CONTRACTS OUTLINE

GENERAL IDEAS:
People are free to engage in contracts- fundamental right.
People are not protected by the courts from making made deals in contracts.
Contracts don't involve morality. We are not trying to punish people for their actions.
Breach- how do we determine what person is entitled for the breach of the contract. Courts evaluate the issues, facts, promise; breach to determine which damage measure should be applied.

Chapter 1 - REMEDIES FOR BREACH OF CONTRACT

Section 1 - The Goals of Contract Damages

Hawkins v. McGee- Hairy hand case (NH 1929 pg. 3)
Dr. promises 100% perfect hand. Damages standard emerges expectation or benefit of the bargain damages. Expectation damages is the interest of a party in realizing the value of expectancy that was created by the other's promise. The promise of a 100% hand less what he actually has now the hairy hand. The difference between the two is what the P is entitled to under the expectancy measure.

Sullivan v O'Connor -Nose job Case (Mass. 1973 pg. 7)
Surgery results in undesired result. Performer- undergoes three surgeries. Expectancy measure to harsh. To put the value on the condition that would have resulted if promise lived up to is too hard to determine.
Reliance damages applied: party's interest in recovering losses suffered by virtue of reliance on doctor's promise which includes her costs and amount to get it fixed.

Groves v. John Wunder Co. (Min. 1939 pg 11)
Groves leases land to Wunder for plant, remove gravel from 24 acres. Lease states when done must leave land at a level grade. Cost to level is $60K but actual property value is only $12K. D claims to fulfill contract would result in economic waste.
Court say the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance. The D is liable to P for reasonable cost of (performance) doing what defendant promised to do and willfully and in bad faith did not meet.

Acme Mills & Elevator Co. v Johnson (KY 1911 pg 22)
Johnson to deliver wheat to Acme for 1.03 a bushel to be sold sometime in future. They provided him with sacks to put wheat in. Ct finds instead of being injured Acme benefited from breach due to drop in market value of wheat. Measure damages as difference between contract price and market value (UCC adopts in Section 2-713). Since buyer could have went and bought wheat on open market for less then contract price there was no damage. No measurable loss - no expectation damages. However, can recover restitution damages for the sacks they provided that seller used to sell wheat to other party?

UCC § 2-713: Buyer's Damages for Non-delivery or repudiation:
(1) Subject to the provisions of this article with respect to proof of market price, the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together and consequential damages, but less expenses saved in consequence of the seller's breach. (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Laurin v DeCarolis Construction Co. Inc. (Mass. 1977 pg 25)

P purchased land from D, which house was being built on. D removed gravel (360 truckloads) from property without Ps consent. P entitled to value of gravel, as it laid on ground- can't recover for value added by Ds labor.

Lousie Caroline Nursing Home v. Dix. Constr. Corp. (Mass. 1972 pg 36)
P contracted to build nursing home. D failed to build and P gets someone else to build. Court upholds cost of completion measure of damages: if the cost of completing project is more than K can recover. In this case to complete the construction P didn't pay more than K price. No harm no damages.

Section 2 - Limitations on Expectation Damages

Rockingham County v Luten Bridge Co. (1929 pg. 39)
P had K to build bridge for county. Change in control of county commissioners. P informed K no good but continues to build. County breach and at that point P should have stopped building. P would be entitled to materials used, expenses, incurred and profit of K. But only up to the point where he was informed of breach. Rule- duty to mitigate damages.

Parker v. 20th Century Fox (Ca 1970 pg. 45)
P had K to be in musical. Cancel movie offered other movie, with different options. L says if D breaches they pay $750,000. D claims P duty to mitigate requires her to take other movie. Ct finds that duty to mitigate does not require her to take employment that is both different and inferior.

Missouri Furnace Co. v. Cochran (PA 1881 pg. 54)
D breached K for the sale and delivery of coal to P. Serial K for 36,621 tons @ $1.20 ton to be delivered in several shipments over time. D delivers 3,765 tons and rescinds remainder of contract. P contracts with 3d party to for remainder of coal @ $4 ton. P wants the difference between new K price and K price with D. Ct. finds P was not bound to enter into new forward contract. Ds breach occurs each time he fails to make deliveries. Damages will be based on the difference between market value and K price at the time of each breach. *Different result today due to UCC 2-712: breach can purchase goods or contract to purchase goods to cover items not received from seller if done reasonably and in good faith.

UCC § 2-712 "Cover"; Buyer's Procurement of Substitute Goods
(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined but less expenses saved in consequence of the seller's breach. (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Reliance Cooperage Corp. v. Treat (8th Cir 1952 pg. 56)
P contracts for oak staves @ $450. D contacts P and says needs to increase K price in August. In Oct. P refuses price increase. P claims entitled to recover the difference between the K price and the market price. Ct rejects P claims. Says the doctrine of anticipatory breach by repudiation is intended to be an aid to the injured party not used to convert into a benefit.

Neri V. Retail Marine Corp. (NY 1972 pg 62)
P contracts to buy a boat & gives deposit of $4,250. 6 days later informs D not going to buy boat and wants deposit back. D says no can't I have already ordered from manufacturer. What damages is D entitled to due to the breach by P?
Ct agrees that P is entitled to get deposit back less loss of profits and incidental damages of D. (UCC § 2-710). P says no loss of profits because D sold boat, but D says if not for the breach I would have sold 2 boats. The standard measure of damages would not have put seller back in as good as position as if performance was done.

UCC § 2-710 Seller's Incidental Damages
Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

Hadley v. Baxendale (Court of Exchequer 1854 pg 67)
P owned a mill that shut down because of a bad crankshaft. Contracted with D to get the part to Greenwich by noon the next day. The shaft was not delivered the next day. P wants damages for time mill shut down due to non-delivery. Ct finds special circumstances never communicated to D. The loss of profits not a consequence of the breach did not flow naturally from K; not reasonably foreseeable.
Special circumstances- both parties must have been able to potentially understand the special circumstances.

Valentine v. General American Credit Inc. (Mich. 1984 pg 75)
P had employment contract with D. She is seeking mental anguish damages arising from breach. General rule is uniformly to deny mental distress damages even though they are foreseeable within rule of Hadley. Ct finds that no compensation for mental distress because this employment contract is a commercial contract and does not involve personal issues. Expectation damages are limited. Consequential and incidental damages are not allowed under expectation damages. The goal of contract law is not to punish people for things we don't like.

Freund v. Washington Squqre Press, Inc. (NY 1974 pg 79)
P contracts with D to publish book. Company failed to publish. P wants specific performance. Under contract law specific performance is rare. An exception to this is land deals. Ct finds P was deprived of his royalties due to the breach. This amount is purely speculative and cannot be established to a certainty. He did not suffer losses of actual printing costs. Ct says cannot recover for speculative damages because this is not a natural flow of damages from this contract. You need to be able to quantify damages. Was awarded 6 cents.

Fera v. Village Plaza (Pg 82)Book and bottle shop. Going to open shop in mall. Offered different spot but refused. Sued for net profits would have made. Ct finds that although damages are purely speculative, the fact finders, the jury, found that there was sufficient evidence to possibly establish damages based on expert testimony.

Section 3 - Alternative Interests: Reliance and Restitution

Chicago Coliseum Club v. Dempsey (Ill. 1932 pg. 85)
P contract with D for boxing match. Before P gets contract signed with D he contracts with other boxer to fight, a promoter. P sends note to D saying as per K a dr. will be coming out to give exam for insurance. D sends we don't have a K and I am fighting another fight. Gets injunction D fights anyways.
Ct finds (1) loss of profits from fight to speculative. (2) Expenses incurred for K with other fighter did not naturally flow from D contract (Did not have the signed contract with Dempsey yet). (3) Cost of injunction- took these steps at own financial risk D had breached. (4) Post signing & pre-breach expenses- some allowed. Money he spent on arranging the event. Special expenses are recoverable.
General holding- items recoverable are such items o f expense as were incurred between date of the signing of the agreement and breach of July 10. Only those expenses incurred as a necessary expense in furtherance of the performance.
This does not mesh with Acme?

Boone v. Coe (Ky 1913 pg. 96)
P contracts to move from KY to TX. D told P he would have a house for him to live on and provide materials to build a barn for his animals. Get to TX and D won't let them on farm. Took them 55 days to get there and only four to return home. This is oral contract (parole). P claims that he relied on the K and should be allowed to recover his out of pocket expenditures. Ct. finds that the statute of frauds because it could not be performed within a year and was not in writing. However, if D had received benefits from the acts of part performance and

the law therefore implies a promise to pay. If D received benefits from Ps actions those expense could be recovered. Reliance damages could be granted if the other side had received a benefit.

Statute of Frauds requires that certain contracts must be in writing. These include contracts for land, marriage, cannot be finished in one year. UCC contract for sale of goods of $500 must be in writing.

United States v. Algernon Blair, Inc. (1973 pg. 99)
D subcontracted with P to perform certain steel work and a crane for government K. P began performance then D refused to pay. Ds refusal was breach and P had completed 28% of job and ceased work. P seeks quantum meruit damages. Did not seek expectation damages because to complete the job would have cost him more- made bad bargain.
Ct finds that the standard for measuring the reasonable value of the services rendered is the amount for which services could have been purchased from one in the Ps position at the time and place the services were rendered. Removed the value given D by P actions. In end game, P benefits from Ds breach. Court says trying to remove unjust enrichment gained by D.

Britton v. Turner (NH 1834 pg 111)
P agreed to work D's farm for 1 year @ $120 dollars. After working for 91/2 months work P abandoned. Ct. finds when a party receives value or had advantage from labor he is liable to pay the reasonable worth of what he has received. Quantum meruit- other party received a benefit unjustly. <u>Implied contract or obligation to pay</u> for what you have received. Ct departs from historical contract law in this case. Dealing with getting around an expressed K. Claim within expressed K there also are implied K between the parties. Claim the implied promise theory entitles P to recover partial amount of his salary that he was guaranteed under the contract. Service contracts are often put under this theory of quantum meruit.

Pinches v. Swedish Evangelical Lutheran Church (Conn 1887 pg 117)
Contract to build a church. Church built and some of specifications not right. Ceiling was lower, windows were shorter and narrower, and seats were narrower. Church refuses to pay. Ct finds P acted in good faith and church is reasonably adapted to the wants and needs of D. It would be impossible to make the church to conform to the contract without tearing it down and rebuild. <u>Diminution in the value</u> of the building by deviation in the contract. Efficiency and waste concept that must avoid economic waste.

Vines v. Orchard Hills, Inc. (Ct 1980 pg 121)
P going to buy a condo & puts down deposit. Being transferred and wants his deposit back. He breaches but he still wants restitution. The contract has a <u>liquidated damages</u> clause that says that if breach 10% down payment is the actual damages.

Ct. finds that a purchaser whose breach is not willful has a restitution claim to recover moneys paid that unjustly enrich his seller. P must prove unjust enrichment. The court generally is not friendly to liquidated damages clause because they are considered in some instances as a penalty. If the damages are a penalty it will not be enforced because contracts damages rule is not to penalize. Liquidated damages are okay if they are a reasonable estimate at the time the contract that the damages are difficult to ascertain and are a reasonable amount of damage. 10% in real estate contracts as liquidated damages is really standard in the industry so, it may be okay. The court sends back for retrial- give P the ability to present evidence to why this is unjust enrichment.

GENERALLY DAMAGES

Damages for Breach of Contract (3 types)

1. **Expectation** - (Hawkins)- this is classical general rule of put the non-breaching party in the same position they would be in of promise was kept. Also know as Benefit of the bargain. Reliance damages are usually subsumed in expectation damages.

2. **Reliance-** (Sullivan)- This is out of pocket expense based on the promise made in a contract. Put back in position before K was made. Out of pocket expenses. These are usually less than expectancy damages and if expectation damages are awarded included in that amount.

3. **Restitution**- (Groves)- The interest of a party in recovering values conferred on the other party through efforts to perform a contract. Dislodging value that doesn't belong to the other party. *Quantum Meruit- type of restitution damage*. Recovery allowed under implied K (quasi) to pay reasonable value of services rendered. Unjust enrichment. Restore to P was is rightfully his. Based on implied promise to pay for benefit received. Even in written contracts courts have recognized this implied promise.

Other theories:
Economic waste- the court may limit the claims to recover full damages for whole item if economic waste would result. Ex. building that use wrong pipe and they want to tear down whole building.

Section 4 – Contractual Controls on the Damage

Liquidated damages cannot be a penalty.
The test of enforceability is whether the damages are:

1. Damages are difficult to estimate accurately; and
2. Whether the amount fixed is a reasonable forecast of what is required to justly compensate the injured party.

a) ***City of Rye v. Public Services Mut. Ins. Co.*** (City of Rye sought to recover liquidated damages from a bond without proving actual loss suffered)
   i) P sueing D for a $100000 bond posted to ensure liquidated damages of $200/day for each day past the projected completion date for the buildings. 500 days past completion date, city sued to recover bond.
   ii) An action on a performance bond will not lie if the amount is not related to actual damages.
   iii) Parties may provide for liquidated damages that reasonably approximate likely actual damages – however if liquidated damages are so disproportionate as to constitute a penalty – they will not be permitted.
   iv) No evidence that P incurred any damages
   v) To allow P to recover would go against premise of contract law which is to restore damaged party – not put them at a better place than if there was no breach.

Restatement §356 – Liquidated Damages and Penalties

1. Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as penalty.

b) ***Wilt v. Waterfield*** (sale of farm - % used for liquidated damages)
   i) D contracted to sell his farm to P for $19000 but sold to another party for $26000– provision in contract that if either party breaches, sum for damages equal to 10% of the agreed sale price.
   ii) Liquidated damages clause that utilizes an arbitrary percentage measurement to calculate damages is invalid as a penalty.
   iii) Since liquidated clause is invalid – P is entitled to recover for his actual loss which is the difference b/w the contract price and the market price at the time and place of delivery of the property.
      (1) P entitled to $7000

c) ***Fretwell v. Protection Alarm Co.*** (security system did not work – P sued for damages)

i) P contracted with D for home security system, system failed and P sued for damages. D had a liability limitation clause that if the system failed, only liable for $50 – Ps damages were $90000.
ii) Liability limitations in a contract are lawful and constitute a part of the parties' relationship.
iii) Contract provides for a limitation on liability which is what the parties bargained for – D is only liable for $50

Section 5 - Enforcement in Equity

d) ***Van Wagner Advertising Corp. v. S & M Enterprises*** (billboard space) (Specific Performance)
   i) P contracted with Michaels to lease billboard space – Michaels sold their property to D who then terminated Ps contract. P is suing for specific performance to get their billboard space back. P does not want monetary damages and D argues that future damages to P are speculative and uncertain.
   ii) Where there is substantial, reliable information as to the monetary value of the subject after a breached contract and where specific performance would create harm to the defendant disproportionate to its aid to the P, specific performance is not available.
   iii) To obtain specific performance:
      (1) P must show that monetary damages are inadequate because the subject matter fo the contract is unique OR
      (2) Because damages are too speculative to be awarded
   iv) Subject matter of the contract is unique when there is little reliable information as to its economic value – creating a high risk that monetary damages will over or under compensate the P
   v) In this case – space is not unique – possible to estimate future losses – specific performance is not available since it would inequitably burden D disproportionate to Ps benefit.
   vi) **RESTATEMENT (SECOND) OF CONTRACTS § 360** – historically sale of land has been given special treatment though specific performance – land considered unique and monetarty damages are considered inadequate compensation

Restatement §360 – Factors Affecting Adequacy of Damages (p. 157)

In determining whether the remedy in damages would be adequate [to protect the expectation interest of the injured party], the following circumstances are significant:
   a) the difficulty of proving damages w/ reasonable certainty;
   b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages; and
   c) the likelihood that an award of damages could not be collected.

e) ***Fitzpatrick v. Michael*** (elderly man was going to leave nurse estate but fired her) (Specific Performance)
   i) P was told that if she stayed with D until the end of his life, he would give her room & board, $8/week, he would leave her a life estate in his home and title to his automobiles – D repudiated his contract two years later w/o explanation – P sues for specific performance
   ii) Court will not grant specific performance in a personal services contract
      (1) Would require the court to monitor the quantity and quality of the services to be rendered by P – beyond the scope of the jurisdiction of the court
      (2) Because excessive court entanglement is involved the request for specific performance must be denied

f) ***American Broadcasting Companies v. Wolf*** (sportscaster's employment contract w/ABC)
   i) ABC entered into an employment contract with D – D agreed to enter into 90 day good faith negotiations prior to termination of contract and could not negotiate with anybody else during first half of this period. P also was allowed right of first refusal to any contract offer to D.
   ii) 145 days prior to end of contract, Wolf entered into negotiations with CBS – tentatively agreed to offerbut said had to keep open until day following the first refusal period.

iii) Ds actions constituted a breach of the agreement to neogtiat in good faith but did not breach re: first refusal – first refusal right only applied to offers accepted during the designated period – not 145 days out.
iv) Employment contracts will not be affirmatively enformced by courts
v) Negative injuctions are sometimes used to prevent employee from working for a competitor during contracted term.
vi) After an employment contract has expired, negative enforcement will only be granted when necessary to prevent injury to the employer from:
 (1) Unfair competition – usually involveing the theft of trade secrets or customer lists
 (2) To enforce an express and valid anticompetitive covenant
vii) Since neither of these factors are present – equitable relief is denied

g) ***Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co*** (refurbishing steel mill) (Specific performance)
 i) D agreed to refurbish a steel mill for P and hire additional workers which he incorporated into contract. D lagged behind schedule and refused to hire additional workers – P sues for specific performance to require D to hire workers
 ii) Court will not issue a decree of specific performance where such an order would require extensive research by the court
 iii) P may seek relief in form of damages – but would be unwise for court to supervise a massive construction project

Chapter 2 - GROUNDS FOR ENFORCING PROMISES

Section 1 – Formality

h) ***Congregation Kadimah Toras-Moshe v. DeLeo*** (temple sought to enforce decent's oral promise to donate money)
 i) An oral promice to donate money is unenforceable.
 ii) Gratuitous promise to do or give something to another without any benefit accruing to the promisor lacks element of consideration and therefore no contract
 iii) Consideration – Value given by one party in exchange for performance or promise to perform by another party
 iv) By allowing oral promises to be considered contracts, it would cause fraudlent claims.

Section 2 - Exchange Through Bargain

i) ***Hamer v. Sidway*** (nephew promised to not drink or smoke for $5000)
 i) Uncle requested his nephew not drink or smoke until he was 21 – if he performed as requested, he would give him $5000)
 ii) Uncle died – nephew brings suit against estate
 iii) Forbearance from a lawful act is sufficient consideration
 iv) Forbearance – Refraining from doing something that one has the legal right to do.
 v) Courts will not ask whether the thing promised does benefit the promise or is of any substantial value to anyone – enough that something is promised, done, forborne, or suffered by the party to whome promise is made as consideration for promise
 vi) Promise to go to college is sufficient consideration
 vii) Immaterial whether the forbearance would have been undertaken regardless of promise

<u>Restatement §71 – Requirement of Exchange; Types of Exchange</u> (p. 209) -

<u>Restatement §81 – Consideration as Motive or Inducing Cause</u> (p. 209) -

j) ***Fischer v. Union Trust Co*** (Fisher deeded realty to daughter and agreed to pay off mortgage – he died before doing so and she sues)
   i) Daughter was mental incompetent – gave father $1 as consideration of contract
   ii) Nominal Consideration – Consideration that is so insignificant that it does not represent the actual value received from the agreement
   iii) Mere love and affection do not constitute sufficient consideration to compel performance of a purely executory conract.
   iv) Circumstances of grantor's actual motivation for conveyance of land was love and affection
   v) Not adequate consideration
   vi) Courts typically do not evaluate the adequacy of consideration between parties

k) ***Batsakis v. Demotsis*** (500000 drachmae - $25 in return for Ds promise to repay $2000)
   i) WWII – P loaned D 500000 drachmae and wanted full repayment of $2000. D argued that was lack of adequate consideration
   ii) Inadequacy of condiseration will not void a contract – benefit of the bargain
   iii) May not be a good bargain, but it was agreed to and bargained for.
   iv) Restatement § 234 – may turn same case today differently
      (1) gross disparity in the values exchanged may be sufficient ground, without more, for denying specific performance
      (2) provides for avoidance of a contract which contains an unconscionable term

l) ***Duncan v. Black*** (Illegal cotton quota - $1500 promissory note)
   i) P contracted with D to purchase land and a certain amount of cotton to grow – because of the govt quotas on cotton, short first year so D gave P some of his. Next year, D didn't do that and P threatened to sue – D offered a $1500 promissory note but later refused to execute it. P sues for damages.
   ii) Forebearance to sue on a claim is not sufficient consideration if claim itself is illegal.
   iii) Claim is based on something contrary to public policy – direct violation of statute – cannot form basis of consideration for settlement
   iv) Wrong done is against the state and only the state can forgive it.
   v) Attempt to transfer allotment was contrary to Federal allotment system and illegal – therefore can't constitute consideration

<u>Restatement §74 – Settlement of Claims</u> (p. 224)

m) ***Martin v. Little, Brown & Co.*** (P found that one of Ds books was plagiarized – send information and wanted compensation) (Quasi Contract)
   i) One who volunteers information to another to the other's benefit has not formed a contract.
   ii) There was no offer-acceptance therefore no contract
   iii) When party performs gratuitously, can't be an implied-in-fact contract because parties did not demonstrate a contract-like relationship
   iv) Those who volunteer their services without recompense have no right to unilaterally demand payment therefore after the fact
   v) Quasi-Contract – An implied contract created by law to prevent unjust enrichment
   vi) Unjust Enrichment – The unlawful acquisition of money or property of another for which both law and equity require restitution to be made
   vii) Restitution – the return or restoration of what the defendant gained in a transaction to prevent the unjust enrichment of the defendant.

Section 3 - Promises Grounded in the Past

n) ***Mills v. Wyman*** (caring of Ds sick son – D promised to pay expenses and didn't)

i) A moral obligation is insufficient as consideration for a promise
ii) Moral Consideration – an inducement to enter a contract that is not enforceable at law, but is made based on a moral obligation and may be enforceable in order to prevent unjust enrichment on the part of the promisor

o) ***Webb v. McGowin*** (P injured himself while trying to save Ds life – D promised to pay for remainder of Ps life. D dies and his estate stops payment)
i) A moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit – even though there was no original duty or liability resting on promisor
ii) Material Benefit – An advantage gained by entering into a contract that is essential to the performance of the agreement and without which the contract would not have been entered into.

Restatement §86 – Promise for Benefit Received (p. 243) -

1 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.
2 A promise is not binding under Subsection (1)
   a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
   b) to the extent that its value is disproportionate to the benefit

Chapter 2 - Grounds for Enforcing Promises

Section 4 – Reliance on a promise (Promissory Estoppel)

- **Traditional rule** – absent bargained for consideration, agreements are not enforceable

Kirksey v Kirksey (1845) –

D promises to let P and children move into his land – but later kicks them out
Majority – promise was a gift – lacked consideration so not enforceable
Dissent – loss and inconvenience of P (moving 60 mi.) is suff. consideration to support the promise

Rickets v Scothorne (1898) –

P, a working girl, was induced to abandon employment and rely on the bounty promised her by grandfather
- Lacks the "bargain" feature of Hamer v Sidway

Rule commonly applied to promises to subscribe to charities applies here:
- Expenditure of money or assumption of liability by donee on the faith of the promise is the true reason D is estopped to deny consideration

Allegheney College v Natl. Chautauqua Bank (1927) –

"in consideration of [D's] interest in Christian education and in consideration of others subscribing" D promises to pay.
- Memorial fund in D's name will be established.

Cordozo – the promise to perpetuate the name of the founder is sufficient consideration
- It is needless to consider whether promissory estoppel will result
- Positions promissory estoppel not as an exception to consideration but squarely w/I it.

Dissent – no quid pro quo (consideration)

- even if there was an offer there was no acceptance bc the gift had never been made known as demanded

<u>**Misfeasance – Nonfeasance Distinction:**</u>

- **misfeasance (tort action)** – active negligence to support a tort
- **nonfeasance** is generally a contract action unless there was a special duty

<u>**Modern Applications of Promissory Estoppel –**</u>

Restatement §90: promisor is estopped to deny enforceability if:

- Promise might foreseeably induce the promisee to rely or take some action (of a definite and substantial character) based thereon;
- There was a reasonable reliance on the part of promisee;
- [As a result, promisee suffered substantial economic detriment;]?
- Injustice can be avoided only by enforcement of promise.

Recovery is limited to the extent of reliance and not full expectations

East Providence Credit Union v Geremia (1968)

"if we are not notified of a renewal policy w/I 10 days, we shall be forced to renew the policy for you and apply this amount to your loan"

- D called P and told them to go ahead and pay the premium (but P didn't)
- Was this really a promise? (sounds more like a threat)

Court applies RST § 90

- D's reliance and forbearance to obtain insurance himself is grounds for promissory estoppel
- Even so, there is valid consideration because P would have earned interest on the insurance premiums paid

Enforcement of charitable subscriptions:

I & I Holding v Gainsburg (1938) –

An invitation or request to perform the services need not be expressed, it can be implied
Dissent – P must prove that it changed its position bc of the promise , or – of we accept the doctrine of promissory estoppel – as a consequence of the promise

Salisbury v Northwestern Bell

Public policy – requirement of proof of reliance might result in enforcement of fewer charitable promises
Most courts have rejected this but it is commonly believed that charitable subscriptions are enforced in this country despite the absence of significant reliance

Estoppel from applying Statute of frauds

Seavey v Drake –

P had made significant improvements to land that his father had promised to transfer to him
Father died - there was no written contract and statute of frauds prohibited the transfer of land
Equity lends its aid, when there has been part performance, to remove the bar of the statute

- It is a fraud for the vendor to insist upon the absence of a written instrument when he has permitted the contract to be partly executed.

- Part performance can also be shown by occupancy of the vendee over an extended stretch of time w/ no sign of protest from vendor
- Equity protects a parol gift of land equally w/ a parol agreement to sell it

RST § 139 *–incorporates essential elements of § 90 into an estoppel to plead statute of frauds- looks into:*

- Availability and adequacy of other remedies – e.g. cancellation and restitution
- Definite and substantial character of action or forbearance
- Extent to which above corroborates the evidence of contract
- Reasonableness of action or forbearance
- Foreseeability of action or forbearance

Forrer v Sears (1967)

Parol promise of "permanent employment" is generally interpreted to mean "at will employment" when there is no further consideration in addition to services incident to employment

- Additional consideration must be economical or financial benefit to employer
- P giving up his farming operation did not qualify as additional consideration

Here promise of employment was kept
=>promissory estoppel does not apply

Stearns v Emery-Waterhouse Co. (1991)

Similar to Forrer except parol contract was for definite period (5 yrs)
Actual subjective intent to deceive can estop the statute of frauds

- But otherwise it id too easy assert reliance on a promise of employment – promissory estoppel does not apply here

Goodman v Dicker (1948)

Expenses incurred in reliance of a promise to grant franchise can be recovered
However, lost profits should not be allowed bc they were not incurred as a result of P's reliance

Waiver or Estoppel?

Mahban v MGM Grand Hotels

Even if there is no explicit waiver of a contractual right, the actions of a party in inducing detrimental reliance of the other may be grounds for promissory estoppel of asserting that right

UCC § 2-209(4) – (5)

- attempt at modification can serve as a waiver (even if it doesn't satisfy statute of frauds)
- waiver can be retracted by reasonable notification

Adjustment of Contract

Levine v Blumenthal (1936)

- There was parol evidence that P agreed to lower the payment amount of an existing 2 yr lease
- Subsequent agreement to modify an existing contract must be accompanied by independent consideration

- Promise to do what a promisor is already legally bound to do is unreal consideration
- Economic adversity in not a sufficient reason to waive consideration requirement

Legal Duty Rule

- However, payment of something other than money, prepayment, payment to a different place, or payment to a different person may be sufficient consideration for a lowered payment of a debt

Statutory exception to requirement of consideration for adjustment

- **UCC § 2-209(1)** an agreement modifying a contract w/i this article needs no consideration to be binding

Section 5 – Promises of Limited Commitment (illusory promise)

Bilateral contracts – promise for promise

Can a promise serve as consideration?

- *working rule (99% reliable) that a promise is consideration if the performance promised, either act or forbearance, would be consideration if it alone where bargained for*

Mutuality of Obligation – traditional contract rule

Both parties must be bound are neither will be

- Exception – contracts with minors/insane (voidable at their option)

Illusory promise –

promisor retains an unlimited right to decide later the nature and extent of his performance

- e.g. A promises to buy from B "as much as he wants" –
  - not enforceable bc there is no commitment on the part of A
  - no consideration bc B has the option to buy from C if it is cheaper

- Contract can be modified to have consideration
  - A promises to buy *exclusively* from B as much as he needs (requirements contract); or
  - A promises to buy from B as much as he wants, *but a minimum amt of x*

Davis v General Food Corp (1937)

D's letter –

- "We will be glad to examine your idea, but only with the understanding that the use to be made of it by us and the compensation, if any, to be paid therefore are matters resting solely in our discretion"
  - illusory - too indefinite for legal enforcement
- no quantum meruit bc P did not rely upon the promise as a contractual obligation but on the fairness and liberality of D

Nat Nal Service stations v Wolf (1952)

Courts are reluctant to enforce statute of frauds and will interpret contracts as a series of separate contracts

Obering v Swain-Roach Lumber (1927)

- Conditional promises do not lack consideration
- As soon as condition (P purchasing land) occurred, D was bound to perform

Omni Group v Seattle - condition of satisfaction is not illusory bc there are many objective factors that play a role in determining satisfaction

- Satisfaction is not a matter within P's unfettered discretion
- There is a duty to act with good faith

<u>RST § 77 – illusory and alternative promises</u>

Promise which gives promisor a choice of alternative performances is not consideration unless

- Each of the alternative performances would have been consideration on their own or
- There is a substantial possibility that before promisor exercises his choice events may eliminate alternatives which would not have been consideration

e.g. B agrees to act as A's agent for 3 years but reserves the right to terminate on 30 days notice

- there is consideration bc B is required to keep his agency open for 30 days prior to termination

Wood v Lady Duff (1917)

There is an implied promise from P to use a reasonable effort to promote D's good

Governed by **<u>UCC 2-306(2)</u>** – "good faith required"

Feld v Henry Levy (1975) –

- good faith required to produce goods in an output contract
- fact that performance would be "uneconomical" is not grounds for ceasing production
  - bankruptcy or genuine imperiling of the business would be though

Corensweet v Amana –

- good faith requirement is erratic
- better test would be for unconscionability under **<u>UCC § 2-302</u>**

Sheets v Teddy's Frosted foods

- Public policy limits termination of at will employment
  - Retaliatory discharge of "whistle blowers" is against public policy

- Most states construe "public policy" narrowly
  - e.g. – Price v Carmack Datsun – filing of an insurance claim was a private concern not mandated by public policy

Chapter 3 – The Making of Agreements

<u>Section 1. Mutual Assent</u>

Objective interpretation of contract

Embry v Hagardine

Generally, there must be a "meeting of the minds"

- But it is not literally or universally true

- The "inner intentions" of a party to a contract cannot be alleged to make a contract
- only such intentions as the words or acts of the parties indicate
- determined by a reasonable standard
- general rule
  - is for the court to construe the effect (meaning) of writings relied on to make the contract and also the effect of unambiguous oral word
  - if the words are in dispute, it is for the jury to determine whether or not they were used

- P asks for renewal of contract
  - D replies (P's version) – "Go ahead you're all right. Get you're men out and don't let that worry you."

- No reasonable person would construe that to mean a renewal of contract for another year

Kabil v Mignot

- Mutual assent must be construed from communications and overt acts and not their undisclosed intents and ideas
- But in face to face negotiations words are not everything
  - Fact finder might well believe that what a party thought he was doing would show in what he did.
- Criticism of both theories – Rickets v Pa RR
  - "actual intent" theory - induces much fictional discourse which imputed to the parties intentions that they plainly did not have
  - "objective theory" – excludes as legally irrelevant, consideration of actual intentions of the parties
    - represents more of a desire for legal symmetry

NY Trust v Island Oil

L. Hand -

- In ascertaining what meaning to impute, the circumstances in which the words were used are always relevant and usu. indispensable

When P bought subsidiary, he knew that the amount of money it was owed was a "sham"

Employee Handbook

McDonald v Mobil Coal

Disclaimer - *that policies set forth in employment handbook were not a contract*

- inconspicuous
  - Was not set off by a broader or larger print
  - Contained in the welcoming section of handbook
- Unclear as to effects on the employment relationship
  - No explanation given that D did not consider itself bound by the terms of the handbook

There is ambiguity as to whether D manifested intent to modify at will employment to an employment which could be terminated only for cause

- Remanded to trial court to determine whether employee handbook and course of dealing could be construed as modification

Is Employee handbook an offer?

Pine River state Bank -

- Was there acceptance of the offer and consideration furnished?

Advertisement or Offer?

Moulton v Kershaw –

D's letter - "we are authorized to offer" salt at a certain rate

- Did not specify a specific quantity
  - Enforcement would be difficult bc it was not specified

Nature was to attract attn of those interested in business – not an offer to sell

Agreement to Agree

Joseph Martin Deli v Schumacher

Since material term was left out it was not a contract

- Agreement to agree is not enforceable
- There is no need for explicit expression of the rent to be paid
  - Methodology for determining the rent needs to be w/I the "4 corners" of the lease
- No hint of commitment to be bound by fair market rental value

Course of dealing

- **<u>UCC §1-205, §2-204</u>** – for sale of goods course of dealing may be considered to give meaning to uncertain terms
- Does not apply to Real estate contracts

Empro v Ball-co

- Letter of intent not enforceable
- "subject to" condition of satisfaction of both parties
  - nothing said it was a one-sided commitment

<u>RST § 33 – Certainty:</u>

1. Manifestation of intention cannot be accepted unless the terms are reasonably certain
2. Terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy
3. The fact that one or more terms of a proposed bargain are left open or uncertain may show that manifestation of intention is not intended to be understood as offer or acceptance
   - contracts should be made by the parties and not by the courts
     - remedies must have a basis in the agreement

<u>UCC</u> – fills in when certain terms are not specified

- § 2-305 (price); §2-308 (place of delivery); §2-309 (time of shipment); §2-310 (time for payment)

Detrimental reliance on indefinite promise

Wheeler v White

- Promissory estoppel (RST § 90) applies
- D cannot advance any defense inconsistent with assurance that franchise would be granted

Ambiguity

Raffles v Wichelhaus (Peerless)

- there was no meeting of the minds as to which "peerless" was being referred to
- contract did not specify this either
- no mutual assent therefore no contract

<u>RST § 20 – Effect of misunderstanding</u>

1. No manifestation of mutual assent to an exchange if parties attach 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 has reason to know the meaning attached by the other

2. The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
   - that party did not know of any different meanings attached by the other, and the other knows the meaning attached by the first party

- that party has no reason to know of any different meaning attached by the other, and the other party has reason to know the meaning attached by the first party.

Section 2 – Control Over Contract Formation

Cobaugh v. Klick-Lewis, Inc.
Superior Ct. Penn. (1989)
p. 363

P was playing golf and a sign read if you get a hole in one, you win a free care from D, a car dealership. P gets a hole-in-one to win a car, but finds the sign was for a previous event which was over. D refuses to give P the car and P sues for breach. P wins and D appeals.

D is claiming the offer was for another group the day before. D says it was not there subjective intention to make an offer to P. Subjective intent does not matter it's the manifested intent which construed an offer and by getting a hole in one P accepted the offer.

Court said the sign was promise of an offer which and was a <u>unilateral contract</u> (an exchange of a promise and present performance). Ps hole in one amounted to consideration and the contract was binding.

Affirmed. P wins and courts awards P the car to complete the contract.

Rule: An offer to give away a prize contingent on performance of an act is enforceable by one doing the act.

Allied Steel (D) v. Ford (P)
US Ct of Appeals (1960)
p. 368

On appeal by Allied.

P (Ford) sign a contract to buy some machinery from D (Allied). Ford submitted a order form to Allied which stated that the order agreement was not binding until Allied notified Ford of acceptance. Along with that agreement Ford sent a separate form which required Allied to assume full responsibility and liability for any accidents or problems involving Allied's employees or Ford's employees who use Allied's machine. This contract attempts to move liability from Ford to Allied.

Allied began installing the machine prior to returning the agreement to Ford, before they returned the forms to Ford an Allied employee was hurt b/c of a Ford employee's negligence. Allied says they're not bound by the indemnification provision b/c since the contract was not effective until the gave word back to Ford (acceptance) which occurred 2 months after the injury.

Issue:
1. When does acceptance of the contract take place (after the accident)?

Affirmed -- Court upholds the decision and says there is more than one way to accept a contract. Allied demonstrated acceptance by undertaking the performance as called for in the contract with Ford's knowledge and consent. Ford allowed Allied to come and begin work prior to the signing of the contract documents. The court also said Ford was merely suggesting a mode of acceptance and by showing up and performing Allied demonstrated acceptance by another method.

Rule: Where the offeror suggests a permitted method of acceptance, other methods of acceptance are not precluded.

Davis v. Jacoby

Sup Ct of Cal. (1934)
p. 371

Maternal relatives v. paternal relatives.
A sick old man invited P and her husband to come look after him and his sick and to take care of some of his business affairs. The offer said when his wife dies, you'll inherit his land and other stuff. P responded in a letter that they accept and took care of some business in Canada and headed for Cal. He dies (voiding the contract) before they leave but P still came and cared for his wife until she died. The parties were very close. But the old man's will left all of his stuff to a distant relative D. P is seeking specific performance of an alleged contract to make a will.

Is this an offer or a contract? Was a contract formed and was there acceptance before he died; if not then no land.

Lower court rules that the old guy's offer was a unilateral contract which required the Ps to perform prior to the old guy's death and their letter does not amount to acceptance.

Reversed – offer was ambiguous, so when in doubt it should be construed an a <u>bilateral contract</u> which would allow acceptance in exchange for future performance, as opposed to a <u>unilateral contract</u> which calls for acceptance and actual performance. A bilateral contract immediately protects the expectations of both parties. Specific performance granted.

Unilateral Contract – one in which no promisor receives a promise as consideration for his promise (p. 374)
Bilateral Contract – one in which there are mutual promises b/w 2 parties to the contract; each party being both a promisor and promisee.

Rule: In case of doubt it is presumed that an offer invites the formation of a bilateral rather than unilateral contract.

<u>Restatement: Methods of Termination of the Power of Acceptance</u> *<u>(p. 377)</u>*

If there's some ambiguity in what the offeror is asking for (a promise or an act) there is a preference to construe as a promise for a promise b/c it binds the parties sooner.

1. "An offeree's power of acceptance may be terminated by
   a) rejection or counter-offer by the offeree, or
   b) lapse of time, or
   c) revocation by the offeror, or
   d) death or incapcity of the offeror or offeree

2. In addition, an offeree's power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer."

Petterson v. Pattberg

Ct of Appeals, NY (1928)
p. 377

P was responding to an offer by D to allow him to pay a mortgage off early. P complied within the time period to accept D's offer but when P showed up at his house to pay D the money, D told P that in the meantime he had sold the mortgage to someone else.

Issue: Can D w/draw the offer anytime before acceptance even if he said he'd hold the offer open to a certain date? Does this offer bind D?

Court ruled this was a proposal for a unilateral contract, but D was able to w/draw the offer before its acceptance had been tendered. Whatever the act may be, until it is performed, the offer is revocable. There was no consideration and D w/drew it before it became binding so therefore there was no contract ever made, thus there can be no breach.

An offer can be revoked prior to acceptance.

Restatement: Option Contract Created by Part Performance or Tender – (p. 383)
Part performance can create an option contract.

Brackenbury v. Hodgkin
Maine Sup Ct. (1917)
p. 384

D (the mother of P) sent a letter to P (her daughter) offering D's farm if P would come care for her. P gave up her home in Missouri and moved to Maine. Things didn't work out and D ordered P off the farm and eventually gave the deed to the house to her son. P is seeking specific performance to undue the transaction from the brother, essentially undeed him.

Court says the mom's offer was a unilateral contract (promise for an act) and P accepted by their performance so they are entitled to the land. Once P began performing D is not allowed to revoke the offer. Specific performance granted.

Rule: A contractual offer may be accepted by performance if a unilateral contract is involved.

Restatement: Effects of Performance by Offeree Where Offer Invites Either Performance or Promise - (p. 387)

Section 3 - Precontractual Obligation

Option contract – someone obligates themselves to keep the contract open for a period of time.

Thomason v. Bescher
NC Sup Ct. (1918)
P. 391

Ct awards specific performance on an option contract, b/c the stamp amounted to consideration. *Stamps are no longer acknowledged as adequate consideration.*

Option Contract – a contract pursuant to which a seller agrees that property will be available for the buyer to purchase at a specified price and w/in a certain time period.

The restatement lessens the standard for consideration (purported) for option contracts [an indication you intend to be bound for the option; the underlying contract will have to stand on it's own ground].

As long as there's something indicative of intent (e.g., something in writing; or $1 given, etc…) to hold the contract open.

Option contract differs form letter of intent (which does not offer anything).

Restatement: Option Contract – (p. 394) –

1) An offer is binding as an option contract if it
   a) 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 w/in reasonable time; or
   b) is made irrevocable by statute.

James Baird Co. v. Gimbel Bros. Inc.
US Ct of Appeals (1933)
p. 395

p (Contractor) contracted to construct a public building in PA, part of the contract called for linoleum. D (a subcontractor) sent someone down to bid on it and they mistakenly bid low, and P figured this low bid into his bid, which was selected b/c it was so low. D notified P of their mistake but P had already accepted the contract. D refuses to perform the installation saying they goofed. P had to spend twice as much on linoleum elsewhere.

The court was reluctant to find an obligation; could find no reason to bind the D to the bid. The court says the mere use of D's bid in P's bid was not enough to bind the parties. D bid to all of the contractors bidding on the project, and some of the other contractors noticed their mistake and alerted D to it.

Court rules for D and says there was not consideration and no contract, and the bid did not amount to acceptance. The court also says there is no option contract here. Court rejects promissory estoppel because no consideration was present.

Mutuality of obligation – binding the contractor to a particular subcon.

Rule: Promissory estoppel shall not be applied in cases where there is an offer for exchange as the offer is not intended to become a promise until after consideration.

Drennan v. Star Paving Co.
Cal Sup Ct. (1958)
p. 398

Action for damages for failure to perform according to a bid. P, a contractor won a paving contract, but its bid price was low b/c it relied on the bid price of a subcontractor (D) which was low. P won the bid and D would not perform according to its phone bid, it wanted almost double. P found another paver willing to do the job for about $3,8000 more than D's bid price. P is suing for the difference.

Issue: Did Ps reliance on D's offer make that offer irrevocable?

YES – Restatement 90 (can make promises binding w/out consideration – reasonable reliance in lieu of consideration) – D had a reason to expect that if its bid was low that it would be used by P and so induced "action…of a definite and substantial character on the part of the promisee."

D's bid did not state or clearly imply that it was revocable any time before acceptance.

Unilateral Contract – no theory of revoking offer at any time before completion. When any part of the consideration requested in the offer is given or tendered by the offeree, the offeror is bound (the main offer includes a subsidiary promise which is implied).

D had a stake in Ps reliance on its bid. D's mistakenly low bid was not so low that P should have know that. This case broadened the view of Restatement 90 (**Baird v. Gimbel**) beyond charitable or donative promises to business use.

Ct said an implicit offer to keep the offer open – the giving of the bid – treated like an option contract w/a bit of promissory estoppel.

- Subcontractors bid must be more than just an estimate and if it is so out of line then reliance would not be justified.
- Detrimental reliance only comes up when it's the general contractor suing the sub…

This case kind of goes against Gimbel theory.

Rule: Reasonable reliance on a promise binds an offeror even if there is no other consideration.

Subcontractor is held to what they offered.
If there's acceptance of the bid buy a subcontractor then you are binding the contractors before they should be.
Issue of reciprocity.
Ct comes out against the subcontractor .

UCC §2-205 is mentioned in some notes (p. 403).

Restatement: Option Contract (p. 408) – basically says reasonable reliance on a promise binds an offeror even if there is no other consideration in order to avoid injustice.

Hoffman v. Red Owl Stores
Sup Ct Wisc (1965)
p. 408

Issue: Pre-contractual obligations – at what point in time should someone be stuck w/what they said.

Appeal from award of damages. Special verdict.

An agent of D (a supermarket chain) promised P (an investor) a franchise for $18K. In reliance on this promise and to gain experience (as recommended by Ds agent) P bought a supermarket. P then sold his supermarket to D (upon Ds recommendation) and paid $1K for an option on land for building a new store. After moving near the land P was told he need $24K for a franchise. P got that amount but was then told he needed an additional $2K. He got that and was then told to sell a bakery he owned which he did, and then D told P he had to get a statement saying that the money he borrowed from his father-in-law was a gift not a loan. Knowing P was short of money D required P to have some addition capital before they would award him the franchise.

P then sued for damages using promissory estoppel, to recover income he lost & expenses he incurred in reliance of promises from D. P won damages but set aside and on appeal

This case smelled of fraud here but no way of proving it.

Issue: When a promisor makes a promise which he should reasonably expect to induce action on the part of the promisee and which does induce such action, can he be estopped from denying enforcement of that promise?

YES – Under promissory estoppel, since there's no contract here (still in the formative stages).

Restatement 90 – A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be awarded only by enforcement of the promise."

- Ct found a promise – a representation made by the agent which P could rely upon to his detriment = Promissory Estoppel!
- There's no contract in this case, it's the conduct of D's agent which gave rise to the liability.
- In some jurisdictions you can plead promissory estoppel for your claim.

- All that is important here is that P substantially relied to his detriment on Ds promise….and D should have foreseen such reliance.

P gets loses resulting from selling his bakery, from purchasing the land option, from moving and from selling his grocery store (no lost profits, only difference b/w his selling price and fair mkt value). It was the cost of all the "do this, this, and this…" that the ct found to be detrimental reliance.

- No expectation damages b/c this is not a contract claim = no future profits.
- Promissory Estoppel & Detrimental Reliance are found together.
- Actions based on Promissory estoppel are not the equivalent of breach of contract actions.

Section 4 -- Conduct Concluding A Bargain - *Acceptance & Timing of Acceptance when it becomes effective*

Livingstone v. Evans
Canada (1925)
p. 415

D (land seller) wired P (land buyer) offering to sell land for $1,800. P responded with a counter-offer for $1600 and D said can't reduce price. Before P then wired acceptance of the original price but D sold the land to someone else. P is seeking specific performance. A unilateral offer

Did P's counteroffer a rejection of D's offer thereby freeing D from any commitment?

Court says P's counter-offer amounted to a rejection of the contract but Ds reply, "can't reduce price" amounted to a renewal of the original offer, and P's acceptance creates a binding contract b/c P's. Court says P's counteroffer was an inquiry so the first offer remained alive. P wins, gets SP.

Mirror Image Rule – applies to common law (not UCC) that for acceptance to be effective the offeree must accept each and ever term of the offer.

Deviant Acceptance Rule – introduction of new or variant terms means that the offer is dead and the process of contract formation begins anew.

Next few cases are Standard (Pad) Contracts

Acceptance:

- Battle of Forms – Idaho Power; UCC 2-207
- Silence -- Toms Tree; Hobbs; Morrison

Idaho Power v. Westinghouse

US Ct of Appeals 9th Cir. (1979)
p. 421

P is trying to recover damages from D, caused by D's faulty machinery, even though D's price quote included language which would bar such a recovery. On appeal from dismissal. P allegers errors:

1. Error in concluding that limits on liability in D's sales form were part of the contract b/w parties—P says the court should follow the contract terms in P's agreement which did not limit D's liability.

P contacted D for a price inquiry--D responded w/a price quote, but on the form was a disclaimer limiting D's liability. P responded w/a purchase order accepting the quote and w/ its own terms which were to supercede D's terms; however none of them addressed or discussed D's liability. D's machine caught fire damaging some of P's stuff.

<u>UCC 2-207 (1) Additional terms in Acceptance or Confirmation (p. 429)</u>

UCC has a bias in Commerce, usually favors letting the contract go forward, allows for little slips. (§ 2-204).

If there's no acceptance then there's no contract.

- Since this was under the UCC, the common law (*the Mirror image rule*) which would have had the counter-offer void the contract didn't come into play.

Court rules that Ps purchase order was acceptance of the limiting terms on Ds form and since P did not address liability issues on their form and never said they were unwilling to proceed unless D amended the liability provisions the court accepts P's forms but allows the liability language from D's forms because P never addressed or indicated disapproval of them.

- Ps terms did not conflict with Ds dirrectly and did not nullify the disclaimer.
- Ct had little sympathy since these are 2 large companies w/ relatively equal bargaining strength.

Affirmed.

<u>Last Shot Principle</u> – who ever fires off the last counteroffer before negotiations end and performance begins, those terms govern.

Rule: A contract b/w merchants may be created even though the acceptance contains different terms than the offer.

Morrison v. Thoelke

FL (1963)
p. 429

P, (seller of land), sued to quiet title, requesting D (land buyer) be stopped from making any claim under a recorded contract for the land. D counter-claimed, seeking SP. D appeals judgement for P.

P owns the property—D sent by mail a purchase contract—but prior to it arriving in the mail P called and cancelled the contract. Lower court agreed ruled there is no legal binding contract here to rule on.

Is a contract complete and binding when the letter of acceptance is mailed (deposited acceptance rule) OR when it's received? *[circle argument, someone will always be at an advantage no matter which manner is selected].*

Reversed and remanded – Court said there was a contract. Essentially the offeror is bounded before he knows it.

Rule: An acceptance is effective when it is put in the mailbox (even though a subsequent rejection may already be on its way).

<u>Mail Box Rule</u> (Adams v. Lindsell) – a revocation of an offer is ineffective if received after an acceptance has been properly dispatched.

<u>Restatement: Time When Acceptance Takes Effect</u> (p. 436) –

(A) acceptance is made as soon as it is put out of the offeree's possession (e.g., mailbox) w/out regard to whether it ever reaches the offeror; but
(B) acceptance under an option contract is not operative until received by the offeror.

Tom's Tree Surgery v. Brant
Conn. Sup Ct 1982
p. 439

P (a landscaper) action in express and implied contract to recover value of labor, materials, etc..against D (a customer). P wins - Ds appeal.

The parties had a history here of informal contracts, where P would be asked to do additional yard work by D in the midst of a contract to do other work and D would then pay for the additional work. P told D all of the extra work was difficult to keep track of, but D said he'd pay for it all. Trial court found for P under implied contract.

D says trial court erred by not recognizing express contract. Court said the express contract had no intent by either party. D was informed of the cost over-runs and said proceed, so an implied contract can be inferred by the court.

Affirmed – Since there was no express contract and it was difficult to value all of the work and labor the P should be compensated on a time basis. D was aware of the expense of the additional and said it was okay to proceed.

- Here D's failure to object served as valid acceptance.

- QM could have been an issue but no there was no price.
- Acceptance by silence sort of undercuts QM.

Rule: A contract can be implied based on the conduct of the parties to compensate a party on a "time basis" when no proof of an express contract is presented.

<u>Restatement: Acceptance by Silence of Exercise of Dominion (p. 441)</u> -

Hobbs v. Massasoit Whip Co.
Mass Sup Ct 1892
p. 442

Eel skins case. P (an eel skin seller) shipped D (a whip maker) eel skins. P had done this in the past and D would always pay. D sat on them for a while and then destroyed them. There was no contract for them and D never formally excepted them. P sued for there value.

Issue: Can silence be deemed acceptance?

Court rules Yes. D's silence can be construed as acceptance b/c there was this preceding conduct/history between the parties which gave rise to expectations.

- Silence can not create a duty between strangers but since these parties had prior dealings and D held on to them acceptance is found.

Monroe v. Monroe
Ct of Appeals NY 1980
p. 446

P (wife) alleges an oral agreement with D (husband) for household services. The couple had in effect a common law marriage (although NY does not recognize common law marriage). Thrown out and P appealed.

Issue: Can a contract for earnings and assets be implied from the relationship of an unmarried couple living together and whether an express contract of such a couple on these subjects is enforceable?

Court says No. While other states such as Cal. have said yes, since the NY legislature opted to abolish common law marriages in the state the court opts to follow the intent of the legislature. In dicta the court says that even so these types of services in such a relationship are rendered gratuitously. No implied contract between unmarried couples living together.

Section 5 – The Effects of Adopting a Writing

Parole Evidence Rule

Parole evidence is only when your trying to intro evidence in the face of written document. The writing is the best intention of the parties. The intent of the parties has been put down in the final writings of the contract.

Mitchill v. Lath
Ct of Appeals NY
1928
p. 451

Action of Specific Performance (to get rid of the ice house).

P (land buyer) bought some land from D (seller). D orally agreed with P that if he bought the land he would remove an ice house that he maintained on an adjacent piece of property that was not his. (2 parcels of land owned by 2 different people) Once P got the property D refused to remove the ice house. P is seeking specific performance to enforce the oral agreement. D appealed on the parole evidence rule.

Issue: Will an oral agreement which is not collateral, which contradicts express or implied conditions of a written contract, or which consists of terms which the parties could reasonably have been expected to embody in the original writing be permitted to vary a written contract?

<u>Exclusionary Rule for Parole Evidence (p. 453):</u>
No – an oral agreement is permitted to vary a written contract only if it's in
1) collateral form;
2) does not contradict express or implied conditions of the written contract; and
3) consists of terms which the parties could not have been expected to include in the original writings.

Reversed – D wins - The court says this oral agreement fails 3; b/c it is so closely related to the purchase of the property you would expect to find it in that contract, not as a separate oral agreement.

Integration --
- Here the parole agreement does not meet these requirements since it is closely related to the subject of the written contract. It also may contradict the conditions of the written contract. The fact that the written contract was made with her husband while the oral agreement was made with P herself is not determinative since the deed was given to her and it is evidence that she and not her husband was the principal in the transaction.

- UCC §2-202 – addresses this issue for the sale of goods - (rejects the assumption that just b/c a writing is final it is to be interpreted as including all of the matters agreed upon by the parties).

- ***Parol Evidence Rule: Exclusionary Rule (see above) – when parties enter into a written contract they intend there to be a deal.***

- Court says SP can make them take it down, but how can it make them go on someone elses property.

- Court says that the removal of the ice house may have been agreed upon, but it was not in the final written contract for the land.

Dissent – you could argue the removal was a separate agreement on the side, which could stand on it's own.

Test of Integration –

Hatley v. Stafford
Oregon Sup Ct. 1978
p. 458

credibility and naturalness

P (lessee) filed an action for trespass against D (lesors). D contends under the lease they can terminate the lease and recover the possessions.

P leased some farmland from D. The parties put the contract together themselves and it had a buy-out clause. 6 months into the lease D took possession of the farm and cut P's wheat crop. D claims they took possession to build a mobile home park and offered to pay P $70/acre (fair mkt value was $400). P claims that the written lease does not include an agreement that D could only buy-out P b/w 30-60 days after the lease began. Jury found damages for P. On appeal, error allowing the admission of parole evidence relating to the time limit on the buy out agreement.

Parol evidence rule applies only to the part of the bargain that the parties **intended** to put in writing. The intent to put the language in the final agreement is crucial. Applied only to complete and final integrations.

- Parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, so that an action to enforce an oral rep. or promise relating to the subject matter of the contract must fail.

P sought to show that the document was a "Partial Integration" – the written contract included some but not all of the terms of the actual agreement. D argues that such a showing could be made only if the material was "not inconsistent" w/ the agreement.
- to be "inconsistent" the oral agreement must contradict or negate a term of the writing.

Parole Rule - W/out separate consideration for an oral agreement the agreement must be 1) **consistent** w/the written lease and 2) not such an agreement which might **naturally** be made as a separate agreement by the parties.

No inconsistency b/c the written contract does not address the specific time period.

In determining whether the oral term is natural the court can look at the surrounding circumstances , e.g., business experience of the parties, bargaining strength.

In this case the court looked at the lack of business experience (hand written lease); no counsel. Trial court was correct at looking at the unfair result the literal reading of the contract would have created.

Traynor pointed out that the difficulty of accommodating the formalized structure of a deed to the insertion of collateral agreements makes it less likely that all of the terms of such an agreement were included.

Affirmed – P wins – admission of parole evidence was okay.

Dissent – courts ruling goes against the statute and leg intent. P had to know the terms they were agreeing to sucked.

Rule: For an oral agreement to be inconsistent with a writing, thereby barring its admission as evidence under the parole evidence rule, it must be contradictory to an express provision contained in the writing.

Parole Evidence is a matter of law, once a side says it will introduce it, there will be an objection and the judge will here the issue aside – so that way the jury is not tainted by hearing the info. first. In this instance it was okay and the testimony was allowed to go before a jury.

*** Parole evidence is always admissible to prove a fraud / decete.**

Restatement: Integrated Agreements (p. 464) – A writing(s) constituting a final expression of one or more terms of an oral agreement.

Restatement: Effect of Integrated Agreement on Prior Agreements (Parole Evidence Rule) – p. 465

Restatement: Evidence of Prior or Contemporaneous Agreements and Negotiations – p. 465

Restatement: Consistent Additional Terms - p. 466

UCC Parole Evidence Rule 2-202 (p. 467) (see also the example on p. 470) – strict view…the integration issue is a matter of "intention" – a writing finalizes only what the parties intend it to finalize.

LI Trust v. Internat'l Inst. for Packaging Educ. Ltd.

NY Ct of Appeals 1976
p. 470

On appeal which held for P. The alleged conditional statement was insufficient notice to P and public policy estops D from showing his claim w/the oral conditions – Conditional Delivery.

P (a bank) held a note – D alleges there was an oral agreement that the guarantee would not become effective until P got all 5 co-signers approval.

Bank loaned D $25K for 90 days, w/5 co-signors, and it was agreed with the bank that any renewal of the not must be endorsed by the 5 co-signors. The bank extended the loan and gave another $10K but only got 4 signatures. The loan was not repaid. P sued to recover the money and P won and the court said the parole evidence was inadmissible. D appealed.

D claims the note is unenforceable b/c it goes against the oral agreement to obtain 5 signors.

Reversed – Court said the parole evidence is admissible since the agreement with the bank is silent about the need to have 5 co-signors approval, and since it is silent the parole evidence therefore cannot contradict it.

- Court then goes over the public policy argument and the fact that the alleged agreement contradicts the terms of the written agreement which makes it unprovable by parole evidence – then notes that is not the case here – no contradiction – so parole evidence is okay.

Refutes the public policy argument b/c Appellants (D's) are not untrustworthy/ devious.

A written contract stands on its own and should be respected unless: it's not a fully integrated doc (does not reflect the full intent of the parties; if it's partially integrated then the parole evidence should be let in.

Lipsit v. Leonard
Sup Ct NJ 1974
p. 477

P (employee) is seeking damages for a breach of an oral agreement when D (employer) failed to give him a part of the business. There was an 8 yr. employment relationship b/w P (employee) and D (employer). P claims he was induced to leave and work for D under 1 yr agreements and that he would soon become an equity partner. P rejected a proposal he deemed insufficient and was soon fired.

P claims there was a breach based on the oral promise and a tort claim for fraud (D never intended to keep his promise and misrepresented that to P).

For breach P is seeking 10% of the assets of the business plus damages awarded by an arbitrator.

Trial court dismissed on summary judgement for D. Ruling the employment agreements were not contracts and were unenforceable agreement to consider and negotiate. And the oral promise was inadmissible b/c of the parole evidence rule.

On the tort claim the trial court erred by throwing it out based on the parole evidence rule for damages in an action grounded upon fraud in the inducement of a contract.

A promise w/ an implied representation that there's an intention to carry it out = Reliance; and – a promise w/out the intent to perform is sufficient to an action of deceit for restitution or other equitable relief – Prosser.

Issue: Can the above action be maintained when the promise itself can't be enforced (no consideration)?

NY adheres to the “out-of-pocket” rule for $$$ damages in fraud, not the “loss or benefit of the bargain rule”

D claims Ps asking for 10% is the “benefit of the bargain rule” which is not NY law.

Reversed, P should be allowed to proceed on his tort claim but the trial court was correct in not allowing the parole evidence in because it contradicted the written terms of the contract.

- The Conn. case has similar facts but was pursued under QM.

- Parole evidence’s intent is to block attempts to vary the terms of a written contract.

LaFazia v. Howe
Sup Ct. of RI (1990)
p. 483

D (deli seller) contracted w/ P (buyer) to buy their deli. P represented the deli as extremely profitable and said they didn’t keep good books so they don’t reflect the true figures. D agreed to buy the deli for 90k, and paid 60k and signed a promissory note for 30K. Trial court found for P.

The sales contract contained merger and disclaimer clauses, disclaiming any representations P made. The deli failed to make $$ and D sold it for 45K. P sued for breach on the note and D counter sued for misrepresentations and faud.

Disclaimer explicitly states: 1) buyer takes it as is; 2) the written contract represents the entire written contract. (So no parole testimony allowed in)

The right to rescind a contract and sue for damages for deceit must be done w/in “reasonable promptness” which was not the case here. D continued to pay P for a period of time while they knew they had been swindled.

Deceit claims require – evidence showing a party was induced to act b/c of reliance upon the false representations.

Affirmed - P wins, b/c the merger & disclaimer clauses prevent D from claiming P’s misrepresentations and reliance on them.

- Collusion b/w the tax cheating sellers & the buyers who bought into their tax cheating profits representatinon?

- D read the contract and had counsel who reviewed it as well so Ds asserted reliance on Ps oral claims is not justifiable.

- Specificity in contracts is key and here the contract was very specific.

Hoffman v. Chapman
MD Ct of Appeals (1943)
p. 488

Another ex of when parole evidence is allowed.

D (land buyer) bought part of a piece of land from P (seller). The deed had a mistake which said D owned more land than they knew they bought. D refused to deed over the portion of the land which was mistakenly deeded to them once the mistake was detected. P brought suit in equity to reform the deed on the ground of a mistake. P wins at trial court

Rule: Courts of equity will reform an written instrument to conform it to the real intention of the parties in the face of clear, strong convincing evidence.

Affirmed - Here it was quiet clear that the intent of the parties was for a smaller parcel of land, no vagueness as too how much land the parties thought they were conveying.

- Equity overrides the parole evidence rule which prevents oral evidence from contradicting the terms of a written doc upon the ground of accident, mistakes. However, the document can't be vague the intent of the parties must be clear.

- Equity will fix the mistake of the draftsman of the deed to express the real intentions of all parties.

PG & E, Drayage & Rigging Co.
Cal Sup Ct. 1968
p. 494

Action for damages for a breach

D (a repairer) contracted to fix part of P's (a utility co.) machine and to perform the work at its own risk and expense and to indemnify P against all loss and damage. D also agreed to buy 50K worth of insurance to cover any liability. P's machine was damaged and P claimed it was covered under the policy, D said the policy was only to cover damages to 3rd persons.

Issue: Was Ds' offered evidence relevant to proving a meaning to which the language of the instrument was susceptible?

YES - Rule – The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and ambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

- This case expands the admission of extrinsic evidence to show intent.

- Traynor says a contract is always at least a bit ambiguous. The court takes expansive view of parole evidence rule. *Let the evidence in and let the chips fall where they lay.*

- The contract is clearly ambiguous and there's a need for extrinsic evidence in order to clarify the intentions of the parties. Extrinsic evidence for showing the intent of the parties could only be excluded when the intent of the parties can clearly be determined from the words of the contract alone. Rational interpretation

- The case disproves the "plain meaning rule" which states that if a document appears clear and unambiguous then the meaning must be determined from the 4-corners (the express terms of the contract) of the doc w/out any extrinsic evidence.
- UCC 2-202 goes against this rule as well.

Trident Case - Handout - Judge Kozinski disputes Traynors broad view.

Restatement: Interpretation of Integrated Agreement (p. 499) -

***Parol Evidence Rule & the Statute of Frauds** (p. 500-01)

Section 6 – Standardized Forms: Assent and "Public Policy"

Mundy v. Lumberman's Mut. Cas. Co. (p. 503)
Facts: Lumberman (D) renewed Mundy's (P) insurance policy and sent P the policy along with a summary of such policy both written in straightforward English and using readable print. Both the policy and summary contained D's new 1K limit on the recovery of lost silverware. Silverware was stolen and P sought full value reimbursement arguing limitation was buried in text of new policy.

Concise Rule of Law: An insured is bound by the terms of a renewal insurance policy as long as he receives the policy.

Decision: Breyer, C.J. In this case, even a casual reading of the material mailed to the P would have given them adequate notice of the policy change. Far from being buried in the fine print, the renewal policy plainly stated the $1K limitation under the boldface headline reading "special limits of liability" and then reiterated it in the summary of changes and accompanying the policy.

Henningsen v. Bloomfield Motors, Inc. (p. 510)
Facts: Henningsen (P) was severely injured by her new auto when it crashed due to a mechanical error. P brought suit. Bloomfield Motors (D) defended on the basis of a fine print clause on the reverse side of the sales contract which disclaimed all express or implied warranties and limited liability to repair of parts delivered to the factory.

Concise Rule of Law: Where there is a gross disparity of bargaining power, a disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is invalid as contrary to public policy.

Decision: Francis. J. All of the major automobile manufacturers use a standardized contract containing the same disclaimer clause. The consumer is placed on a "take it or leave it" position. If he wants a new car, he must accept the conditions. No bargaining is present. The automobile companies have combined to utilize their superior bargaining power to remove all choice from the consumer. The dealers may not even modify the agreement. Most consumers lack the ability or opportunity to determine whether the automobile is in good working order. They must rely on the manufacturer/dealer who has disclaimed all liability beyond repair. The disclaimer itself is in fine print on the reverse side of the contract. It is not even labeled as a disclaimer or limited warranty. It does not specifically state that it excludes claims for personal injury. The buyer is not told to read it and it is not explained. We find that under all of the facts herein, that public policy requires that attempted disclaimers, based on unequal bargaining power, which attempt to waive the implied warranty of merchantability and the liabilities/obligations arising therefrom are invalid.

Richards v. Richards (p. 516)
Facts: When Jerilyn Richards (P) was injured while riding in her husband's truck after signing a form contract releasing the truck's owner from all liability for accidents to passengers, she argued that the form release was void as against public policy.

Concise Rule of Law: An exculpatory contract will be deemed void when the public policy of imposing liability on persons whose conduct creates an unreasonable risk of harm outweighs the public policy of freedom of contract.

Decision: Abrahamson, J. First of all, in this case the title of the form was misleading since it would not be reasonably clear ot the signer that a form entitled "Passenger Authorizatoin" is in reality the passengert's agreement to release Monkem Co. (D) from liability. Secondly, the release is extremely broad and all-inclusive. The very breadth of the release underlines its one-sidedness; it is unreasonably favorable to Monkem Co., which drafted it. Thirdly, the standard fine-print form was not negotiated or discussed by the parties before signing, and there was an inequality of bargaining power since Monkem Co. wrote the agreement and also derived some benefit from it. The combination of these three factors leads to the conclusion that the contract is void and unenforceable as against public policy.

Broemmer v. Abortion Services of Phoenix (p. 521)

Facts: Broemmer (P) was told to complete three forms, one of which was an agreement to arbitrate any dispute resulting from the fees or services of (D) Abortion servicer. The clinic staff did not explain the agreement to P nor indicate she could refuse to sign. P signed forms. Doctor punctured her uterus. P filed suit. D moved to dismiss on the ground that arbitration was required.

Concise Rule of Law: An adhesion contract will be enforced unless it is *unconscionable* or beyond the reasonable expectations of the parties.

Decision: Moeller, J. An adhesion contract is a standardized form offered on a "take it or leave it" basis which the consumer must accept without bargaining if she wants to obtain the desired product or service. The arbitration agreement signed by P was an adhesion contract because it was prepared by D, presented to P as a condition of treatment on a "take it or leave it basis," and its terms were nonnegotiable. Whether or not it was also enforceable depends on whether it was beyond P's reasonable expectations. In this case, it was not reasonable to expect a high school graduate to agree to arbitrate her medical malpractice claim, thus waiving her right to a jury trial, as a consequence of filling out three forms given her highly emotional state and her inexperience in commercial matters. Furthermore, it would be unreasonable to enforce the critical provision requiring that the arbitrator be a obstetrician/gynecologist when it was not a negotiated term and D failed to explain it or call attention to it. Because the arbitration agreement fell outside P's reasonable expectations and is, therefore, unenforceable, it is unnecessary to determine whether the contract is also unconscionable.

Restatement of Contracts, Second Section 211 (p. 527)

Standardized Agreements

(1) Except as stated in subsection (3), where a party to an agreement signed 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.
(2) 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.
(3) 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.

Chapter 4 – Policing the Bargain,

Section 1 - Competency to Contract

Halbman v. Lemke (p. 533)

Facts: Lemke sought restitution for damages caused to a car by Halbman, a minor, before he disaffirmed the purchase.

Concise Rule of Law: Absent misrepresentation or tortuous conduct, a minor who disaffirms a contract for the purchase of a nonnecessity may recover his purchase price without liability for damage, depreciation, or other diminution in value.

Decision: Callow, J. This view (though not generally accepted) is more in keeping with the purpose behind the laws permitting a minor to disaffirm a contract, i.e., to protect him from improvident dealings with more experienced, and sometimes-unethical adults. To force P to compensate Lemke for the damage inflicted upon his car would be, in effect, to force him to undertake the responsibilities of his contract. Such a decision, if desired, should come from the legislature, and not the courts.

Faber v. Sweet Style Mfg. Corp. (p. 538)

Facts: Mr. Faber (P) suffers from manic-depressive psychosis, which affects motivation rather than ability to understand. This action seeks to rescind P's contract to purchase land from Sweet Style (D), made during his illness.

Concise rule of law: Incompetence to contract exists not only when cognitive capacity is lacking but also when a contract is entered into under the compulsion of a mental disease or disorder but for which the contract would not have been made.

Decision: Meyer, J. Lack of cognitive capacity is not the sole criterion for assessing incapacity to contract, such is also indicated by a mental disease or disorder compelling one to enter into a contract which would not have been made but for that disorder. An incompetent may elect to void his contract, a showing of incompetence alone being sufficient for rescission if, as in this case, the other party can be restored to status quo. When the status quo cannot be restored, incompetence will not result in rescission of a fair and reasonable contract with one who was ignorant of the incompetence. Once the party alleging incompetence fulfills his burden of proving it, rescission is proper. So, this contract is rescinded.

<u>Restatement of Contracts, Second Section 15 (p. 543)</u>

Mental Illness or Defect

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
    (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
    (b) he is unable to action in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

Odorizzi v. Bloomfield School Dist. (p. 549)

Facts: P was arrested on homosexual charges. Immediately after his release, the school district (D) convinced him to resign.

Concise Rule of Law: When a party's will has been overborne, so that in effect his actions are not his own, a charge of undue influence may be sustained.

Decision: Flemming, J. While none of P's allegations have any basis, he has made out a prima facie case of undue influence. In essence, the charge involved the use of excessive pressures to persuade one vulnerable to such pressures to decide a matter contrary to his own judgment. Extreme weakness or susceptibility is an important factor in establishing undue influence. It is normally found in cases of extreme youth or age or sickness. While it normally involves fiduciary or other confidential relationships, they are not necessary to the action. Here, extreme pressures were leveled against P. He had just gone through an arrest, booking and interrogation procedure for a crime which, if well publicized, would subject him to public humiliation. He was threatened with such publicity if he did not immediately resign. He was approached at his apartment, immediately after his release. He was not given the opportunity to think the matter over or to obtain outside advice. He was told that in any event he would be suspended or dismissed. These factors present a jury issue. If P can establish that he would not have resigned but for these pressures and the jury finds that they were unreasonable and overbore his will, P could rescind his resignation.

<u>Section 2 - Revisions of Contractual Duty</u>

Austin Instrument co. v. Loral Corp. (p. 554)

Facts: Austin (P) threatened to withhold delivery of precision parts unless Loral (D) would raise the contract price.

Concise Rule of Law: A contract modification is voidable on the ground of duress when the party claiming duress establishes that its agreement to the modification was obtained by means of a wrongful threat from the other party which precluded the first party's exercise of free will.

Decision: Fuld, C.J. D has made out a classic case of economic duress in that (1) P threatened to withhold delivery of 'needful goods' unless D agreed, (2) Loral could not obtain the goods from another source of supply, and (3) the ordinary remedy of an action for breach of the original subcontract would not be adequate [since so much was riding on D's own general contract with the government]. Thus it is 'manifest' that P's threat deprived D of his free will. 'Loral actually had no choice.'"

Alaska Packer's Ass'n v. Domenico (p. 560)

Facts: P who had agreed to ship from San Francisco to Alaska at a fixed pay, refused to continue working once they reached Alaska, and demanded a new contract with more compensation.

Concise Rule of Law: A promise to pay a man for doing that which he is already under contract to do is without consideration.

Decision: Ross, J. The performance of a pre-existing legal duty guaranteed by contract, is not sufficient consideration to support a promise. No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage on the necessities of the other party. The parties in the present case have not voluntarily rescinded or modified the contract. The D's second contract with the seamen is unenforceable although the seamen completed their performance in reliance on it.

Brian Constr. & Dev. Co. V. Brighenti (p. 565)

Facts: Brian (P) claimed that Brighenti (D) breached a subcontract to remove rubble from an excavation.

Concise Rule of Law: Where unforeseen circumstances make the performance of a contract unduly burdensome, and the parties agree in view of the changed conditions to an adjustment in price, a new contract supported by consideration is formed.

Decision: It is an accepted principle that when a party agreed to perform an obligation which he is already obligated to perform, albeit for a different price, the second agreement does not constitute a valid contract. However, the doctrine of unforeseen circumstances provides an exception to the general rule. Under that doctrine, when unforeseen circumstances make the performance of a contract duly burdensome, the parties may agree, in view of the changed conditions, to an adjustment in price. The new agreement thus created, constitutes a valid, binding contract. In the instant case, the record shows that the existence of the additional ruble at the excavation site was clearly unanticipated by the parties. Therefore, D's failure to carry out that contract was a material breach, for which P is entitled to damages.

Universal Builders v. Moon Motor Lodge (p. 573)

Facts: Universal (P) contracted in writing with Moon (D) to build a motel and restaurant. One condition was that all change orders had to be signed either by D or the architect, but D's agent requested many changes which Universal P made, which Berger promised would be paid. D failed to pay for the extra work.

Concise Rule of Law: Unless a contract is for the sale of goods, it is undisputed that the contract can be modified orally although it provides it can be modified only in writing.

Decision: Eagen, J. The extra work done under oral direction can be said to have been done under an oral agreement separate from the written contract and not containing the requirement of written authorization. D's agent's direction for extra work often done while he was present makes it reasonable to infer that he was aware of the extra work to which he clearly did not protest, therefore impliedly promising to pay for the extras. The waiver of the provision requiring written authorization does not have to be express, if the agreement or permission is given while the performance of the condition is possible, and in reliance on the agreement or permission, while it is unrevoked, the promise materially changes his position, Restatement (First) section 224. Therefore, when an owner requests a builder to do extra work, promises to pay for it and watched it being done knowing it was not authorized in writing, he cannot refuse to pay on the ground there was no written change order.

Hackley v. Headley (p. 579)

Facts: Headly (P) was forced to accept less than the contract amount to avoid financial ruin.

Concise Rule of Law: Mere refusal to pay a debt/contract is not duress.

Decision: Cooley, J. When a party merely exercises a right, it may not be deemed duress. D had a legal right to dispute the amount of the value of the services. D was not responsible for P's financial difficulties. But for them, P could have pursued his remedies in court. P freely chose to accept a lesser amount because of his personal financial difficulties. A transaction is only voidable for duress where one of the parties is forced to act in a manner inconsistent with his own free will. While P's financial difficulties were the reason for accepting the lesser amount, they were not D's fault and cannot be deemed to be duress.

Marton Remodeling v. Jensen (p. 585)

Facts: Marton (P) engaged in a payment dispute with Jensen (D), added “not full payment” to check Jensen had sent as an accord and satisfaction, and cashed it.

Concise Rule of Law: A creditor cannot escape the discharging effect of a draft sent in satisfaction of a debt by adding the words non-acceptance.

Decision: Howe, J. The general rule is that when a claim is whole and unliquidated, the acceptance by the creditor of an amount offered in satisfaction of the debt cannot lose its settlement nature by the addition of a reservation by the creditor. The law favors settlement of disputes, and the law of accord and satisfaction would be eviscerated if the rule was otherwise. Here, P did accept an amount offered in satisfaction, and that discharged the debt.

Denney v. Reppert (p. 593)

Facts: Denney (P), an employee of the First State Bank, contended he was entitled to a reward offered for the arrest and conviction of three men who robbed that bank. The trial court gave the reward to Reppert (D), an officer from another jurisdiction who assisted in the arrest.

Concise Rule of Law: Agents, employees, and public officials acting within the scope of their employment or official duties cannot claim a reward offered to the general public for the performance of some specific act even though, as a general rule, it may be claimed by any person who performs such act.

Decision: Myre, Spec. Comm. Although the general rule is that a reward offered to the general public is payable to anyone performing the specified act, this is not the case for agents, employees, and public officials who are acting within the scope of their employment or official duties. Bank employees have a duty to protect and conserve the bank’s moneys and to safeguard its interests. Thus, only D, who was out of his jurisdiction and under no legal duty to make the arrest, is eligible for the reward.

Sherwood v. Walker (p. 602)

Facts: Walker (D) sold a cow as barren to Sherwood (P) and refused to turn it over when he learned it was with calf.

Concise Rule of Law: When there is a mutual mistake going to the very substance of what is being sold, no contract exists.

Decision: Mores, J. While this is a very close case, what the parties thought was being sold/purchased was a barren cow which could only be used for meat. In reality, the cow was fertile and with calf. Where the very substance of the bargain was based on a mutual mistake, equity may refuse enforcement of the contract. Mere errors as to quantity or quality will not invalidate the contract no matter how material. Here, the mistake went to what was really being purchased, a barren cow. In such cases, where there was a mutual mistake going to the very essence of what was being sold, no contract exists.

Elsinore Union Elementary School Dist. V. Kastorff (p. 612)

Facts: Contractor (D), who had committed a clerical error in submitting a bid, contacted the School Board (P) upon learning of his mistake, but the School Board (P) voted to accept his bid as originally submitted.

Concise Rule of Law: Relief from mistaken bids allowed where one party knows or has reason to know of the other's error, the mistake is material to the contract, was not the result of neglect of a legal duty, enforcement would be unconscionable, and the other party can equitably be placed in status quo.

Decision: Schauer, J. Relief from mistaken bids is consistently allowed where one party knows or has reason to know of the other's error and the requirements for rescission are fulfilled. Here, the school district was aware of Kastorff's error before it accepted his bid. Kastorff was not neglectful of a legal duty when he was initially asked about the correctness of his figures since he did not have his worksheets present to inspect them. At the earliest practicable time, he contacted the school district. The bargain the school district is seeking is too sharp for law and equity to sustain. The school district, being given advance notice of D's rescission, could easily be returned to its status quo by accepting another bid. Finally, a difference of $2,785, when measured against the total bid of $89,994, is material error.

Hinson v. Jefferson (p. 619)

Facts: Hinson (P) sought to rescind her purchase of land due to the mutual mistake of the parties.

Concise Rule of Law: In North Carolina, the doctrine of mutual mistake regarding a physical condition of real property is not a ground for the rescission of the sale of such property.

Decision: Copeland, J. The general rule in real property transactions has long been caveat emptor. As the rule has been eroded, however, several exceptions have arisen. One is the doctrine of mutual mistake. Under this doctrine, where both parties to a contract are mistaken as to a material fact, the contract may be rescinded. The instant case concerns not a mutual mistake of fact, however. P got the property she bargained for. Instead, it was a mistake of assumption, i.e., the assumption that both parties held that the subject property was suitable for construction of residence. No North Carolina case has ever held the doctrine of mutually mistake assumptions to constitute a ground for rescission of a sale of real property. This is because of the vast uncertainty surrounding the doctrine and the difficulty in practically implementing it. However, this does not mean that the P has no remedy in the instant case. Another of the special exceptions to the caveat emptor doctrine is the recognition of implied warranties. This case appears to be a perfect example of a case in which a breach of implied warranty should be found. Because of deed restrictions, P's land was limited to residential construction. Accordingly, the vendor, D, will be held to have impliedly warranted that the land was suitable for that purpose. Since it was not, rescission is proper.

Johnson v. Healy (p. 626)

Facts: Johnson (P) bought a house from Healy (D), the builder, who had unknowingly constructed it on improper fill, resulting in substantial damage to the foundation and the sewer lines as the house settled.

Concise Rule of Law: Innocent misrepresentations that reasonably induce reliance amount to an express warranty of habitability which, if breached, entitled the injured party to damages limited to the diminished value of the building.

Decision: Peters, J. Although the rule of caveat emptor – let the buyer beware – used to be the established rule regarding sale of real estate, courts now recognize claims for negligence and express and implied warranty, just as they have in sale of goods cases. In this case, D has been engaged in the real estate business for about thirty years, and his indefinite statement that there was "nothing wrong" with the house could have convinced P that D had sufficient factual information to justify his general opinion about the quality of the house. Because this statement could have reasonably induced reliance by P, it amounted to an express warranty of workmanlike construction and fitness for habitation. Therefore, D may be held liable despite the absence of written warranties concerning the fitness or condition of the house. However, because neither D nor the building

inspector had actual or constructive notice of the lot's instability, D could not be held liable for negligence. Damages for breach of warranty claims are to be measured by the difference in value between the property as it was represented and the property as it actually was. This will place P in the same position he would have enjoyed if the property had been as warranted, which is the general rule of contract law as applied to the sale of a new house. Since the reasonable cost of repairs is often a good approximation for damages that are difficult to prove, the lower court must distinguish between expenses for repairs incident to the breach and expenses for improvement, which it failed to do at trial. Judgment set aside and remanded on the issue of damages only.

Cushman v. Kirby (p. 632)

Facts: The Cushmans (P) purchased a house after being assured by Kirby (D), the seller, that the well water on the property was fine, only to discover that the water was in fact sulfurous and undrinkable.

Concise Rule of Law: When a home seller discloses only a portion of the information he has but leads the buyer to believe he has made a full disclosure, he will be liable if the buyer acts in reliance on that partial disclosure.

Decision: Dooley, J. In this case, although Mrs. Kirby's (D) statements about the well water were not actually false, they fell short of full disclosure about the presence of sulfur in the water, of which D was well aware. Because the P then relied on the truth of P's statements about the extent of the water problem when making their decision to buy the house, there was sufficient evidence to make out a case of actionable fraud, and it was not error to deny D motion for directed verdict. On the other hand, the claim for fraud against D was based exclusively on his silence while Mrs. Kirby was making her statements about water quality. A different standard of conduct applies to him, namely that a home seller has a duty to disclose material defects about which he was knowledge at the time of sale. Since Mrs. Kirby's statements amounted to an inadequate disclosure constituting misrepresentation, Mrs. Kirby had an affirmative duty to speak, in light of his knowledge about the sulfur in the water. Since Mr. Kirby's liability was a question clearly within the province of the jury, the trial court correctly denied his motion for a directed verdict also. Furthermore, the jury determined the appropriate damage aware by compensating the Cushmans for the loss they actually sustained, placing them in the same position that they would have been had they not been defrauded.

[Add pages 632 – 756]

Section 2: Conditions of Satisfaction

Grenier v. Compratt Constr. Co.
Construction contract that called for a final sign-off (certificate of performance) from city engineer. Problem was that the city engineer did not generally write such letters. The city attorney did write such a letter.

The occurrence of a condition may be excused in the event of **impracticability** "if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result." Restatement § 271

"the trial court was warranted in inquiring whether the failure to produce the engineer's certificate was a material part of the agreed exchange in the contract. The court found that it was not, because the D's major concern was not the letter itself but what it represented, 'to wit, whether the road was acceptable so that a certificate of occupancy could be issued.'"

Nolan v. Whitney
In building contracts, you are not held to perfect performance, you do not have to literally comply

Substantial performance is enough. In this case there were trivial problems with the masonry work and an architect's certificate was withheld. This was held to be unreasonable.
(aesthetics is a different issue)

Van Iderstine v. Barnet Leather Co.
"Vealskins are not buildings" Distinguished from cases involving architects or engineers approving building contracts. The vealskins could be resold at the market. price. There can be unjust enrichment in building contracts, but not in this case.

Fursmidt v. Hotel Abbey Holding Corp.
Subjective test (outside of buildings). **"Taste, fancy, sensibility"** is important. Not the reasonable standard.

Contract stated that hotel would be the "sole judge of the sufficiency and propriety of the services [of the valet]. The valet was let go.

"In this case the defendant did not bargain for a particular type of pressing, stitching or laundering but rather for a relationship between the P's organization and the hotel's guests as would protect and enhance the good will so essential to the operation of the hotel business. No objective standards of reasonableness can be set up by which the effectiveness of the P's performance in achieving the effect sought can be measured. It is for that reason that in cases of this nature the honest judgment of the party rather than that of a jury is all that is required."

Gotham Securities
Law firm doing securities work, seemingly routine and successful. P asserted that legal work was not up to the standard of previous attorneys he had used. "The ingredient of personal satisfaction in contractual arrangements is subject to certain well-recognized limitations... Clearly this case [compared with Fursmidt] falls into the **operative fitness or utility** category as a matter of law. There had been full performance.

Section 3. Constructive Conditions: The Order of Performance

Nicholas v. Raynbred
Abramowitz: "insane result" here. At one time there were no constructive conditions.
Who breaches first?

Kingston v. Preston (Lord Mansfield case)
Corporate acquisition. Young man wanted to buy a business. He was going to buy it on credit. He had to show security. He did not provide sufficient security for his payments. Preston would not sell.

These two covenants (to sell and to give sufficient security) are **dependent**. "According to the 'temporal sequence' test, Preston's duty to convey his business was dependent on Kingston's giving of sufficient security."

"The essence of the agreement was that the D should not trust to the personal security of the P but , before he delivered up his stock and business, should have good security for the payment of the money. The giving such security therefore, must necessarily be a **condition precedent**." Timing issue.

Price v. Van Lint
Distinction from Lord Mansfield case seems to be that these covenants were independent. The P knew early in the game that D might not have enough money to loan him.

Speculative timing of performance.

[look at this one again]

Conley v. Pitney Bowles
Issue: "whether a claimant must exhaust administrative procedures when, contrary to the requirments of his plan, the letter denying him his benefits does not inform him of appeal procedures." ERISA. You had to go through this procedure before you could sue. A **condition precedent**.

ERISA - plan must have appeals procedures.

A pro-employee decision. The underlying condition to inform is not fulfilled. Promises must be fulfilled in a certain order. You can't reasonably expect employees to get all this detail.

Court: we won't impose that condition because you failed to notify.

Ziehen v. Smith
General rule is that in order to recover damages for breach of an executory contract, a party must show performance or tender of performance on his part. But if the vendor is disabled, unable to perform then this is unnecessary, it would be "an idle or useless ceremony."

Cohen v. Kranz
"A vendor with incurable title defect is automatically in default whereas a vendor with curable title defects must be placed in default by a tender and demand, which was not done here." The problems were easy to fix. The swimming pool did not violate any local ordinance, just didn't get a piece of paper, (certificate of occupancy). Who has one?

Beecher v. Conradt
Ready, willing and able rule. Like lay a way. Once everything was paid, he would get the land. Seller didn't have to be ready, willing, and able until the end of the line.
[unclear on this one]

Osborne v. Bullins
Awarded purchase price instead of specific performance on sale of land
[look at again]

Stewart v. Newbury
If order of performance is unclear. "Where a contract is made to perform work and no agreement is made as to payment, <u>the work must be substantially performed before payment can be demanded</u>." P in this case claimed that the usual custom was to pay 85% at the end of each month, then 15% at the end when all the excavating work was done. Periodic payments can not be implied. (this probably was the custom however)

<u>**UCC 2-307:**</u> Delivery in Single Lot or Several Lots
UCC 2-612: Installment contract
Restatement § 233: (1) Where performances are to be exchanged under an exchange of promises, and the whole of one party's performance can be rendered at one time, it is due at one time, unless the language or the circumstances indicate the contrary. (2) Where only a part of one party's performance is due at one time under subsection (1), if the other party's performance can be so apportioned that there is a comparable part that can also be rendered at that time, it is due at that time, unless the language or the circumstances indicate the contrary.

Titpton v. Feitner
The occurrence of a condition precedent creates the duty of counter performance.
A segregable contract.

Was the contract entire or divisible? There is no express provision in the agreement other than the promise to pay. The agreement deals with two types of hogs, live and dressed. The price for each is different. The time of delivery is different. On these facts we hold that a separate payment was required with each delivery.

Restatement § 240
If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

Section 4. Protecting the Exchange on Breach

Oshinsky v. Lorraine Mfg. Co.
Timing. Where **time is of the essence** and clearly specified in the contract, failure to perform on time releases the other party from their obligation. Specific date, November 15, for delivery of "shirtings" was given in the contract. Perfect tender: If you say the 15th, the 16th doesn't work. (this result can be questioned since it appears that the buyer was not injured. "If this case arose today under the UCC, which requires a seller and a buyer to act in 'good faith' is iot clear that the seller, confronted with § 2-601 would again lose the lawsuit?

Prescott v. Powles (Australian onions case)
Defective performance as to quantity or quality bars an action on contract for damages.

Instead of 300 crates of Australian onions only 240 crates were shipped to San Francisco because the US govt. had commandeered space on the ship. Powles attempted to cancel, but the ship had left. Partial performance is acceptable only where the promisor makes performance impossible or where performance is waived. It was the US govt here (third party) during wartime. This was forseeable and this contingency could have been built into the contract. Full performance was expected: Fill or Kill.

Bartus v. Riccardi (Hearing aid case)
CURE
A breaching party can cure defective performance.

Riccardi returned hearing aid because it was A-665 instead of A-660. He had contracted for A-660. Bartus agreed to get the other model he wanted. Riccardi refused to accept the tender of a replacement. Defendant relied on 2-601 and 2-602, but "neglected to take into account 2-508 which has added a new dimension to the concept of strict performance."

UCC § 2-508
(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for the performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

UCC: If no time of performance is indicated then the parties have a reasonable time to perform.

Oddo v. General Motors Corp. (contrast with Riccardi)
P's Cadillac Eldorado electrical system burst into flames after car was driven for 17 miles. P demanded a new car or return of payment. D said that their sole obligation was to repair the defect in accordance with the warranty. Held that P is entitled to rescission and return of the purchase price. Courts have relied on UCC 2-601 in rejecting a dealer's offer to cure defects in accordance pursuant to the manufacturer's warranty. "To hold

that these warranties were the limit of a purchaser's remedies would be an unconscionable result under the facts of this case."

<u>**UCC 2-601:**</u> If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

Plante v. Jacobs
Another construction case. Standard in these cases is <u>substantial performance</u>. "the test of what amounts to substantial performance seems to be whether the performance met the essential purpose of the contract." Not a great likelihood that you can achieve perfection in construction. In this case the living room was 1 foot too small and rebuilding would cost $4,000. Would have been economic waste to tear down the wall. This was an off-the-shelf house. (Groves v. Wunder: No "essence of the contract" terminology, but similar analysis?)

Jacobs & Young v. Kent (the Reading Pipe case!)
D learned that some of the pipe in the house was not Reading manufactured pipe. The quality of the pipe that was installed was identical, same quality, appearance, market value. Installation was a mistake. Willfulness is important to Cardozo in this ruling.
Cardozo ruled that this was a "trivial and innocent" mistake.

Hadden v. Con. Ed.
<u>Substantial performance rule applied to the employment context</u>. Employer had substantially performed for many years, but there was misconduct in the latter years (secretly accepted money from contractors doing business with Con. Ed.). "Since employment contracts are divisible, the situation presented by an employee's breach in some, but not all, of the years of his employment relationship is somewhat analogous to the problem encountered in installment contracts where there has been a material breach with regard to one of the installments... In the present case, while Hadden's willful misconduct may have been a material breach with regard to a specific term of his employment, it does not impair the value of his nearly four decades of work for the Company."

Worcester Heritage Society Inc. v. Trussell
Agreement was to complete historic preservation of a house within a year or society could have other workers complete it at Trussell's expense. Trussell (D) has made steady progress but had not completed the house after a 1 1/2 years (he had lost his job and was short on funds). The society sued for rescission. Holding: "There is ample authority for <u>refusing rescission where there has been only a breach of contract rather than an utter failure of consideration or a repudiation</u> by the party in breach." House was 65-75% done, visibly uncompleted sections were at the rear, significant because the society's main concern was the exterior appearance and the front was presentable.

Wholesale Sand & Gravel v. Decker
<u>**UCC 2-609**</u>
(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such **assurance** may if commercially reasonable suspend any performance for which he has not already received the agreed return. (<u>Also Restatement § 251)</u>

Contract to install a gravel driveway. No completion date given in the contract (but P thought he had 90 days). P told D it would be completed in a week, but ground was too wet, bulldozers got stuck, etc, so they decided to wait until it was dry. Wholesale said it would "get right to it" in response to two inquiries. He was given one more chance and did not show up. D hired another contractor to finish the driveway. Holding was that this was a proper **anticipatory repudiation** (by conduct).

K & G Construction v. Harris
Installment contract conditional on doing "workmanlike" work. Contractor has a right to refuse to pay because of bulldozer incident in which the D caused damage to the P's house. Contractor is entitled to withhold installment payment because of negligent operation of the bulldozer. [this is a questionable ruling: the incident was not part of a pattern, and could have been repaired, it was a single event, seemed there was "workmanlike work overall]

Hathaway v. Sabin (Vermont snowstorm case)
Is there an anticipatory breach or should they wait for the other party to perform? "Here the D was mistaken in supposing that the P would not be able to perform, and we know of no rule which permits him to plead reasonable cause to believe so in excuse for the failure on his part." Because it was such a bad snowstorm thought that there was no way there could be a concert, no audience. But musicians showed up.
"A party who becomes involved in difficulties for which he is not responsible, if ultimately able to perform, is not to be deprived of the benefits of his contract because of an assumption by the other party that the difficulties would prove insurmountable."

Cherwell-Ralli v. Rytman Grain
<u>There must be reasonable grounds to request assurance of performance</u>. There was concern that shipment from Rytman might be discontinued due to grain shortages. President of Rytman assured Cherwell that shipments would continue. Cherwell stopped paying Rytman when it heard a rumor that shipments would stop. Apparently Cherwell wanted another assurance that shipments would continue, but there were not reasonable grounds for insecurity about performance.

Greguhn v. Mutual of Omaha Ins. Co.
The doctrine of anticipatory breach has not ordinarily been extended to unilateral contracts. Installments could be paid but he could not get a lump sum payment for the future benefits. There was a continuing unilateral contract.

Reigart v. Fisher
"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." P indicated in a contract that the country estate would be "about seven acres more or less" but it turned out to be 4.76 acres. D asked for return of down payment and decline further performance. Held here that he got substantially what he wanted, so specific performance was decreed.

Keating v. Price
Distinguish from Reigart: Here the shortage was only 1/4 acre, but it was held that the vendee could not be forced to accept the defective performance because he intended to use that 1/4 acre for a phosphate and canning factory. It did go to the essence of the contract.

<u>**END**</u>