. Namquit Worsted Co., (note) - buyer breached contract to buy \$50,000 lbs of yarn...contract allowed DD to chose btwn 48 diff styles and sizes, each with a diff price
  - Measure of damages was the least profit the PP’s would have made on any of the yarns which the DD was entitled to specify under the contract
- **Joseph Martin, Jr. Delicatessen v. Schumacher** – Lease stated PP could renew for another five years at annual rentals to be agreed upon...DD charged much higher than the FMV
  - A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable....contract must contain all material terms at time of formation

- Neither landlord nor tenant were bound to any formula...nothing about fair mkt value...or reasonable rent
- If there is some method of interpretation of the intentions of the parties, such as previous agreements amongst the parties than the clause may have been enforceable
  - May Metro Corp – (sale of goods) there were prior renewals, which allowed the ct to give meaning to otherwise uncertain terms
- Southeast Eng'g Co. V. Martin Tractor Co.
  - UCC...subsection 3
    - If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonable certain basis for granting a remedy
- *Restatement of Contracts, Second*
  - §33. Certainty
    - Even though a manifestation of intention is to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain
    - The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
    - The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance
  - **Raffles v. Wichelhaus** – cotton to arrive on ship named Peerless, but there were multiple ships with the name Peerless...PP delivered in Dec. DD wanted in Oct.
    - When an ambiguous term is misinterpreted by both parties in good faith, it'll be considered that neither party meant to agree to the agreement and it'll be void due to lack of mutual assent. Doesn't pass subjective or objective intent
    - Indefiniteness: failure to include term (Deli, Nader), vagueness (chicken), failure to make an included term definite (Fairmount...qty), ambiguity (Raffles)
  - Flower City Painting Contractors v. Gumina Const. – argument over whether painting exterior walls was part of the contract
    - Both interpretations are possible and probable and thus no contract ever came into existence
  - Dickey v. Hurd – PP wanted to buy land from DD, but did not pay full cash on time
    - It is the duty of the offeror to inform the PP that the offer called for full payment if he knew the term/offer was not interpreted in that way by the PP
- *Restatement of Contracts, Second*
  - § 20 Effect of Misunderstanding
    - There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
      - Neither party knows or has reason to know the meaning attached by the other; or
      - Each party knows or each party has reason to know the meaning attached by the other
    - The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
      - That party doesn't know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
      - That party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party

### Control Over Contract Formation

- **Caldwell v. Cline** – sale of land via mail
  - When an offer is made by mail, with a stipulation that it must be accepted in a certain time period, the period begins when offerree receives offer. Acceptance is made legal when it's given to a reasonable courier

- Offeror is master of the offer – he exercises power to set duration for acceptance and mode of acceptance
  - After revocation of offer and other party knows in any form, there's no mutual assent and thus no contract
  - Mailbox rule – if there is no specified time for acceptance than acceptance is good when it's sent even if it's never received
  - If the letter gets lost in the mail and arrives very late, the offeree should realize that the offer is no longer valid/good
  - Death = revocation of offer...objective theory ends
- Dickinson v. Dodds – DD gave PP til Friday to accept offer, but sold it on Thursday
  - If someone hears that an offer has been rescinded through another party or in any way, the offer is revoked
- Glover v. Jewish War Veterans of U.S. (note) – reward for info leading to an arrest, but PP turns in money not knowing of reward
  - Unless claimant is giving the desired info knew of the offer of the reward and acted with the intent of accepting such offer; otherwise claimant gives the info not in the expectation of receiving a reward but rather out of a sense of public duty or other motive unconnected with the reward
- Textron, Inc. v. Froleich (note) – seller offered broker steel during phone conversation, said interested but would get back...nothing said about time limit
  - If no time for expiration of power of acceptance is specified in the offer, the power terminates at the end of a reasonable time. Determination depends on surrounding circumstances.
- **Davis v. Jacoby** – niece and husband come to take care of aunt in exchange for everything, but nothing is left to them at death
  - Unilateral contract – formed by exchange of promise for performance – method of accepting offer is performing
  - Bilateral contract – promise for a promise – contracts are assumed to be bilateral unless the terms of the contract state that it's unilateral bc bilateral protects both parties (bridge hypo)
  - Have to look at surrounding circumstances to determine what type of contract it is...here asked for immediate acceptance, asked for performance beyond his death, was desperate
- Restatement of Contracts, Second
  - §32
    - In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses
  - §36 Methods of Termination of the Power of Acceptance
    - An offeree's power of acceptance may be terminated by
      - Rejection or counter-offer by the offeree, or
      - Lapse of time, or
      - Revocation by the offeror, or
      - Death or incapacity of the offeror or offeree...Jordan v. Dobbins
    - In addition, an offeree's power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer
  - Brackenbury v. Hodgkin – mom offers to give land if daughter and her husband take care of her...doesn't work out and mom gives deed to son...court of equity
    - In a unilateral contract, the only acceptance of the offer that's necessary is the performance of the act...the promise becomes binding when the act is performed
    - In a unilateral contract, the offer cannot be revoked after the offeree has partially performed. It's not fair if offeree can continue to revoke after performance begins, even though acceptance isn't given until complete performance. But offeree can still quit performance
    - Remedy – since PP hadn't completed performance, not entitled to land – order to reconvey the land to mother to hold in trust for PP if they complete performance – compels PP to complete performance
    - Maybe some reliance
- *Restatement Second*



- § 62. Effect of Performance by Offeree Where Offer Invites Either Performance or Promise
  - Where an offer invites an offeree to choose between accepting by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance
  - Such an acceptance operates as a promise to render complete performance
- § 45 Option Contract Created by Part Performance or Tender
  - Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it
  - The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer

### Precontractual Obligation

- **Mier v. Hadden** – option contract (an offer coupled with a promise not to revoke the offer) gives PP right to buy land by specified date. PP gave \$1 as consideration
  - Offeror cannot terminate offer before an option period expires when there is consideration given in return for the option period. There was mutual inducement for the period of acceptance here
  - Here he pays for the promise not to revoke (compared to *Dickinson v. Dobbs*)
  - UCC makes offer to sell goods irrevocable
    - *E.A. Coronis Associates v. M Gordon Constr. Co.*,
      - An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such a period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
- *Restatement Second*
  - § 87 Option Contract
    - An offer is binding as an option contract if it
      - Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
      - Is made irrevocable by statute
- **James Baird Co. v. Gimbel Bros.** – linoleum offered by subcontractor (DD) to contractor for construction of a public building...DD revoked bid before contractor's bid was accepted
  - When a contractor relies on an offer, which has not been formally accepted, subcontractor is not bound to the offer merely because it was relied upon. Unless there is consideration, an option is not given and the offeror can still revoke
  - Restatement of Contracts § 35
    - If the offer is withdrawn before it is accepted, the acceptance is too late and there is no contract
  - An offer can become a promise to deliver only when the equivalent is received; that is when the PP promised to take and pay for it
  - Doctrine of avoidable consequences
- **Drennan v. Star Paving Co. (majority opinion now)** – subcontractor bid to do paving work for school, but revoked after contractor's bid was accepted
  - If the offeror should reasonably have expected that the offer would induce reliance by the offeree prior to acceptance, and such reliance occurs, the offer is irrevocable
  - Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding
  - There's an implied promise/obligation to keep his bid open for a reasonable time after award of the prime contract to give the general contractor an opportunity to accept the offer on which he relied in computing the prime bid

- E.A. Coronis Associates v. M. Gordon Constr. Co., - Supra
- Southern California Acoustics Co. v. C.V. Holder, Inc. (note) – contractor used subcontractor’s bid, which was reported, but actually gave the job to another company
  - DD did not accept PP’s offer nor make any promise or offer to PP intended to induce action or forbearance of a definite and substantial character
- Restatement of Contracts
  - § 87. *Option Contract*
    - An offer which the offeror should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the offeree and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
- Ragosta v. Wilder
- Pg. 417 Ardenre

### Conduct Concluding a Bargain

- **Livingstone v. Evans** – DD offered to sell land for a certain price, PP responds saying he’d buy for a different price, DD said he couldn’t reduce, PP said he’d buy at the original price, DD wouldn’t sell
  - The making of a counter-offer is a rejection of the original offer
  - Court looks at circumstances to see if this was a rejection or renewal of offer (here renewal)
  - Objective manifestation
  - Mirror image rule
    - At common law, an acceptance must be a “mirror image” of the offer – if an acceptance deviated from the offer in any way, even immaterially, it was deemed a qualified or conditional acceptance and did not form a contract, but was a counter-offer.
    - inquiry to substance of offer, isn’t a counteroffer
    - if it makes something implicit, explicit, not a counteroffer
  - UCC – gets rid of mirror image rule (designed to deal with form contracts); [only for merchants???](#)
    - Definite and seasonable acceptance, sent within a reasonable time, operates as acceptance even with additional or different terms, unless acceptance is made conditional on assent of these terms
    - Additional terms to be construed as proposals for addition to the contract. Between merchants, such terms become part of contract unless:
      - Offer expressly limits acceptance to the terms of the offer
      - They materially alter it
      - Notification of objection to them has already been given or is given within a reasonable time after notice of them is received
      - Conduct by parties which recognizes the existence of contract is sufficient to establish a contract for sale although the writings of the parties don’t otherwise establish a contract. In such case, the terms of the particular contract consist if those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this act
- Restatement of Contracts
  - § 69. Acceptance by Silence or Exercise of Dominion
    - Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
      - Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation
      - Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer
      - Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he doesn’t intend to accept

- An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him
- 
- **Hobbs v Massasoit Whip Co.** – sent eels skins to DD when not requested
  - If there are prior business dealings amongst two parties, the DD's retention of the goods for an unreasonable time received from a standing offer coupled with silence amounts to acceptance
  - In most cases silence does not include acceptance
    - Exceptions:
      - Where the offeree by her own prior words or conduct gave the offeror reason to interpret her silence/lack of action as an acceptance
      - Where there's a prior business relationship...it's reasonable that the offeree should notify the offeror if he doesn't intend to accept
      - Continued retention of a benefit where there's no reason to believe it was a gratuity, party is presumed to have agreed by implication to the contract (Austin v. Burge...newspaper)

## The Effects of Adopting a Writing

- **Parol Evidence Rule**
  - Restricts the use of evidence of negotiating history to vary the terms of a written agreement intended to be the final expression of the parties' deal.
  - Admissibility of the alleged agreement turns on the applicability of the parol evidence rule
  - The rule provides that where there is a fully integrated contract, parol evidence (evidence of a prior or contemporaneous agreement) will not be allowed into evidence to vary, add to, or contradict the terms of the writing.
  - **If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, evidence of a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.**
    - This only to prior agreements
    - Inclusion of a merger clause cannot be taken at face value....don't automatically make it a complete agreement
- **Restatement (First) § 240**
  - An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration...if the agreement is not inconsistent with the integrated contract, and
    - Is made for separate consideration, or
    - Is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties of the written contract.
  - **Mitchell v. Lath** – DD's promised to remove ice house in consideration of PP purchasing the farm
    - Oral promise is not accepted as evidence when it is one that would have been expected to be embodied in the writing, the omission leading to the belief that it was intentionally left out
    - Parol evidence excludes that evidence from being included in court
    - Three part test...exceptions...where the rule is not applicable....where the writing is allowed
      - The agreement is a collateral one
      - It does not contradict express or implied provisions of the written contract
      - It is one that the parties would not ordinarily be expected to embody in the writing
  - **Hatley v. Stafford** – farm rented, but owner had right to buy out renter at \$70. PP claims \$70 would only apply for 30-60 days after agreement. He demanded \$400- FMV
    - Courts should admit evidence of consistent additional terms only if there's substantial evidence that the parties didn't intend the writing to embody the entire agreement
    - Evidence or oral agreement is allowed when:
      - It's not inconsistent with the written lease (inconsistent...must contradict an express provision of the writing)
      - Was an agreement as might naturally be made as a separate agreement by parties situated as were parties to the written contract

- Courts are entitled to consider the fact that a literal reading of the written contract would've led to an unreasonable result
- Hayden v. Hoadley (note) – parties agreed to exchange houses. As part of that agreement, DD's promised in writing to make some repairs to property. Orally agreed to have till Oct to do so and only needed to spend \$60.
  - The legal effect of the contract before us – it being silent as to the time of performance – was to require the repairs specified to be completed within a reasonable time
  - Opposite conclusion of Hatley

#### Restatement of Contracts, Second

- § 209. Integrated Agreements
  - Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression
- § 213 Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)
  - A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
  - A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
  - An integrated agreement that is not binding or that is voidable and avoided doesn't discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would've been part of the agreement if it had not been integrated
- § 214. Evidence of Prior or Contemporaneous Agreements and Negotiations
  - Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
    - That the writing is or isn't an integrated agreement
    - The meaning of the writing, whether or not integrated
    - Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
    - Ground for granting or denying rescission, reformation, specific performance, or other remedy
- § 2-202 UCC's Parol Evidence Rule
  - Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
    - By course of dealing or usage of trade or by course of performance
    - By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
  - **Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.** – DD was replacing part of steam turbine when the cover fell and DD was injured.
    - Parol (extrinsic) evidence can be admitted to explain ambiguous terms. The test of admissibility of evidence to explain the meaning of a written agreement is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible
  - Bethlehem Steel Co. v. Turner Constr. Co., (note) – PP contracted to erect structural steel for an office building. There was provision that if prices of component parts rose, there'd be an adjustment of the contract prices
    - When a contract is clear in and of itself, circumstances extrinsic to the document may not be considered and where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract.
    - Only when contract language is ambiguous...then you do consider outside evidence

#### Restatement of Contracts, Second

- § 212. Interpretation of Integrated Agreement

- A question of integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law

### Standardized Forms – Whither Assent

- What you sign is an objective manifestation of intent...creates duty to read
- Bound by what you signed as long as you weren't fooled or didn't know what you signed (misrepresentation)
- If one induces you or prevents you from reading it...courts are likely to conclude the documents aren't binding
- Signature isn't always an appropriate manifestation of intent
- Assuming a person has a reasonable opportunity to read, then there's a manifestation of assent
  - **Agricultural Ins. Co. v. Constantine** (note) – PP parked car in lot and it was stolen. On ticket it stated cars were left at owner's risk
    - Retention of ticket wasn't enough, since she had no knowledge of the conditions of the ticket
    - DD should've called attention to the printed terms.
    - Exculpation clause which allows a bailee to relieve itself of liability for its negligence in the course of a general dealing with the public is contrary to law against public policy
  - **Mundy v. Lumberman's Mut. Cas. Co.** – silver stolen and new policy limited recovery to \$1000
    - When even a casual reading of the mailed material would have given the PP's adequate notice, excuse of not reading the policy will not suffice for ignorance of the change

Art auction

Lleylen comments 517

- **Henningsen v. Bloomfield Motors** – steering wheel broken and car crashed, automaker only promised to replace defective parts
  - Court will not enforce a disclaimer when there is unequal bargaining power or the disclaimer is hidden, or it's unclear
  - The manufacturer cannot use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile...public policy argument (waiving of legal rights)
  - Consequential damages from Hadley
  - Focuses on assent process and substantive issues of policy
- **Richards v. Richards** – wife rode with husband in work truck...was in an accident...had signed away her rights to sue company or anyone affiliated with company
  - Three reasons it's void
    - Contract isn't clear...doesn't know what she's saying
    - Contract is overly broad
    - Contract is a std. form...inequality of bargaining power
  - Public policy is that principle of law under which freedom to contract is restricted by law for the good of the community
    - Here the public policy of imposing liability on persons whose conduct creates an unreasonable risk of harm outweighs the public policy of freedom to contract
  - The lack of an opportunity to discuss and negotiate a contract is significant when considered with the breadth of the release...against public policy
  - Focuses on assent process and substantive issues of policy
- **Hill v. Gateway 2000, Inc** – computer sent to PP, included 30 days to return if they did not agree to terms. Terms include disputes solved by arbitration
  - A buyer may accept by performing the acts the vendor proposes to treat as acceptance...silence is acceptance
  - Maintain status quo...form contract fine
    - Ct. is allowing gateway to unilaterally change agreement if PP doesn't protest (against Fairmount, Embry...against objective manifestation of assent)
  - If one is given reasonable time and methods to discover all aspects of a contract, you will be held liable for the contract

## NOTE CASE

- **Broemmer v. Abortion Services of Phoenix** – PP signed an agreement to arbitrate at an abortion clinic
  - Contract of adhesion (take it or leave it...shown by the fact that it is not negotiable, presented as a condition of treatment, not explained nor told one is free not to sign)
  - To see if a contract is enforceable, look to
    - The reasonable expectations of the adhering party
      - The unobtrusive waiver of such a fundamental right as a jury trial was beyond the reasonable expectation of the PP. **what about hill?**
    - Whether the contract is unconscionable
      - Not discussed since it was not a reasonable expectation by PP
- Restatement of Contracts, Second
  - § 211. Standardized Agreements
    - Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing
    - Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing
    - Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement

## Std. Forms

- **Agricultural, Mundy, Gateway, Henningson**
  - **see if one is expected to read the terms and if the terms are clear**
- **Does it meet the reasonable expectations of the party?**
  - **Broemer....Richards/ Agricultural? What about hill?**
- **Is it against public policy?**
  - **Richards, Henningson, Broemer**

## Chapter Four: Policing the Bargain

### Revisions of Contractual Duty

- **Austin Instrument, Inc. v. Loral Corp.** – DD was awarded a contract by Navy and subcontracted to the PP. PP refused to deliver goods unless DD paid more and awarded them a second contract
  - Contract is voidable on ground of duress when the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will (couldn't take other contracts)
  - Economic duress or business compulsion is shown by
    - Threatening immediate possession of needful goods OR
    - Proof that one party has threatened to breach the contract by withholding goods unless the other party agrees to some further demand.
    - AND
    - The other party couldn't obtain the goods from another source AND
    - the ordinary remedy of an action for breach would not be adequate
- **Smithwick v. Whitley** (note) – PP worked land for three years when DD demanded extra money for the land than originally agreed upon
  - Not deprived of free will
  - Could sue for specific performance
- **Preexisting duty rule** – promise to do what is already contracted is not consideration...only way to modify is if both modify (lodge built in Canada hypo).
- **Marton Remodeling v. Jensen** – DD said the hours claimed for remodeling were excessive and sent a check for \$5000 marked full payment. PP refused the offer, but cashed the check anyway.

- In a bona fide dispute over price and a check is tendered in full payment of an unliquidated claim, creditor cannot cash the check and disregard the terms of the attached condition, so that he can collect the difference in balance....retention of the check constitutes assent/acceptance and an accord and satisfaction
- For an accord and satisfaction (payment of a disputed debt), there must be
  - An unliquidated claim OR
  - A bona fide dispute over the amount due
- Preexisting duty rule is trumped by a policy settling disputes in an accord and satisfaction (Duncan)
- Actions speak louder than words

### Mistake, Misrepresentation, and Nondisclosure

- **Sherwood v. Walker** – replevin for a cow
  - If there's a difference or misapprehension as to the substance of the thing bargained for, or if the thing actually delivered or received is different in substance from the thing bargained for, then there is no contract.
  - Mutual mistake
    - Mistake must be to the "nature of the thing" – mistake as to material fact
      - Heart of the contract...collateral fact
      - Both parties make the same mistake
      - Once mistake is made, either party can rescind
      - Uncertainty known to both parties is NOT a mistake
  - The difference must be to the substance of the thing bargained for...not just a difference in quality
  - Dissent
    - There's no mistake, one was more correct in his judgment of the cow than the other
- **Beachcomber Coins, Inc. v. Boskett** (note) – coins which turned out to be counterfeited, but neither seller or buyer originally knew
  - Where the parties can be restored to the status quo, a negligent failure to discover a mistake such as this does not preclude rescission (voiding the contract)
  - *Restatement § 502*
    - Where the parties know that there's doubt in regard to a certain matter and contract on that assumption, the contract isn't rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargaining
- **Hinson v. Jefferson** – PP planned to build a residence but could not because they could not get permission for a septic system due to the quality of the land
  - **Aggrieved party isn't entitled to relief under the doctrine of mutual mistake for conveyance of real property, but the common law maxim of caveat emptor can be put aside in order to create an implied warranty for purchases of land subject to restrictive covenants, where unbeknownst to both parties, the land cannot be used for such use that the covenant warrants**
    - **Deed restricted the use to which it was bought...just for residence**
  - If it had been an obvious defect that the buyer should realize, then no rescission
  - **Implied warranty of merchantability** – sold goods should be fit for ordinary purposes for which such goods are used. Exception is if it's an obvious defect that a reasonable person should know of, then the warranty doesn't apply.
- **Cushman v. Kirby** – house with sulfur water, wife said it was fine, husband had duty to speak since he knew of misrepresentation
  - One who's led a party to believe that full disclosure has been given, but only gives partial info with intent to deceive and prevent investigation is guilty of fraud against which equity will relieve if PP relies on them
  - There's a duty to speak when material facts are available to sellers and not buyer, and one seller gives only partial info
  - Duty to speak

- Where seller has knowledge of a defect in property or goods and fails to disclose the knowledge to the other party in the following circumstances
    - Failure to correct assumption...knows the other is operating under false assumption
    - Partial disclosure...a disclosure must be complete to the extent of his knowledge
    - Concealed defect – knows of defect that's not detectable by reasonable inspection
- *Eyton v. Bach* (note) – imitation paintings, seller made no representation as to whether painting were original, buyers thought they were
  - There customers not inquiring into whether canvases were originals, there was no duty upon the vendor to inform him of the obvious....due to low price
- **Summary**
  - If there's mutual mistake in goods sold, the parties can rescind
    - *Sherwood, beachcomber*
    - If there's mutual mistake in real property, mistake doesn't void
      - But implied warranty of merchantability...*Hinson v. Jefferson*
  - If one is not sure, he must live with risk
    - *Sherwood*...dissent, restatement
  - If one knows and fails to disclose problems and when he knows the other party's relying on it...if there's deceit
    - *Cushman v. Kirby*
    - But does have to comment on obvious
      - *Eyton*
  - If parties can and fail to investigate and there's mistake...too bad
  - Where a party acquires info that makes the transaction desirable, maybe he shouldn't disclose because he worked hard to get the info

### Unconscionable Inequality

- **Wollums v. Horsley** – Uneducated PP sold all the oils, gases, and minerals on his land with mining privileges for \$0.40 an acre to educated businessman...land was probably worth \$15 an acre
  - Courts of equity won't decree specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension, or where, from a change of circumstances, it would be unconscionable to enforce it.
  - But even if specific performance is denied, it does not mean the contract is invalid...can still sue for damages, though probably won't win
  - Mere inadequacy of consideration isn't enough to withhold specific performance unless it's so grossly inadequate, that it renders the contract unconscionable
- **Williams v. Walker-Thomas Furniture Co.**, - DD sold items to PP on lease. Terms stated that title for all items ever purchased would remain with DD, until monthly payments were paid for all items (kept a balance due on every item)
  - If a contract is unreasonable and unconscionable, but not void for fraud, a court of law will not uphold the contract, but will give to the party who sue for its breach damages, not according to the letter, but only such as he is equitably entitled to....here court of law is saying unconscionably is enough (*Wollums*...court of equity)
  - **Unconscionability**
    - **absence of meaningful choice on the part of one of the parties**
      - some equality of bargaining power (procedural)
        - contradiction: if we look to business setting and all use the same terms
      - reasonable opportunity to understand the terms of the contract (not hidden or minimized by deceptive sales practices) (substantive)
      - Meaningful choice..., or high pressure/deceptive sales tactics
    - **together with contract terms that are unreasonably favorable to the other party** (look at the setting...here it's commercial)
  - **UCC §2-302 – provides that a court may refuse to enforce a contract, which it finds to be unconscionable at the time it was made or limit the application of any unconscionable clause as to avoid any unconscionable result**



- Frostifresh Corp v. Reynoso (note) – Spanish speaking DDs signed an English contract for a \$1000 fridge
  - No bargaining power + price is too high, it can be considered unconscionable (Central Budget Corp. v. Sanchez)
  - Even though the contract was unconscionable, DDs were to pay cost + reasonable profit + reasonable finance charges (not really a remedy or deterrence of unconscionable behavior)

- Timeshare...good faith

- **Gianni Sport Ltd. V. Gantos, Inc.** – DD submitted to PP a purchase order for women's holiday clothing, but reserved the right to terminate as long as goods haven't been shipped...both in commercial setting
  - **UCC – looks to see if in light of the commercial background and commercial needs of the particular trade, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract**
  - To determine unconscionability
    - Relative bargaining power of the parties, the parties economic strength, the alternative sources of supply
    - is the challenged term substantively reasonable? If so, other options or unequal bargaining power will not invalidate contract.
  - Court found the clause was not reasonable, PP had no bargaining power, DD was much more powerful (would be left with clothes that'd soon be out of fashion)

## Chapter Five: The Maturing and Breach of Contract Duties

### Effects of Express Conditions

- **Condition**
  - **Some operative fact subsequent to acceptance and prior to discharge**
  - A fact upon which the rights and duties of the parties depend
  - It may be a performance that has been promised or a fact as to which there is no promise
  - Occurrence of a condition creates a duty (fulfillment of a promise discharges a duty)
  - Non-occurrence of a condition will prevent the existence of a duty in the other party, but it may not create any (duty to pay damages) at all, and it will not unless someone has promised that it shall occur
- **Howard v. Federal Crop Ins. Corp.** – heavy rains ruined crop, tried to recover from insurance company, DD denied claim bc stalks had been plowed and thus destroyed...condition precedent in one paragraph, but not another
  - If language saying stalks shall not be destroyed is a condition precedent, then they forfeit coverage
  - But if language is a promise/covenant/obligation, DD can recover damage sustained, but must pay coverage
  - How do we know?
    - Intention of parties...main criteria...Glaholm v. Hays
      - Look at language
        - The expression of one thing is the exclusion of another (expressis unis)...one paragraph did, but another didn't
      - Circumstances/ trade usages
    - General legal policy against forfeiture and **§261 Interpretation of doubtful words as promise or condition**
      - ...if question of whether it's a promise or condition precedent, they will be construed as a promise
  - Warranted = condition precedent often
  - Condition precedent...specifies something to be done, tells when something won't be payable...needs to be done for an agreement to be enforced...excuses duty and can't get damages
  - Promise – needs to be performed as part of the agreement...doesn't excuse performance and can get damages

- **Gilbert v. Globe Rutgers Fire Ins. Co.** – beach cottage burned by fire...Insurance policy gave one 12 months to commence action...DD promised to pay for a year and then refused...Action by PP was brought four years after fire and three years after insurance refused payment
  - Court held that action was not commenced within a reasonable time after insurance's notification/refusal
    - Add time that one believed claim would be paid to original time given...time limitation begins when estoppel is lifted
  - Control of condition occurring is in PP's hands (though at first he is induced not to perform)
  - DD was estopped from denying claim while they said they'd pay, but didn't waive condition permanently
  - Nonoccurrence of a condition may be excused because of DDs conduct
- **Semmes v. Hartford Insurance Co.** (note) – 12 month limit for bringing suit after damages occur, Civil War prevented commencement of action within 12 months
  - Where fulfillment of the condition is impossible within the state time period, condition must be fulfilled within the reasonable time fixed by statute of limitations
- **Aetna Cas & Sur v. Murphy** – DD tried to get his insurance (3<sup>rd</sup> party) to cover damages he caused...but he delayed in giving them info as required
  - Absent a showing of material prejudice (harms the insurance company), an insured's failure to give timely notice doesn't discharge the insurer's continuing duty to provide insurance coverage
    - This was a contract of adhesion and would cause a disproportionate loss to the DD
  - Condition can be excused where it doesn't prejudice the other party

### Conditions of Satisfaction

- **Second Nat'l Bank v. Pan-American Bridge Co.** – DD used 10 rivets instead of 8
  - When a condition precedent for payment is certificate of satisfaction by a third party, the test for whether the certificate was withheld improperly is bad faith of the actor, not unreasonableness. (doesn't matter what courts think is right)
  - Tension btwn allowing parties to settle on their own and avoiding coercion (Duncan and Marton Remodeling)...courts will enforce parties' settlements, even if unreasonable, as long as they are in good faith/not fraudulent
- **Maurer v. School District No. 1** (note) - school...liquidated damages
  - Refusal to grant certificate for reasons other than unsatisfactory work are refusals in bad faith
  - Work was completed...he should give certificate
- **Fay v. Moore** (note) – architect giving bad instructions from owner to builder
  - withheld certificate bc owner directed him not to, not because work wasn't good
  - he's supposed use his own judgment...didn't and thus wrong
- **Hartford Elec. Applicators of Thermalux, Inc. V. Alden** (note) - PP made repairs due to architect's dissatisfaction, but architect didn't check again
  - Refusal by architect to inspect the work waives the condition precedent needed to receive payment
- **Furmsidt v. Hotel Abbey Holding Corp.** – PP rendered valet service, which had to meet with DDs approval...DD discontinued service
  - For aesthetic contracts, good faith is std./honest judgment of party for measuring satisfaction
  - For functional contracts, use reasonable person std
- **Haymore v. Levinson** (note) – PP sold house to DD...before they pay \$3000 they demand more repairs, then say they are dissatisfied again
  - Condition of satisfaction is functional and is an objective std.
  - Party giving approval has incentive not to bc then he doesn't have to pay

### Constructive Conditions: The Order of Performance

- **Three types of conditions**
  - o **Mutual and independent** – either party may recover damages from the other and one's nonperformance does not excuse the other
  - o **Dependent** – performance of one depends on the prior performance of the other and until the prior condition is performed, the other party isn't liable to an action on his covenant
  - o **Mutual conditions to be performed at the same time** – if on party is ready and offers to perform and the other neglects or refuses to perform his, he who is ready and offered has fulfilled his engagement and may maintain an action for the default of the other
  - o **Nichols v. Raynbred** – PP sued for money even though he didn't deliver cow
    - PP can get money even if he doesn't deliver the cow
    - Promises are independent...each party can expect others to perform even if they don't perform (old rule)
  - o **Kingston v. Preston** – PP was to get business but didn't procure good and sufficient security and thus DD wouldn't give him business
    - Here giving security was condition precedent to DD giving him the business
    - Giving of security is not only a promise, but a condition
      - How to determine if it's a promise and a condition?...dependent
        - o Look at language...little help...not express contract
        - o Intent of parties...written/circumstances
        - o What's fair and just

#### Restatement

- **Render or Tender Rule**
  - o In order to collect damages, you must attempt to tender performance. Exception is where in advance of an exchange, a party knows the other will not perform, he will have an obligation to render or tender performance to maintain an action for breach
  - o Render – to be able to perform
  - o Tender – to offer to perform
  - o **Price v. Van Lint** – deed delayed from Holland while being signed
    - When it's in contemplation of both parties that a promised act may be impossible to perform before the date specified for the other party's performance, then the promises are viewed as independent
    - Court's don't favor independent promises (favor concurrently conditional)
      - But here they look at the extraordinary circumstances which result in injury
  - o **Ziehen v. Smith** – DD was to convey a good and sufficient deed to the PP for a hotel and land. Neither of them tried to render or tender performance on the given date. Later it was found that there was an action to foreclose the mortgage on the land that neither PP or DD knew about.
    - General rule: when the acts of the parties are to be concurrent, in order to entitle a party to recover damage for breach of an executory contract, he must be willing to show performance or tender performance on his part and demand performance from the other party
      - Exception
        - o When the DD is unable to tender performance
        - o Tendering of performance would be a useless act
        - o Where the other party repudiates their part of the contract (???pg. 799 note)

#### - Bell

- o **Neves v. Wright** (note) – seller did not have good title to real estate when selling
  - Seller does not have to have legal title during the entire executory period of a real estate contract
  - The test is whether the defect, by its nature, is one that can be removed, as a practical nature.

#### Protecting the Exchange on Bargain

- once a party ceases performance, we must enquire into whether the effects on nonperformance are sufficiently serious to justify the other side in responding in the manner it did

- **Oshinsky v. Lorraine Mfg. Co.** – shirtings were assumed, though not expressly stated, to be delivered on Nov 15<sup>th</sup>, but were delivered on Nov. 16<sup>th</sup>
  - The purchaser is not bound to accept and pay for goods, unless the goods are delivered and tendered on the day specified in the contract
  - In contracts for the sale of goods, it is assumed that time is of the essence and thus late delivery automatically terminates the contract
  - Perfect tender rule – a buyer may reject the entire contract if it is not perfect in every manner (quality, qty, time and place of delivery)...opposite of Nichols where PP didn't have to perform at all to induce DDs performance
- **Plante v. Jacobs** – PP built a house for the DDs, but there were about 20 items incompletely performed including a misplaced wall, which narrowed the room 1 foot. Thus DDs didn't finish paying off the contract
  - PPs can't recover unless there is substantial performance
    - whether the performance meets the essential purpose of the contract
    - every detail doesn't have to be in strict compliance with the specifications and plans unless it is the essence of the contract
      - here the house was built close to specifications and did not change the value of the house
    - Damages: diminished value rule...value of the house as it should be – value of the house as it is
    - Cost of repair/replacement is economic waste that is unreasonable and unjustified
  - In contract, if PP has substantially performed (largely performed), then DD will come under a duty to perform (thus PP is permitted recovery (it suffices))
  - Not right to allow DD to have benefit of PPs work without paying
- **Jacob & Youngs v. Kent** (note) – wrong brand of Reading pipe used throughout the house
  - Substantial performance is reached despite a inconsequential and trivial mistake that would place a major economic burden to replace
  - However, a willful transgressor might be treated differently...Cardoza
- **Hadden v. Consolidated Edison Co. of NY** (note) – DD terminated PPs pension when it was found that he had secretly accepted cash from business contractors
  - PPs performance was substantial and DD had received the benefit of his performance for 37 years
  - The value of PPs performance over the course of four decades isn't substantially impaired by his disloyalty in some of those later years
- **Turner Concrete Steel Co. v. Chester Constr. & Contracting Co.** – DD was a subcontractor employed by PP. PP did not pay full amount...disputed amounts and DD quit work
  - **In a construction contract, a subcontractor does not have the right to abandon performance when the contractor does not pay part of a monthly installment because of good faith. Party may only cancel if there is a material breach.**
  - If there is no honest dispute, the contractor may rescind, if in doing so he acts reasonably
  - However, before rescinding, reasonable time must be given to comply with the demand before the contract work is abandoned....though he can stop work until being paid
  - Material breach
    - Opposite of substantial performance
    - Must go to the essence of the contract
    - Consider cause and extent of default, needs and expectations of the parties, and continuance of the nonperformance (Cardoza)
  - Policy - want them to try and work things out
  - Obligation = full performance...discharged
  - Condition = substantial performance...satisfied
- **Greghuan v. Mutual of Omaha Ins. Co.** – mason almost fell and had back problems. Insurance cut off payments
  - Restatement
    - In a unilateral contract for the payment of money in installments after default of one or more, no repudiation can amount to an anticipatory breach of the rest of the installments yet due.

- A refusal to perform is a repudiation even if the party in good faith believes he's not obligated to perform
- Std rule for when an anticipatory breach occurs
  - Reasonably certain that a party is not going to meet its obligations under the contract
  - It's a material breach if the contract is bilateral and the PP hasn't completed performance. If unilateral, PP has no future obligation, if bilateral and PP has completely performed there's no future obligation – doesn't have to remain ready to perform
- Damages
  - Sue at once OR
  - Wait for performance
- **Reigert v. Fisher** – DDs conveyed their home with only 4 acres instead of the 7 written in contract
  - Where there is a substantial defect with respect to the nature, character, situation, extent, or quality of the estate, which is unknown to the vendee, and in regard to which he is not put upon inquiry, specific performance will not be decreed
    - The variance must be substantial and material.
  - If such variance is of small importance or immaterial to his enjoyment of that which has been conveyed, the vendor may insist of performance with compensation to the purchaser
    - He likely would have bought it anyway
- Keating v. Price (note) – shortage of .25 of an acre along waterfront
  - He intended to use the land for a factory and thus the waterfront was important to him
  - It was not an immaterial breach