CHAPTER ONE—DAMAGES

I. **Expectancy Principle**

A. **Definition:** Put the non-breaching party in position he would have been in had the K not been breached. “Forward-looking” to position party would have been in at the end of the K, not the position he was in before the K.

   i. Expectancy encompasses reliance and restitution. *Greenfield*.

B. **Measuring damages under expectancy:**

   i. **Construction Ks when builder breaches:** Award non-breaching party the cost of completing the contract, (*Groves* majority) unless that would be disproportionate to the goal attained or would entail undue expense. If there is undue expense with giving c/c, award difference between the market value the land would have had if K had been performed fully, and the market value the land had on date of breach. *Groves* dissent and *Restatement First*.

   1. **CASE:** *In Groves v. John Wunder*, contract was for D to lease land from P, to remove all sand and gravel from land, and to leave land at same grade as it was initially. D removed only the highest grade gravel and left the property much worse off. P sued for c/c ($60,000). Trial court said P should only get difference in land value ($12,160). Majority sided with P no matter what. Dissent agreed with trial court, because c/c disproportionate to goal attained from it.

   2. To choose between cost of completion and difference in market value for damages, courts can consider:

      a. Purpose for which contract was made to see whether P’s interest was purely in the construction, or whether P wanted the construction to prepare land for sale, market value, etc. *Peevyhouse v. Garland Coal & Mining Co.*

         i. Ugly fountain example from Restatement: A breaches building the $5000 fountain that would decrease land value. B had already paid $2800. C/c is $4000, so B could recover c/c minus the price unpaid.

      b. Whether c/c is greater than diminution in land value, and when it is, go with the latter. If not, then c/c. *Peevyhouse*.

         i. In this case, D leased land from P, was to extract coal from the property, and fill in all the pits and smooth surface at the end of the lease. D did not fill in pits, and the c/c would be $29,000, but the value of the land if performance was completed would increase only by $300. Court said to look at purpose of K, as stated above, and also that no person can recover greater amount in damages than he would receive by full performance. Award diminution of land value.

   c. Intent of owner. *Advanced, Inc. v. Wilks*

      i. In this case, even if c/c > diminution in land value, if it was clear that owner would use the money to complete performance (i.e. if performance had special value to the owner), P could get c/c.

ii. **Construction Ks when receiving party breaches:** K price – expenses saved (This is an easier way to calculate expenses incurred + lost profits, as in *Rockingham*) (For practice in calculating, see also: car manufacturer hypo)

   1. Always allocate fixed costs in expenses (do not subtract them as expenses saved). *Security Stove*. (*Leingang* case is wrong here, because it subtracts overhead expenses from expenses incurred.)

   2. Plaintiff trying to recover lost profits needs to show the amount of loss with reasonable degree of certainty. *Dempsey*.

   3. Lost profits already include expenses. *Rockingham*. (*Anglia* incorrect in saying you can’t recover both expenses and lost profits and must choose between the two).

   4. Always include allocated fixed cost to calculation, and only deduct those gains to P that would not have been made had it not been for the breach. *Kearsarge Computer v. Acme Staple Co.*
a. [In this case, the company could accept virtually unlimited amounts of business because of the nature of its operations, so it was not as though D’s breach opened up a new opportunity for so much more business. Also, P would not have spent so much more on overhead if they would still have performed for D, so no substantial savings to subtract from damages either.]


1. **CASE:** In Acme Mills v. Johnson, P contracted with D to buy wheat for $1.03 per bushel, to be delivered when D was done threshing. D failed to deliver wheat at that time, and P sued to recover the difference between the K price for which D sold the same wheat to a third party ($1.16) and the original K price ($1.03), plus $80 for the sacks P had given D to pack the wheat. Court only gave him $80 for the sacks, because the market price on the day of the breach was $0.97, so P did not suffer any other damages as result of breach. Court said this is the well settled rule.

   a. **Exception** to the rule in Acme Mills that generally says to look at P’s loss and not D’s benefit in evaluating damages: In Laurin v. DeCarolis, P bought land from D, but before closing, D removed gravel from the property. P sued for, and was awarded, the value of the gravel, and not the diminution of land value. Diminution would be seriously inadequate, because value didn’t change much. Value of the gravel was much higher, and removing gravel deprived P of a profit P was entitled to make.
      i. UCC is in line with this reasoning in the opposite case, when it says that when buyer breaches, seller can recover LP + incidental, when regular damages are inadequate to compensate seller. (see below under “sale of goods when buyer breaches”)

   b. Jane v. Roofco Hypo: theoretically same as Acme Mills, but to get full mkt price, add the original $10K to the price she must pay at date of breach for the remaining 6 years of the roof. Then from this, subtract the original K price, and the difference is her damages (so basically, just the current market price of the roof, or in her specific case, the allocated amount because she bought a substitute roof for more than 6 years. There is a choice whether to take her outside transaction into account; consider both ways and argue for one.)

   c. When goods under a K are to be delivered in installments, measure of damages will be estimated by the value at the time each delivery should have been made (although the non-breaching buyer can opt to enter into a new forward K at his own discretion and risk). Missouri Furnace.

2. **UCC**

   a. Mkt price @ t&p – K price + incidental and consequential – exp saved
   b. If buyer “covers,” his damages are (cost of cover – K price + incidental and consequential damages – exp saved)
   c. Cover is not mandatory, but may help the buyer, because he can only recover those costs he could not reasonably avoided (see below in mitigation of damages)

iv. Sale of goods when buyer breaches:

1. **UCC**

   a. Mkt price @ t&p – K price + incidental and consequential – exp saved
      i. However, if this formula is inadequate to put seller back in position he would have been in after performance, then measure of damages is: Lost profit (including overhead) + incidental

      1. Neri and Laurin are consistent with this.

v. Wrongfully discharged employees: K price – the amount that employer affirmatively proves employee has earned or with reasonable effort might have earned. (Projected earnings from other employment opportunities not sought or accepted must be comparable, not different/inferior.) (mitigation of damages). Parker. [see below, limits on expectancy damages]

vi. When employee breaches. Breaching employee must pay employer the excess cost of finding new replacement. (new K – original K)
C. **Limits on Expectancy Damages**

i. **Doctrine of Avoidable Consequences:** a person injured by breach of K can only recover those costs it could not reasonably have avoided through mitigation. *Rockingham, Parker*. Also deduct costs saved from the breach. *Kearsarge*.

1. **CASE:** In *Rockingham County v. Luten Bridge Co.*, D had K with P to build a bridge, but when D had spent $1900 in building expenses, P repudiated and gave notice to D. D kept building until the bridge was complete, and then sued for the entire K price. Court said he could have avoided damages by stopping construction when he was given notice to stop, and thus he could only recover damages until that date of repudiation.

2. Mitigation does not become an issue until after the breach; so if there is a K which has a date set for delivery/performance, mitigation does not kick in until that date, if the performing party has the option to delivery until that date. **Reliance Cooperage v. Treat** *(note case under Missouri Furnace)*

   a. In this case, B and S had K. Seller said he wanted to raise price, but B said he wouldn’t pay and still expected delivery in December as originally planned. Court said they had to use market price in December to calculate damages, because S had option to deliver till that point, and thus breach did not occur until then. Demonstrates problem with *anticipatory repudiation/breach* when promisor repudiates K duty presently due and also repudiates duties due in the future.

3. Avoidability includes concept of **cover**, even though cover itself is not mandatory for buyer to do in event of breach of sale of goods under the UCC. If he reasonably could have replaced the goods, he cannot recover for that avoidable amount. (See below for discussion on cover)

4. When mitigating damages in cases of wrongful discharge of an employee, employee is entitled to the K price minus anything the employer can prove employee has earned OR could have earned. *However, projected earnings* from other employment opportunities not sought or accepted must be **comparable**, not different/inferior. Must be substantially similar to apply toward mitigation. If no comparable alternative is within reach, then award full K price. *Parker v. 20th Century Fox*.

   a. **CASE:** In *Parker*, D decided not to film the movie for which P had been hired. D offered P a role in another movie but P refused it. P sued for K price damages. Court held for P, stating that the second movie was different and inferior, and therefore P should not have been expected to accept it, and it also should not apply toward mitigation. Dissent argued that more information was required to decide whether the two movies were not substantially similar.

5. Showing that the employee failed to look is not the same thing as proving what she could have earned if she looked.

6. The employee cannot be expected to accept less money for essentially the same job with that employer; this cannot apply in mitigating damages, because it is inferior. *Billetter v. Possell* [*Case about floor lady/designer who was asked to change jobs to be a floor lady but for less pay. She refused the alternative job and sued to recover her salary from the first job during the months she was unemployed, but that still fell under the K period.*]

7. *Billetter* also stated that unemployment compensation should not apply toward mitigation—matter of public policy and the purpose of the program. **Collateral Source Rule**.

   a. Other courts disagree, though. In *United Protective Workers v. Ford Motor Co.*, employee was forced to retire 20 months early, and court deducted his retirement benefits in mitigation, because D had acted in good faith, and employee would have received more than compensation. Other decisions take other views on the matter. See brief and pg. 55 text.

8. See also: Hypo about McD’s employee breaching: She would still be liable for the difference between her K price and the new employee’s K price, if she could not prove that McD’s could have hired a cheaper alternative.
ii. **Foreseeability:** Courts and statutes vary with respect to how much liability D should have for a breach, with respect to foreseeability of damages:

1. **Hadley test:** Go with what is reasonably foreseeable result of breach of K. If there are “special circumstances” that could give rise to liability outside of what is reasonably foreseen, they would need to be communicated explicitly.
   a. **CASE:** In *Hadley*, P were millers with a broken shaft, so they sent it to be repaired. Carriers (D) were supposed to deliver it to manufacturer the next day. D delayed, so shaft didn’t come back till a few days later, so P suffered lost profits. Court ruled for D, following rule stated above, and stating that it was not foreseeable that such losses would occur; they were special circumstances that P should have communicated to D in order to recover.
   b. Parties should have considered nature of performance, not necessarily how much it would be worth. By considering performance on K, parties should be able to see what is foreseeable. **Victoria Laundry v. Newman Indus.** (This case follows Hadley rule.)
   c. **CASE:** *Victoria Laundry*: P was a laundry and dyes business that bought a boiler from D, but upon delivery it was in such horrible condition from damage that P wouldn’t accept it. It came 5 months late. D knew P’s business, so it was obvious that the boiler was necessary and that D would be liable for such regular business losses (but not for special unforeseeable jobs P would take on).
   d. Result only needs to be a possible result, not necessarily the most probable result. **Hector Martinez v. Southern Pacific Transport**
      i. In *Hector Martinez*, D was a month late in delivering a dragline which P intended to use in strip mining. Here, it was obvious that (unlike shaft in *Hadley*), the dragline itself had rental value, so it was foreseeable that deprivation of its use would cause loss of rental value.
   e. Also see *McDonald’s-Greasy Spoon Hypo*, in which McD’s could have foreseen that dealer would resell, but McD’s couldn’t have guessed it was for more than (Mkt price – K price) because there was no market.
2. **UCC Rule 2-715 Re: Consequential Damages:**
   a. Agrees with Hadley and rejects Tacit Agreement
3. **Tacit Agreement Test:** It is not enough that the D was aware of some probable result of breach; must consider whether D would have assented to liability for it. (*Lamkins* case about the $20 tractor light delay that allegedly caused hundred of dollars of lost profits in growing soybeans at night)
4. **Restatement Second:**
   a. First 2 parts agrees with Hadley, but then third part shifts toward Tacit Agreement.
   b. (3) “A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”

iii. **Substitute contract/cover:**
1. Under the UCC, if buyer covers, then use (cost of cover – original K price)
2. In *Missouri Furnace*, court said that if seller breaches and buyer makes a new forward K as a replacement and/or means of mitigating, but the new contract is more expensive, the breaching seller is still not responsible for buyer’s “bad” decision to enter the new K. *However, if this case were in present day, UCC would cover it.*
   a. **CASE:** In this case, P had K with D for delivery of coke in installments for $1.20/ton. D rescinded, and P made a new forward K for $4/ton. P sued to recover this K price. Court only awarded difference between Mkt price on day of breach and K price. Follow standard rule; new K does not matter. Can’t hold D liable for P’s independent decision to make that K.

iv. Note on phrasing: there is NO “duty” to mitigate! *Greenfield.*
v. Certainty:
   1. Must show damages to a reasonable degree of certainty. This is higher than any other element that the breaching party must prove. See below in Dempsey too.
   2. Mental distress damages for breach of K have not been awarded where there is a market standard by which damages can adequately be determined. General rule is to uniformly deny mental distress damages in breach of employment K. Valentine v. General American Credit.
      a. In Valentine, P sought mental distress damages from breach of an employment K. She relied on Hadley to recover foreseeable emotional damages from loss of job security. But if Hadley applied here, it could be applied everywhere for emotional damages.
      b. Same denial for construction Ks. Hancock v. Northcutt

II. Reliance Damages
A. General Principle: If non-breaching party is unable to move to his expectancy position, he should be able to go back to how he was before the K was made.
B. Measuring Reliance Damages:
   i. If expectancy calculations award P nothing, P can turn to reliance damages.
   ii. Expenses incurred before the K was formed:
      1. Dempsey says to only look at expenses incurred after K was formed; cannot recover for those incurred before.
      2. Anglia says: P can recover damages incurred before K existed, because expectancy encompasses expenses incurred in reliance on the K. Anglia Television v. Reed. [case about hiring an actor after spending money on preparing to make movie, but then the actor breached]
   iii. P cannot recover damages for actions taken after the breach; he assumes those at his own risk.
      Chicago Coliseum Club v. Dempsey.
   iv. In recovering expenses incurred between K date and breach date, P can recover only those expenses incurred in the furtherance of the K.
   v. Restatement says reliance interest includes “expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the K been performed.” (Armstrong Rubber consistent with this last part)
      1. Armstrong case agrees with saying that damages should be reduced by the loss P would have faced if K was completed.

III. Restitution
A. General Principle: Restitution is its own system of civil obligation, and it comes into play when D benefited from P’s actions and it would be unjust not to compensate P for those benefits to D. Compensation must have been expected from the outset to receive restitution. This is separate from suing on the K, so P must choose between suing on the K and suing in restitution (unless P breached or the K is unenforceable, in which case he cannot recover on the K anyway).
   i. Note: Restitution is subcategory of quantum meruit, so don’t use those words interchangeable; just say “restitution.”
   ii. Even if P is the breaching party seeking restitution, if it would be unjust for D to keep all the benefits of P’s labor, P can recover in restitution. In this situation, however, since P has to balance restitution rights with D’s rights on the K, the K price is the upper limit on P’s recovery. Britton v. Turner (first case to decide this way) (Greenfield agrees with this opinion, but not measure of damages, because K price shouldn’t be the starting point for calculation)
      1. CASE: In Britton v. Turner, P agreed to work on D’s farm for 1 year, but then quit after 9 ½ months. Court allowed P restitution damages, because a benefit was conferred upon D as a result of P’s work.
iii. Even in cases where no benefit is conferred upon D, if the K is otherwise unenforceable and P has rendered services on it because of D, P can be reimbursed in restitution. Expenses incurred because of D, minus any benefits received from breach. **Kearns v. Andree**

1. In **Kearns**, D said he’d buy a house from P if P made certain alterations to the house. P did them. D refused to buy. P sold it to third party, after re-doing what he had to do for D. Here, the written K was unenforceable because it was indefinite, but P could skip suing on the K and instead sue under restitution, even though there was no benefit to D. Even though K unenforceable, there was expectation of compensation.

2. Similar situation in **Farash v. Sykes Datatronics**—Here Statute of Frauds made K unenforceable, but the third claim was for the value of the work P performed in reliance on D’s promise to lease a building. Here, restitution was still in disaffirmance of the written K, so it wasn’t like trying to enforce a K that didn’t comply with Statute of Frauds.

**B. Measuring Restitution Damages:**

i. Restitution damages are awarded based on the **reasonable value** (look to market) of the services performed, or, in other words, the **pro rata** amount for which such services could have been purchased **at the time and place the services were rendered, undiminished by any loss** which would have been incurred by **complete performance**. **United States v. Algernon Blair**.

1. **CASE:** In **Algernon Blair**, P was subcontractor under D. D refused to pay P for crane rental, thus breaching K. P quit working, and then sued to recover for labor/equipment furnished until the breach. Balance due on the K was less than the loss P would have incurred after full performance, so trial court denied recovery. But on appeal, P recovered on restitution.

ii. When receiving party breaches, and performing party seeks restitution:

1. Restitution damages are not contingent on K price. **Algernon Blair**.

2. When suing on the K, K price is boundary because that is expectancy, but in restitution we do not look to expectancy, but rather the benefit conferred upon D and the injustice in not paying P for it. Only consider K price to help determine reasonable value.

iii. When breaching party seeks restitution:

1. Here, P has no remedy in the K, because P breached, so restitution is P’s only option now.

2. K price becomes a cap, because then the receiving party also has a claim on the K, along with performing party’s claim in restitution.

3. Look to value of performance, up to the K price. [Do not look at K price and subtract damages; this is the fatal flaw in **Britton**.]

4. Look at pro rata value of performance; See example about pilot from class notes. In this example, when bound by the K price, calculate each monthly rate separately, and reduce any monthly value that exceeds monthly K price to cap at K rate. For remaining months following breach, reduce P’s value by the expenses D will incur to hire another.

iv. **Once performance is complete, P cannot sue in restitution.** **Oliver v. Campbell**. [In this case, lawyer had already finished job for divorce case]

**IV. Equity**

A. **General Principle:** When monetary damages are inadequate as a remedy because the subject of the K is highly *unique* or if the subject is *real estate* (regardless of uniqueness), P can sue in court of equity to have specific performance done. If it’s an employment K, generally no specific performance, but can get *injunction*.

i. Physical uniqueness alone will not warrant specific performance. Equitable relief cannot outweigh injury to P! **Van Wagner**

1. **CASE:** In **Van Wagner**, though billboard one-of-a-kind, purpose for it was purely economic, so monetary remedy at law was adequate and calculable.

2. Cases ruling on the issue of uniqueness:
a. **Dallas Cowboys v. Harris**: Court said that trial court had been too narrow in defining unique football player. Look relatively.

b. **Pingley v. Brunson**: Organ player who stopped playing who quit. P sued him for quitting, sought specific performance. But organ player was not unique enough—there were 8 other replacements available, and it does not involve any overly special skills.

   ii. Only apply equity after determining that remedy at law will not suffice.

   iii. In some cases, though subject matter is not unique in itself, if situation still shows remedy at law inadequate (i.e. when there is no market from which to calculate mkt p – k price, Curtis Bros. v. Catts), P can turn to equity

   iv. Courts of equity see an exception to the Statute of Frauds, if P has done part performance.

B. **Exceptions**:

   i. Courts will not apply equity to personal service contracts. *Fitzpatrick*

      1. **CASE**: D hired P to be personal assistant. D promised her money/wk, room and board, and life estate in his house when he died. Later he changed his will and tried to kick her out or drive her away, and P sued for specific performance. Court said can’t do specific performance for personal services Ks

      ii. Equity will not enforce a negative covenant. *Fitzpatrick*.

      iii. Courts of equity will take part performance into account when enforcing a K barred by the Statute of Frauds.

      iv. Courts generally will only apply equity in situations where they know equity/specific performance is actually possible. *Northern Delaware*.

C. **Specific Performance for Noncompete Clauses**:

   i. **CASES**:

      1. **Fullerton Lumber Co v. Torborg**: Court changed an unreasonable 10-yr noncompete clause to 3 years—Wisconsin later passed law saying covenants need to be reasonably necessary for protection of employer

      2. **Data Mgt Inc v. Greene**: outlines 3 ways to approach overly broad covenants for noncompete:

         a. Say they are unconscionable and therefore unenforceable (too drastic and mechanistic)

         b. Delete or specify words (too semantic)

         c. If court can reasonably alter it to make it enforceable, do so unless it was not made in good faith.
CHAPTER 2: GROUNDS FOR ENFORCING PROMISES

OUTLINE

I. General/Background
   A. Theories on why we should enforce promises include:
      i. Upholding the fixed purpose of the promisor
      ii. Utilitarian (necessity in civilized community that sensible expectations be induced by a promisor)
      iii. Legal protection and Formality
      iv. Functioning of society
   B. Functions of Consideration
      i. Evidentiary—may be satisfied by writing, attestation, witnesses, etc.
      ii. Cautionary—acts as a check against inconsiderate action. Seal used to work for this function. Writing and notarization fulfill this function now.
      iii. Channeling—channels for the legally effective expression of intention; formalities that serve as memorials and also induce deliberation
   C. Roughly half the states have done away with the seal (taken away its legal effect).

II. Consideration
   A. General principle: benefit to promisor OR detriment to promisee. Quid pro quo (something for something). Mutual reciprocal inducement (there must be a bargain). Detriment here refers to legal detriment. Courts do not look to adequacy (Fischer, see below); parties are free to decide how they want to bargain. There is no such thing as “type” of consideration; it is either consideration or it is not.
      i. Legal detriment may be realistically beneficial to the promisee, but courts do not consider this. They only consider whether the party did or gave up the legal right to do something they otherwise would or would not do if not for the promisor’s promise.
      ii. CASE: In Hamer v. Sidway, P was assignee to a claim for $5000 that initially was promised to a nephew by his uncle. The uncle told the nephew he could have the money on his 21st birthday if he did not drink, smoke, swear, and gamble until that time. Nephew complied, and on 21st birthday, he asked for the money, but uncle said he’d wait until he thought the nephew was ready and allow the money to accrue interest. Uncle died without paying nephew. Court said it was enforceable because nephew had legal detriment (gave up legal right to do all of those things). It did not matter that this detriment did not directly benefit the uncle, because nephew acted this way only because of the promise.
      iii. In Earl v. Angell, an aunt promised her nephew $500 if he attended her funeral (if she were to die before him). An envelope was waiting there for him, and the promise was enforceable. Promises to gift after death are normal and enforceable.
      iv. However, in Congregation Kadimah Toras-Moshe v. DeLeo, D (decedent) suffered prolonged illness and P’s spiritual leader visited him regularly. During a few visits, D promised to give P $25,000. P made plans for what he would do with the money. Court said this was gratuitous pledge, with no legal benefit to promisor or detriment to promisee, and hence no consideration. P’s plans for what to do with the money are insufficient as reliance; hope/expectation does not constitute reliance. (See below for reliance discussion.)
      v. Benefit to the promisor can encompass an abstract gain, such as the success in getting the promisee to do something specific.
   B. Bargain: consideration must reflect mutual reciprocal inducement; the matter claimed as consideration must have actually induced the other party to act; if not, there is no bargain and it is just a gift.
      i. Restatement describes mutual reciprocal inducement as either a performance or a return promise.
      ii. Restatement also says it is not necessary that what is given for the promise is the primary reason for the promise; it is sufficient that it is some reason for the promise.
      iii. CASE: In Fischer v. Union Trust Co., father conveyed real property to his daughter by warranty deed, and he promised to pay the mortgages in the deed when they became due. Father gave this to her for Christmas, and daughter handed him $1. Gift of land was completed by handing over deed, but the promise was for the mortgages. Greenfield explained that the reason promise was
unenforceable was because there was no mutual reciprocal inducement. Father would have given her the land anyway.

1. Similar situation in Schnell v. Nell, where the heirs’ giving a penny for the legacies was not bargain.

iv. In Hamer v. Sidway, summarized above, uncle induced nephew to act in a certain way because of the promise, and uncle got him to act in that certain way. Thus, they had mutual reciprocal inducement.

v. In Whitten v. Greeley Shaw, D wrote an agreement stating a list of things P had to do for D. P signed it. Later, P loaned D money and D defaulted. P sued for foreclosure and D tried to use their prior agreement as a counterclaim. Court said no because D had not given up anything, and the only thing P gained in it was something D stuck in there without P bargaining for it.

C. Limitations on Consideration:
   i. Two prong test to see if consideration makes a promise enforceable: 1) was it done in good faith? and 2) does it have at least some foundation? (Duncan, see below)
      1. If the alleged consideration is grounded on something illegal or in violation of public policy, it cannot really be consideration.
      2. Evaluating good faith in consideration: 1) subjective (honesty) and 2) objective (honest plus reasonable)

   ii. CASE: In Duncan v. Black, D contracted to sell farm land to P and P got allotment for one year. The following year, P requested that D make the same arrangement, but D refused. They settled the claim by D giving P a $1500 note, on which P sued. There was good faith here, but the claim has no foundation. Allotment is only supposed to last one year by statute, and to do otherwise not only would go against the statute but also public policy. No other agreement existed, so P’s claim is for a nonexistent allotment.
      1. Also see Hypo about the man demanding $10,000 from D. D refused and P said he’d let him go if he paid him $100. D didn’t pay, so P sued. D wins because the promise was grounded on invalid consideration.

D. Consideration Performed Before Promise Made:
   i. General rule: Since there is no mutual reciprocal inducement for actions done in the past, it is up to the promisor whether he wants to perform. The promise is not enforceable.
      1. CASE: In Mills v. Wyman, D’s 25 year old son fell ill and P took care of him by his own choice. After all expenses incurred, D promised to pay P back for those expenses. D did not pay and P sued. No new consideration, so not enforceable; there must be some pre-existing obligation. Can’t enforce without consideration even if the result is “disgraceful.” Law “perhaps wisely” leaves it up to person who makes the promise to keep it or not.
      2. CASE: Harrington v. Taylor: P stopped someone from killing D but P was injured as a result. D promised to pay P’s damages, but court would not uphold humanitarian act alone. Court said there needs to be evidence of intent to charge.

   ii. OPPOSITE CASE: In Webb v. McGowin, P’s job was to drop blocks from upper floor. He was about to drop a huge one but he saw D below. To save D from risk of injury, P jumped off with the block but suffered serious injuries for life. D promised to take care of P for like with bi-wkly pmts. This continued until after D died, and P sued his estate for the remainder. Court said promise was enforceable. D became morally bound because the material benefit—P had benefit and D had detriment. D’s subsequent promise made the P’s services no longer gratuitous.
      1. This case compared P’s act to a doctor saving someone’s life. Though historical view was that everyone is motivated by self-interest, they expect compensation. Modern view says a person who acts gratuitously obtains no legal claim for compensation because “expectation of payment is an essential element of a claim for restitution.”
      2. Restatement is consistent with this view in that it states that 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 (but not binding if promisee conferred the benefit as a gift or promisee has not been unjustly enriched…or if compensation is disproportionate to the benefit).
3. **Edson v. Poppe**: at request of a tenant, drilled well on D’s land. D’s subsequent promise to pay P for the service was enforceable because he saw he was directly benefited and agreed to pay the reasonable value thereof. Circumstances did not indicate the act was gratuitous, so the later promise was supported by consideration. **Note**: This is consistent with Restatement.

4. **Muir v. Kane**: D hired real estate broker (P) to find purchaser for their home. This was oral, and was under the Statute of Frauds. In the K with the purchaser that P found, there was a clause saying D owed P $200. Even though barred by the Statute of Frauds, P had to pay because performance was completed. (works the same way as enforcing once-enforceable debts barred by the Statute of Limitations—see below)

   iii. **However**: In some cases, there was a bargain at one time, and for some reason, the law said those promises weren’t enforceable. In these cases, if there is a later promise for those prior bargains, that promise can be enforced because there was a past bargain. Most common examples are debts barred by the Statute of Limitations, debts incurred by infants, debts of bankrupts—at one point they all had consideration, so new promise removes the impediment from them. (In Mills, court discusses such situation in opinion to contrast with the facts of Mills’ situation)

   1. **Note**: Restatement: A new promise to perform (or an acknowledgment of liability) made after default and before the statutory period has expired will start the statute of limitations running all over again.

### III. Reliance on a Promise

A. In some cases, where there is no consideration for a promise, courts will enforce the promise anyway, because the promisee relied on it to make expenditures. Important to note that while courts in the past have seemed to stretch the concept of consideration, they are really just trying to find other reasons to enforce otherwise unenforceable promises.

   i. **CASE**: *Kirksey v. Kirksey*: D said that if P moved to where D was, he’d give her a tract of land and a house. P abandoned her own home, and traveled 60-70 miles to move near D. D gave P land to cultivate for 2 years, after which D notified P to leave. Majority in this case found D’s promise to be a mere gratuity, so it was not enforceable. One justice in dissent wrote that he thought the loss and inconvenience that P suffered constituted consideration.

   1. When this case came about there was no such concept of promissory estoppel, but if there were, P would have won.

   ii. **CASE**: *Ricketts v. Scothorn*: D gave P $2000 note so that P wouldn’t have to work anymore, but stated no condition or requirement for it. P took the note, quit work, and remained out of work for a year, after which she got a new job with D’s permission. D died and P sued on the note. Though the note was gratuity, D’s executor was estopped from denying consideration because P made expenditures and took actions in reliance on the promise.

   iii. **CASE**: *Seavey v. Drake*: D gave P possession of land and promised to give P the deed (didn’t matter that P surrendered promissory note to D, b/c as in *Fischer*, handed it over by choice, no inducement). P moved onto land and spent $3000 improving the land, his action induced by D’s promise. Though the land was a gift and there was no consideration, P’s reliance and expenditures induced by the promise were enough to make it enforceable against the testator.

   1. Note: This is not the same thing as part performance, as the court discusses. Part performance arises when there is an oral contract for sale of land. In *Seavey*, it was just a gift.

   2. Note also that most courts agree part performance is appropriately used to save an oral agreement barred by the Statute of Frauds.

   a. To have part performance work in land K case, reliance in land must be something beyond injury adequately compensable in money, or else you’d have to sue in restitution, and not in equity.

   iv. **CASE**: *I & I Holding Corp v. Gainsburg*: D signed pledge to donate for P’s humanitarian work. P spent large amounts of money but D didn’t pay. P sued. Court here said there was an implied K, so it wasn’t necessary to apply promissory estoppel.
1. Dissent point out that to apply promissory estoppel, the actions the promisee took had to have been taken only because of that promise; cannot apply promissory estoppel for actions the promisee would have taken anyway.

B. For equitable estoppel, the promise on which the promisee relies must be for past or present action; present intentions of future action are too uncertain.
   i. **CASE: Prescott v. Jones.** D insurance agents had insured P’s buildings for a year. D sent P letter saying they’d renew the policy unless notified to the contrary. P did not reply and D did not renew the insurance. Buildings were destroyed and P sued. Here, there was reliance (unlike in *Acme Mills*) but the reliance was not on any statement of fact from present or past; only intent for future action so too uncertain to provide basis for reasonable reliance and action.

   1. Equitable estoppel, explained: The purpose is because it would be a fraud if the party would be allowed to state and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and alter his condition.

C. Promissory estoppel developed as a way to enforce those promises for future actions.
   i. **CASE:** Although in *East Providence Credit Union v. Geremia*, the court found a binding contract to enforce, it discussed how promissory estoppel could be applied in the situation if the K had been unenforceable. In this particular case, D borrowed money from P (the bank), and had promissory note secured by car mortgage. Clause said that if D failed to maintain the required insurance on the car, P could pay the premium immediately. D received letter from P saying premium was overdue and that if D didn’t pay, then P would renew the policy for D and apply the amount to D’s loan. D relied on this but P didn’t pay.

   1. **Promissory estoppel, explained:** (consistent with Restatement too) – 1) a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise, 2) which does induce such action or forbearance, is enforceable if 3) injustice can only be avoided by enforcement of the promise

   a. Promissory estoppel acts as a substitute for consideration in gratuitous cases.

D. Reliance on a promise (promissory estoppel) is only good so far as it is reasonable and as the promise has no other means of justice. (element #3)
   i. **CASE: Forrer v. Sears Roebuck:** P was persuaded to work for D, and was induced solely on that promise for “permanent employment” to quit his farming operations for this job. He began the job with D, but D then fired him without cause. P sued, but D won, because D did uphold its promise for permanent employment (by definition this is employment terminable at will). Though first two elements of promissory estoppel seem to fit here, with regard to the third, justice did not require enforcement because D already fulfilled its promise.

   1. Contrast to result in *Hunter v. Hayes*, in which D hired P, P quit her first job, but D never hired her. P won.

IV. **Mutuality of Obligation, Promises of Limited Commitment, and Conditional Promises**
A. **Mutuality of obligation:** both parties are bound, or neither are; look at inception of the contract (not later performance, see: blackberry hypo: it didn’t matter that seller chose to perform. Buyer was not obligated to pay if seller had not restricted his action initially, but then later chose to perform.)
   i. **CASE: Obering v. Swain-Roach Lumber Co.:** P and D made a K saying that if D bought the a particular tract of land that was for sale, then D would sell the land to P for $8K and remove all the timber within 4 years. Both parties restricted future conduct at the inception of the K. D bought the land and tendered deed to P, but P refused to pay. D won. (Court applies incorrect reasoning, because the mutuality began at inception, not just when D bought the land. Court still reached right conclusion though.)

   1. Example to show why important to look at inception, and not in the way the Obering court viewed it: **Paul v. Rosen:** P and D had a written K, in which D agreed to sell P its retail liquor business and stock of goods for certain price. The K was conditioned on P getting a new 5yr lease from the owner. Before P got the lease, D refused to sell inventory. P sued. Court reached the wrong conclusion because it used the reasoning
from Obering. P should have won because there was mutuality of obligation already, don’t just look at the time beginning with P getting a lease.

B. Contracts are only binding if both parties are bound by them. Flexibility is allowed, but each party has to be bound at least by something (look to present commitment or restriction on future action). Just because one party has flexible performance option doesn’t mean that the other party also has that same flexibility. Look at inception, again.

   i. **CASE: Davis v. General Foods Corp:** P wrote to D saying she had an idea for a recipe. D wrote back saying that it would look at her idea but the use/compensation, if any, were to be determined by D solely at D’s discretion. D later used the recipe but did not pay P for it. P sued for restitution, but could not recover because the promisor retained an unlimited right to decide later the nature and extent of performance. A promise can’t be binding if one party can still decide what future conduct will be. Fairness can’t help P here.

   ii. **CASE: Nat Nal Service Stations v. Wolf:** P and D had oral agreement stating that so long as P purchased its gas requirements through D and D accepted, D would give P a discount. The agreement was not binding on either party’s side because P could still buy from anyone else and if it chose D, D could still reject.  
      1. This is an example of an illusory promise (neither party bound)

C. A party is allowed to have **flexible commitment, as long as the cancellation clause is not unrestricted.**

   i. However, as seen in the blackberry example, if, for example, seller can terminate at any time, then buyer is not obligated to pay seller if seller actually delivers to him, because it was seller’s choice to act, not his obligation.

D. Requirement and **Output Contracts**—Both are valid because both have restriction on future right, even though no present obligation to act.

   i. Requirement contracts are those in which a buyer promises to buy everything he/she will need during a specified period from a particular seller.

   ii. Output contracts are those in which seller promises to sell all of its output during a specified time to a particular buyers.

E. If there is no specific mutuality of obligation stated, you can look for **implied obligation** and the K is still binding.

   i. **CASE: Wood v. Lucy:** D claimed P had no explicit obligation and did not bind himself to anything, so K should not be enforceable. But by looking at the K, it was clear that P had implied obligation via all the smaller things he was obligated to do.
      1. UCC would agree with this case today.

F. Alternative promises can be made if all could be consideration if bargained for individually. **Restatement** (Also see class notes example with cabin/jet ski)

G. Restrictions on Parties’ Flexibility

   i. Ex) Though an employer generally has right to terminate at will in permanent employment situations, employer cannot fire employee because of something employee did that was mandated by Statute. This is against the law and public policy. See Teddy’s Frosted Foods
      1. Opposite case: **In Price v. Carmack Datsum,** D fired P when P said he’d file claim under employee’s group health insurance. P could not succeed on retaliatory discharge, however, because that only applies when in violation of clearly mandated public policy. This was just a matter of private grievance, not one affecting society.

   ii. Cancellation clauses in Ks can’t be unrestricted. If they are, they invalidate the K.

**CHAPTER 3: THE MAKING OF AGREEMENTS**

I. **Mutual Assent:**

   A. **Generally:** offer + acceptance. Both parties must agree to the same thing. However, courts look to objective manifestations of what a reasonable person would perceive as assent from the other party.

   B. **Objective standard:** look to what would a reasonable person perceive in a certain circumstance, in combination with fact that P did so perceive it like that
i. **CASE: Embry v. Hargadine.** P’s employment contract ended with D. He told employer that he wanted to work for another year or an understanding with the boss so that he would not have to worry. D said, “Go ahead, you’re all right. Get your men out, and don’t let that worry you.” P understood this as a new K for employment. Court ruled for P, saying that no reasonable man would perceive the boss’s words any other way than assent, and P did rely on them as such.

   1. **reasonable person + P actually did believe** [Note: if P did not actually believe even though a reasonable person could have, then P cannot win]
      a. Hypo about Greenfield making fake K with his friend just as a scheme. Even though objectively the K looked real, the friend knew it was fake so could not have used objective standard to enforce it.
      b. **NY Trust Co. v. Island Oil & Transport.** D made Ks with several Mexican corporations to have them appear as owners & operators, in a plan to circumvent restrictions on its owning and exploiting oil-bearing lands within 50 km of Mexican Coast. The Ks were obviously shams, and therefore when P (one of the Mexican corps) sued to recover for the supposed balances due, P could not recover. Objective test still applies: look at what a normally constituted person would have understood the words in K to mean when used in their actual setting; here, no reasonable person would have thought they were actual sales.

ii. **CASE: McDonald v. Mobil Coal Producing.** P worked for D, and after rumors that he had sexually harassed a co-worker, bosses told him either to resign or be fired. He resigned but later said it was a dismissal. He challenged the dismissal by pointing to the employee handbook terms and bosses’ conduct to justify his belief that his original at-will employment K terms had changed. Court said a reasonable person could have understood the handbook as changing the original K, and also said that the disclaimer was not conspicuous enough to preclude P’s reliance on the handbook.

   1. **Restatement 2d § 21:** Neither real nor apparent intention that a promise be legally binding is essential to the formation of a K, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a K.

   2. **Dissent from McDonald:** Handbook wasn’t adopted after P began to work, and all employees got the same handbook, so it couldn’t have changed the K he already had. There was already an at-will employment K. Another dissenting opinion also argues that there was no consideration for the handbook terms. **Pine River case** below responds to issue of consideration + acceptance.

      a. **CASE: Kari v. GM.** Here, P could not recover, because the disclaimer in the handbook was conspicuous and outlined in red, and the court said that while an employer’s communications to employee may constitute an offer to contract, the offer must contain a promise communicated in a way that the promise may justly expect performance and may reasonable rely. The handbook here clearly shows intention NOT to create such offer.

      b. **CASE: Pine River State Bank v. Mettille.**

      c. **CASE: Torosyan v. Boehringer...Pharmaceuticals.** Extended Pine River to come up with list of points to consider, i.e. looking at implied terms between employer and employee when there are no express terms, looking at factual circumstances to see if the issuance of handbook was offer (this is fact, so jury decides), and then look at whether there was acceptance [if favorable terms and employee keeps working, there is assent. If unfavorable terms, employee’s continued work does not necessarily signal assent]

C. **Subjective standard:** “meeting of the minds”; Courts do not use this as a single standard.

D. **What Constitutes an Offer:**

   i. Must manifest assent to enter into bargain and be bound by terms of exchange proposed
   ii. Must be reasonable for a recipient of the language to construe it as an offer.
   iii. **CASE: Moulton v. Kershaw.** D sent P letter saying it was authorized to sell fine salt, and advertising a low price. The letter ended with, “Shall be pleased to receive your order.” P wrote back with an order for salt, “as offered in [D’s] letter.” D withdrew the letter, and P sued. Court
found for D, saying the letter was not an offer. It would be unreasonable for P to expect every recipient of the letter to assume it was an offer.

1. Depends on facts. Ex) If the letter had said it offered as much as P needed or if it had restricted the number to something else, then the letter could have been an offer. But the actual language here was very general; it was a notice, not an offer.

2. Contrast to HYPO with Greenfield and Dorothy/Fields. G offered to sell his car (specific offer) to both, and they both assented. So now G has one car and two Ks. Unlike in Moulton, it would be reasonable for Dorothy to have assumed the message on his machine from G expressed G’s assent to the exchange. It did not matter that G also offered it to F in the meantime. Still reasonable for Dorothy to rely on it.

iv. CASE: Fairmount Glass v. Crunden-Martin Woodenware. P wrote D a letter asking them for the lowest price D could give for a specified number of jars. D wrote back with a “quote” for a certain number of jars, with prices and shipment details “for immediate acceptance.” P wrote back with an order, but D then wrote that they were sold out so could not deliver. P sued, saying that its second letter to D had closed the K. Court ruled for P.

1. General rule: Price quotes are not offers (as seen in Moulton above). Transaction not complete until the order based on the quoted prices is accepted by party who gave quote.

2. HOWEVER: need to read all correspondence to get true meaning of the correspondence.
   a. In Fairmount Glass, from the way P’s first letter was written, there was no way D could have known P wanted an offer. And then D’s letter saying “for immediate acceptance” could signal nothing other than an offer to sell immediately. Terms were definite, and both letters combined to create the K.

E. Definiteness of terms—Various views:
   i. Ks must be definite as to price and quantity (enough to be able to calculate damages if needed).

   Wilhelm Lubrication Co. v. Brattrud.
   1. In this CASE, P could recover nothing, because the specific weight of the oil was not specified, and without that, price could not be determined. Court would not insert an average price, because that would amount to inserting a new term and remaking the K.

   2. From this case and the Fairmount drafting problem, we see that to prevent such ambiguity, the seller could have said “if buyer does not specify, then the order will be X amount” or “the order will be X amount unless buyer changes it.” Also important to note time limit before delivery date by which buyer must specify amount.

   1. In this CASE, style of yarn ordered not specified, so price could not be determined when P sued. Court said that the measure of damages is the least profit which P would have made on any of the yarns which D was entitled to specify under the K.

   2. Restatement § 33: see below; this applies here because Restatement agrees with William Whitman

   iii. Court said definiteness of material matters is the essence of K law; even if no explicit definite terms, should be construed from the whole K. A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.

   1. CASE: Joseph Martin Delicatessen v. Schumacher. Renewal clause in lease left price term “to be agreed upon.” When the time came, D (LL) asked for a much higher price than P (T) expected. Court found for D.

   a. Note: if the renewal term was not in the lease, the Court could come up with the term. When parties include it, then they have shown how they are going to address it but they can disagree. (Court could still say they couldn’t stick in price, but P would have easier time if term were missing.)

   b. Dissent’s public policy argument: uncertainty of a term like this should not force P to move his whole business. Some liberal courts enforce renewal provisions more than regular provisions for this very reason—accommodate for right to renewal.

   iv. Prior dealings between the parties can help fill a missing term.
1. **CASE**: May Metropolitan v. May Oil Burner (cited within Joseph Martin) the parties had contracted together before, and therefore could rely on their history of dealing to fill in the missing term.

v. **Restatement 2d § 33: Certainty:**

1. In determining whether the acceptance completes a K with the offer:
   a. Acceptance of offer can’t form K unless terms are reasonably certain.
   b. Reasonable certainty means there is a basis for determining breach and remedies.
   c. If 1 or 2 terms are uncertain, this may show lack of intent for an offer.

2. Rationale for this section: Ks should be made by the parties, not the courts, so remedies for breach should have basis in the K itself.

vi. **UCC 2-204(3):**

1. Even though one or more terms are left open, a K for sale does not fail for indefiniteness if
   a. the parties have intended to make a K and
   b. there is a reasonably certain basis for granting a remedy

2. **CASE**: Southwest Eng’g v. Martin Tractor Co. Application of UCC open terms. In this case, price clearly was not more than a passing interest.

vii. **When terms are misunderstood:**

1. **Restatement 2d § 20 Effect of Misunderstanding:**
   a. There is no manifestation of mutual assent if the parties attach materially different meanings to their manifestation and
      i. Neither party knows or has reason to know the other’s interpretation, or
      ii. Both know.
      iii. ***Greenfield says this is WRONG in saying that if the term is this ambiguous there is no K.
          1. Seller is the one to decide which ship to use. So, buyer is assuming the risk of the seller putting the cotton on a different ship.
   b. The manifestations of both parties are operative in accordance with the meaning attached to them by one of the parties if
      i. The party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party, or
      ii. That party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.
      iii. ***In other words (from class notes) Restatement says that if one party knew of only 1, but the other party knew of both, go with the one that the first party knew.
          1. Rationale for this rule: The one who knew of two could be at fault for not clearing up the ambiguity. The other party wouldn’t be at fault for only knowing of one.
   c. Ex) Both parties have different understanding of the term, and both are in good faith ➔ both claims fail.

2. **CASE**: Raffles v. Wichelhaus (“Peerless case”). There were multiple ships called Peerless, but neither party knew this. D thought K referred to one leaving in December, but P thought he ordered goods to come on the one that left in October. K cannot be enforced, because there was no assent to the same thing.
   a. This follows Restatement, which Greenfield disagrees with.

3. **CASE**: Flower City Painting Contractors v. Gumina Constr. Co. P, subcontractor, thought he only had to paint the inside of the building, but D thought the outside too. Apply Peerless standard. P had no reason to know otherwise.
4. **CASE: Dickey v. Hurd.** P thought “accept by certain date” meant only accept, but D thought it meant “accept and pay.” Once D realized that P misunderstood, D should have clarified the ambiguity.
   a. Note: Restatement (above) says that if one party knew of only 1, but the other party knew of both, go with the one that the first party knew.
      i. Rationale for this rule: The one who knew of two could be at fault for not clearing up the ambiguity. The other party wouldn’t be at fault for only knowing of one.

5. Justice Posner: when latent ambiguity, let parties off the hook. If patent, courts can resolve.

II. **Control Over Contract Formation**

A. **Offers, generally:** Offeror is the master of the offer. Look to intention of the offer (just as in *Fairmount Glass* when language of letter had to be examined).

B. Specification of time limit for acceptance to be effective:
   i. **CASE: Caldwell v. Kline.** D sent P letter on Jan 29, saying that a response was due in 8 days. P received letter on Feb 2, and wired an acceptance to D on Feb 8. D refused to go through with the agreement.
      1. Court said time limit should begin when the offer is received by offeree, so in this case P did reply within 8 days of receipt.
      2. Greenfield disagrees with the court:
         a. Subjective approach tells us offeror would intend for the time limit to start running at the time the letter should have been received.
         b. Objective approach: offeree should have reasonably perceived that the offer began on postmark date. In this case, the postmark date was Jan 29 and the date of receipt was Feb 2. At that time, mail like this should only have taken a day to deliver.
         c. SO: Court should have looked further. It’s not enough to see solely offeror’s intent and offeree’s perception.
   3. See **HYPOS** following this case in supplement
      a. Note: death is a special situation in which offeree’s acceptance cannot automatically form the K. Otherwise, generally, when offeror offers and offeree accepts, there is mutual assent and the K is formed.
         i. This is inconsistent with the objective standard but is the rule anyway.
   4. **Mailbox Rule:** Acceptance valid upon dispatch. Offeror may always specify otherwise. If the manner in which to accept is not specified, go with what is reasonable.

   ii. **CASE: Textron v. Froelich.** D offered to sell rods to P, and 5 weeks after the offer, P ordered the rods. D responded with “fine, thank you.” Court said that if there was no time limit specified, then it should be a reasonable time. The existence of the K would depend on whether the K was formed at the end of the phone conversation, and if it did, whether there was a counteroffer.

C. **Effects of Unilateral Ks vs. Bilateral Ks**
   i. Courts/Restatement define this as a promise in exchange for performance
   ii. Greenfield explains it differently: It is a manifestation of the proposition that offeror is the master of the offer. He can say offeree must render completed performance instead of just promising to do it.
   iii. **CASE: Davis v. Jacoby.** Mr. W wrote to niece and her husband (Ps) to help him manage his affairs, telling them that if they came to help him, niece would inherit everything from Mr. and Mrs. W. He asked frequently for a response, and P responded with acceptance. Mr. W then committed suicide. Ps came immediately and cared for Mrs. W until she died. After her death, they found out Ws had actually left everything to their nephews.
      1. Court said that there was no question that W had offered; the question was P’s manner of acceptance—this would depend on whether the offer was unil- or bilateral. [Unilateral is accepted by performance, but bilateral is accepted by promise. Bilateral will not expire
when the offeror dies. In unilateral, performance is the only way to accept an offer, so if offeree does not perform before offeror dies, there was no K.]

a. The overarching test to determine which it was is to see the intent of offeror and the facts and circumstances of the case. Facts in this case pointed to him seeking a promise, not performance. (even if it were performance, Mr. W would have had to rely on a promise that they would continue to perform after his death)

b. This case applied Restatement 1st, in saying that when in doubt as to whether unilateral or bilateral, go with bilateral. Rationale: protection of the offeree (offeror can’t revoke bilateral).

   i. Greenfield’s explanation of this: Ordinarily, when people make offers, they want the promise that the other party will perform. We assume this by nature. So, in case of doubt, we should presume this is what the offeror seeks.

c. CASE: Jordan v. Dobbins. Offeror’s death automatically terminates the offer.

iv. Restatement 2d § 32:
   1. In case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.
   2. When offer is for either promise or performance, and when the offeree begins to perform, this operates as a promise to complete performance.
   3. Note: this does not retract from offeror’s mastery of the offer; offeree only has the right to choose in case of doubt.

   a. CASE: Brackenbury v. Hodgkin. Mom sent letter to daughter/son-in-law (Ps) saying that if they came and lived with her/took care of her, they would inherit her land when she died. Ps moved in and began performing. They didn’t get along with mom, relations became bad, and mom executed and delivered a deed to her son. Ps sued for re-conveyance and won. Court said there was a legal and binding K. P’s actions constituted acceptance.

v. Restatement 2d § 45 Option K Created by Part Performance or Tender:
   1. Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, and option K is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
   2. The offeror’s duty of performance under any option K so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
   3. Comment: what is begun or tendered must be part of the actual performance invited. Preparations to begin are not enough.

   a. But note that preparations to perform may, however, constitute justifiable reliance sufficient to make the offeror’s promise binding.

III. Pre-contractual Obligation

A. When there is a gratuitous offer, the offeror does not need to give the full time period. Revocation is effective even within the time limit. Dickinson v. Dodds

B. When payment is given for the offer to stay open, there need only be a pretense to keep it open, not necessarily consideration.

   i. CASE: Mier v. Hadden. P entered an option K to buy D’s farm. P gave D $1 in “consideration” of D selling the land to P for the specified amount. P could demand deed at any time within a specified period, and if D refused, P could sue for specific performance and damages. If P refused to buy the property, P would have to forfeit the $1 and pay attorney costs.

   1. Consideration to hold an offer open need not follow the same standard as consideration for a promise. Offer is its own entity. (So it does not matter that this case contradicts Fischer in its treatment of the $1).

C. General contractors’ use of subcontractors’ bids: TWO VIEWS for issue of whether general contractor’s use of subcontractor’s bid in making bid to owner should make the subcontractor’s bid irrevocable
i. **CASE: James Baird v. Gimbel Bros.** D, subcontractor, sent numerous general contractors a bid for linoleum job, but realized later he had calculated incorrectly. In the meanwhile, P used D’s bid in another general bid. D withdrew his bid. Then P won the job. D refused to perform and P sued.

   1. D (subcontractor) won.
   2. Learned Hand wrote that it was clear that the contractors did not suppose that they accepted the offer merely by putting in their bids; an offer for exchange is not meant to be a promise until a consideration has been received. The offer should be held until the offeree accepts it. Looking at timeline, the last point is when P accepted D’s bid, so it should have been held open the entire time…not just when P got the K with O.

ii. **CASE: Drennan v. Star Paving Co.** P was general contractor, preparing a bid for a job. D’s bid was lowest for paving, so P computed his general bid using D’s bid, and ended up getting the job. D later said there was a mistake and he couldn’t pull through, so P sued.

   1. P (general contractor) won.
   2. Traynor says that subcontractor made the bid with hopes of general relying on it and using it in the main bid to owner, so sub shouldn’t be able to pull out last minute after expecting general to rely like this. D had reason to expect P to rely on the promise (promissory estoppel).
   3. Applies Restatement 1st § 45: main offer includes subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made, it will be accepted. [like an option K, because general still wouldn’t be obliged, but sub is to hold the offer open for reasonable time]

      a. Implicit in the subcontractor’s bid is a promise to keep the bid open for a reasonable time after award of the prime K to give the general contractor an opportunity to accept the offer on which he relied in computing the main bid.

   4. Part performance may furnish consideration for the subsidiary promise. [***Greenfield says this last part about consideration is too slick.] This reasoning works to protect the offeree if he had acted in detrimental reliance on the promise.

   5. This case supports Restatement Section 79: Option K: in writing, signed by offeror, recites purported consideration for making the offer, proposes exchange in fair terms and reasonable time.

      a. Or an offer in which the offeror should reasonably expect to induce action or forbearance of a substantial character (reliance) on the part of the offeree before acceptance and which does induce such reliance is binding as an option K, to the extent necessary to avoid injustice.

iii. **Note:** both courts agree that a mere bid does not constitute acceptance. Too many problems would ensue of it did.

iv. Following Drennan: **CASE: E.A. Coronis v. M. Gordon Constr.** P offered to supply and erect steel. D used P’s offer in a bid and won the job. Two weeks later the formal documents were executed, during which time D had not accepted the offer yet, and during which time D sent letter of revocation. D, general contractor, won. Promissory estoppel is applicable.

v. Opposite case: subcontractor’s reliance

   1. **Southern California Acoustics Co. v. CV Holder:** D (general) published P’s (sub) name in newspaper in list of subcontractors who would perform on the job. P assumed that meant acceptance, and therefore did not bid on anyone else’s job. D switched the sub later, and P sued. Court said there was no K between the parties; listing in paper is not implied acceptance. P tried to rely on Drennan to say claim promissory estoppel, but Court said there needed to be an actual promise for that. (P won on another cause of action, but not this one following Drennan).

      a. Policy issue: Subs argue for implied acceptance because they say the Drennan rule is one sided.

      b. But this follows both Baird and Drennan in that the use of the bid was not in itself acceptance.
vi. **CASE: Ragosta v. Wilder.** D said he’d sell to P if cam to bank with money provided no one else bought it. D told P no one else was interested. P incurred costs to act on offer. D refused to sell. No K was ever created, can’t grant specific performance. Parties were merely preparing to perform.

IV. **Conduct Concluding a Bargain**  
A. **Acceptance:**  
   i. **Common law:** Acceptance must be a mirror image of the offer.
      1. Rationale for this is that offeror is proposing the exchange and is determining the terms of the exchange. If we say that acceptance that does not mirror offer and it binds to a K, then we’re saying that the offeror becomes bound to something he didn’t propose, with no opportunity to exercise any control.
      2. **Deviant acceptance rule:** introduction of new or variant terms means that the offer is dead and the process of K formation must start over again.
         a. Exceptions:  
            i. Immaterial variances  
            ii. If offeree’s acceptance merely makes explicit terms which were already implicit in the offer  
            iii. If offeree suggests terms without insisting on their inclusion  
            iv. If it’s a “grumbling acceptance”  
            v. If a new term or counteroffer is made during an option period
      3. Main issue to decide is whether the purported acceptance is absolute or conditioned. Fine line:
         a. **CASE: Ardente v. Horan.** Vendor’s attorney gave vendee’s attorney a K of purchase and sale of house. Vendee’s attorney returned the K signed by vendee, the required deposit, and a note that said his clients were concerned that the specified items remain with the estate and that he wanted confirmation that they were part of the transaction. Court said that the conditionality was inconsistent with absolute acceptance, so it was a rejection.
      4. Question to ask with acceptances that sound like they are difference from the terms of the offer: If the offer rejects the changed terms proposed/mentioned by the offer, would the offeree still accept and was it manifested as such?
   ii. **UCC 2-207: Additional Terms in Acceptance or Confirmation**  
      1. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. [***Subsection 1 strikes down the mirror image rule.]
      2. The additional terms are to be construed as proposals for addition to the K. Between merchants such terms become part of the K unless:
         a. The offer expressly limits acceptance to the terms of the offer,  
         b. They materially alter it, or  
         c. Notification of objection to them has already been given or is given within a reasonable time after the notice of them is received.
      3. Conduct by both parties which recognizes the existence of a K is sufficient to establish a K for sale although the writings of the parties do not otherwise establish a K. In such a case the terms of the particular K consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.
   iii. **UCC 2-204** authorizes formation of a contract for the sale of goods in any manner sufficient to show agreement and declares unnecessary an actual identification of the offeror, offeree, and the moment of making a K.
      1. Restatement agrees with this approach in § 22.

B. **Counteroffers**
i. **CASE: Livingstone v. Evans.** D offered P land for $1800. P responded by saying to send the lowest price and that he would be $1600. D then said he couldn’t lower the price, and D then contracted with someone else. Then P accepted D’s offer. The two parties agreed that unless the intervening Ks ended the original offer, they had a K.

1. Generally, counteroffer is a rejection. Once offeree rejects, he gives up any right to accept the offer thereafter.
2. In this case, need to see how the counteroffer operated with D’s response.
   a. Court said D’s words “cannot reduce price” was a renewal of the original offer, in which case P could then accept and bind D. Court said that the other alternative would have been for the “cannot reduce price” to operate merely as a rejection of the counteroffer.
   b. Must look at manifested intent (“cannot lower price” was in response to “send lowest cash price”), not actual intent (D sold to someone else).

C. **Silence as acceptance**

i. Generally, silence cannot be acceptance.

ii. **Exception:** if the parties to the K have previously dealt with one another and silence has been customary to them is it allowed to be acceptance.

1. **CASE: Hobbs v. Massasoit Whip Co.** Action for price of eel skins sent by P to D. D kept them for some months, until they were destroyed. D gave P no notice that D declined to accept the skins. The parties had dealt together 4 or 5 times, so court said D’s keeping the eel skins for an unreasonable amount of time did constitute acceptance.
   a. **Restatement § 69 (1):**
      i. Even if it is a material alteration under UCC 2-207, prior dealings between the parties may provide a basis for concluding that the offeree was reasonable in inferring assent to the term from the offeror’s failure to object to it.
   b. In applying the Restatement, the big issue is to determine whether there was “reason to know” that the party would construe silence as acceptance.

2. **CASE: Austin v. Burge.** Newspaper deliveries continued after subscription ended, but D had no reason to think they were gratuitous, so he had agreed by implication to pay for them.

iii. **Exception:** (see Dorothy/Syverud hypo vs. insurance hypo). The key difference is that in one, the offeree wanted to accept, and in the other, the offeree didn’t want the K. We can’t force a K, but we can uphold the offer when it’s accepted as designated.

   1. Problem arises when the offeree’s conduct is ambiguous. Like the hypo where dean raises flag—same thing with using silence as acceptance. In **Prescott**, they said there was no expression of acceptance.
   iv. **Restatement 2d § 69: Acceptance by Silence or Exercise of Dominion**
      1. Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
         a. Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with the expectation of compensation
         b. Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer
         c. Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

V. **Parol Evidence Rule**

A. “If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.”
B. Completeness and Consistency
   i. 3 possible situations arise with respect to the completeness of the agreement:
      1. the writing has terms but the parties don’t intend it to embody all terms (as in, they are exchanging drafts and haven’t adopted any of them as the final expression of the terms of the transaction), or
      2. they have agreed on some of the terms, and the writing is the final expression of some of those terms, but not all. (partial integration), or
      3. parties have made the writing the final expression of all of their terms.
   ii. **CASE**: Hatley v. Stafford. D reserved the right to a buyout period for land he rented to P. P alleged D trespassed on the land by taking possession of the land and cutting the wheat crop. D said he just exercised the buyout period right. P said that there had been an extra oral agreement that the buyout provision would only apply for 30-60 days after the lease began, so P claimed there was only a “partial integration.” The court applied Restatement 1st as follows:
      1. Restatement First § 240: (from handout)
         a. An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration…if the agreement is *not inconsistent* with the integrated K, and
            i. is made for separate consideration, or
            ii. is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written K.
      2. Look at whether the parties intended the agreement to be complete. It is ok to admit outside agreement when there is substantial evidence that the parties did not intend the writing to embody the entire agreement (not every time P claims it’s incomplete).
   iii. **CASE**: Hayden v. Hoadley. Another situation with a time limit during which repairs were supposed to be made. Court said D could not use outside evidence saying he had until a specific date, because this would contradict the implied term to complete the work within a reasonable time.
   iv. Restatement 2d § 209: Integrated Agreements
      1. An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
      2. Whether there is an integrated agreement is to be determined by the court as a question preliminary to the determination of the interpretation or to application of the parol evidence rule.
      3. Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.
   v. Restatement 2d § 213: Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)
      1. A binding integrated agreement discharges prior agreement to the extent that it is inconsistent with them.
      2. A binding completely integrated agreement discharges prior written agreements to the extent that they are within its scope.
      3. An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.
         a. Comment: Whether a binding agreement is completely integrated or partially integrated, it supersedes inconsistent terms of prior agreements.
   vi. Restatement 2d § 214: Evidence of Prior Contemporaneous Agreements and Negotiations
      1. Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
         a. That the writing is or is not an integrated agreement
         b. That the integrated agreement, if any, is completely or partially integrated,
c. the meaning of the writing, whether or not integrated
d. illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause,
e. ground for granting of denying rescission, reformation, specific performance, or other remedy.

vii. Restatement 2d § 216 Consistent Additional Terms:
1. Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
2. An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
   a. Agreed to for separate consideration, or
   b. Such a term as in the circumstances might naturally be omitted from the writing.
   c. Comment (Greenfield pointed this out): the meaning of the writing includes not only the terms explicitly stated but also those fairly implied as part of the bargain of the parties in fact. It does not include a term supplied by a rule of law designed to fill gaps where the parties have not agreed otherwise, unless it can be inferred that the parties contracted with reference to the rule of law.

viii. CASE: Interform Co. v. Mitchell. Two extreme views on integration:
1. Writing is the focus, so that is complete.
2. There is only integration when parties intend for there to be integration.

ix. UCC 2-202 Parol Evidence Rule:
1. Focus on parties’ intentions. If the terms are as intended, then the K is final and you can’t contradict with prior evidence. The written K can only be supplemented by:
   a. course of dealing or
   b. with consistent additional terms as long as court didn’t say the K is complete

x. CASE: Luria Bros. v. Piolet Bros. D failed to deliver the scrap metal as agreed, and then introduced outside evidence about needing to get goods from a certain supplier. Court adopted UCC 2-202 in defining inconsistency as “the absence of reasonable harmony in terms of the language and respective obligations of the parties.” In this case, the K was for the unconditional sale of goods, so D’s outside evidence was inconsistent. Court also discusses Comment 3 of UCC 2-202 in discussing that if terms were likely to have been included in the first place, they can’t become part now.

C. Closeness of subject matter to the main K:
   i. CASE: Mitchell v. Lath. D (seller) orally agreed to remove an ice house from the land if P purchased the land. P relied on this, bought the land, and D did not uphold promise. P sued for specific performance, but D won.
      1. Court had 3-prong test:
         a. agreement must be collateral in form, and
         b. it must not contradict express or implied provisions of the written K, and
         c. it must be one that the parties would not ordinarily be expected to embody in the writing.
      2. Court said P did not meet third requirement; the agreement to remove the ice house is too closely related to the actual K, even though it is collateral
      3. Dissent disagreed, saying that it was not too closely related.
         a. Dissent also said that to determine what the writing was intended to cover, the document alone will not suffice. What it was intended to cover cannot be known until we know what there was to cover.

D. Interpretation of the Writing
      1. Plain meaning rule/Four Corners Rule: If language has plain meaning, then that’s the meaning to be given, and you can’t consider that it means anything else. Rule is invoked to interpret K and statutory language.
   ii. CASE: Pacific Gas & Elec. V. GW Thomas Drayage Co. D was to furnish labor/equipment to replace the cover of P’s steam turbine, with clause saying D would indemnify for all damage
done to property in the process of the work. During performance, cover fell and damaged P’s property. P sued. D said the clause was only to apply to others’ property, not P’s.

1. Court said not to use plain meaning rule like trial court did.
2. *The test of admissibility* of extrinsic evidence to explain the meaning of a written instrument is not whether it appears unambiguous on its face, but whether the evidence can lead to a potential interpretation of the writing. Excluding parol evidence can lead to unintended interpretation.
3. Note: this is still consistent with the rule stating that extra terms can’t vary the K. Terms must first be determined before it can be decided whether extrinsic evidence is being offered for a prohibited purpose.

iii. **CASE: Spaulding v. Morse.** Clause in question regarding father’s payment to son pre and post acceptance to college. Son went into military, so dad stopped paying.

1. Court said to look at surrounding circumstances in such a way as to give effect to the main end designed to be accomplished. Main purpose was to provide for maintenance and education, but military took care of it now.

iv. **Restatement 2d § 212: Interpretation of Integrated Agreements:**

1. A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law.
2. Comment: this contributes to the stability and predictability of contractual relations.

VI. **Standardized Forms**

A. Significance: striking a balance between efficiency in the marketplace and the respecting the free will and bargaining power of parties

B. “Duty to read”: just like there is no real “duty” to mitigate, there is no affirmative duty here. However, this means that No party can defend himself from a K just by saying he didn’t read it.

i. **Allied Van Lines v. Bratton.** Unless one can show with facts and circumstances to demonstrate that he was prevented from reading the K, or that he was induced by statements of the other party to refrain from reading the K, it is binding.

ii. **Sharon v. City of Newton.** P was liable for cheerleading injury at school because she and father signed waiver form that a person of ordinary intelligence could understand. It was a clearly-labeled document, unlike ticket stub cases, below.

C. Binding through situations

i. **CASE: Weisz v. Parke-Bernet Galleries.** P bought paintings and later found out they were fake. D had disclaimer about authenticity, but found among many small-font paragraphs. However, the situation was such that the P should have understood the risk anyway, and the situation overrode the lack of obvious writing in the catalogue. (The auction was for paintings whose values depended on the degree of certainty of authenticity; P was under caveat emptor)

D. Exceptions to the duty to read:

i. Where D prevents P from fully reading or understanding the form. Courts will not enforce the K if P did not have reasonable opportunity to read it.

ii. Ticket stub cases:

1. **Agricultural Ins. Co v. Constantine.** P’s car was damaged in D’s parking lot. Her parking stub said D would not be liable. But court said ticket was more for ID purposes, not waiver of liability. No evidence that P assented. Courts won’t enforce the fine print if it’s unreasonable for the person to have read it.

E. Public Policy violations

i. Clear lack of assent via both lack of awareness the disclaimer/K term existed, and inability to understand what it meant (ordinary person standard).

1. **CASE: Henningson v. Bloomfield Motors.** P bought car and got into wreck. P sued D on implied warranty of merchantability. D pointed to disclaimer that limited liability within 90 days or 4000 miles. The disclaimer was on the back in the middle of 10 paragraphs in 8 ½ inches of space. P did not notice or read them, and D did not point them out to P.
a. Court said the disclaimer was not reasonably noticeable, and it was also unreasonable for an ordinary person to interpret “its obligation under this warranty being limited to making good at its factory any part or parts thereof” to mean that he was relinquishing any personal injury claim.

ii. Release too broad

1. **CASE: Richards v. Richards.** P wanted to ride in husband’s company truck with him. She signed an authorization form, which also was an overly broad release from liability, but it was only labeled “authorization.” P was injured on the truck and sued. Court took 3 reasons in combination to rule for P and say the K violated public policy:
   a. Document was not clearly labeled.
   b. Release is too broad.
   c. No one told P the significance of what she was signing, and her husband’s employee handbook didn’t say anything either.
   d. NOTE: the court here says these 3 must be considered in combination, but Greenfield says this may not be true; you might be able to use one or two only.

iii. Arbitration clauses in fine print

1. **CASE: Hill v. Gateway 2000.** P ordered a computer from D. Computer arrived and came with a K document, which included an arbitration clause, and a notice saying that if P kept the computer past 30 days, he assented to the terms of that K. After 30 days, computer malfunctioned, and P sued, but D pointed to arbitration clause and won. Court here said that the K was formed after the 30 days (this goes against what we’ve learned about assent, though. K should have been formed on the phone, and P’s silence could not have been assent).
   a. Court here is responding to a realistic problem with sellers like this one—can’t read 4 pages of terms over the phone.
   b.

2. **CASE: Broemmer v. Abortion Services of Phoenix.** P wanted abortion, went to clinic, and had to sign forms, one of which was an arbitration agreement that called for binding arbitration in the event of any dispute, and the arbitrators would have to be licensed OB/GYNs. P signed in less than 5 minutes; no one explained the forms to her or told her she could refuse; they were given to her as part of her procedure; she was not given copies of the forms either. P suffered punctured uterus from the procedure, sued, and won.
   a. Court says test for enforceability is to see whether the K was beyond P’s expectations or unconscionable. Court applied Restatement too (below)
   b. Here, it was beyond P’s expectations to have signed off her right to jury trial.

3. **Restatement 2d § 211: Standardized Agreements**

a. Except as stated in subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

b. 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.

c. Where the other party has reason to know that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

d. **Comment:**
   i. b) **Assent to unknown terms:** …Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But
they understand that they are assenting to the terms not read or not understood, subject to such limitations that the law may impose.

ii. e) Equality of treatment: One who assents to standard K terms normally assumes that others are doing likewise and that all who do so are on equal footing.

iii. f) Terms excluded: Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound by unknown terms which are beyond their reasonable expectation....a party who adheres to the other party’s standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. (Comment also lists factors to consider in reason to believe: bizarre/oppressive because it eviscerates the non-standard terms agreed to, eliminates dominant purpose, if adhering party didn’t have chance to read the term, it was illegible or hidden.)

CHAPTER 4: Policing the Bargain

I. Duress

A. Overview: Wrongful threat precluding exercise of free will; threat to breach K is NOT enough

i. CASE: Wolf v. Marlton Corp. Deal to buy house, down payment given, but B cancelled and wanted down pmt back. S said he’d only give a portion of it back, so B threatened to buy the house and then sell it to some horrible person so that S would never sell a house in that area again. S was not held liable for not paying the rest of the down payment, because he could use duress as a defense.

a) Duress tested not only by the nature of threats, but rather by the state of mind induced thereby in the victim. See whether the threat was made, whether S believed it would be carried to, and whether his will was thereby overborne.

b) In this case, though B does have a right to sell to whomever later, if he does so purely maliciously and threatens based on these motives, it is wrongful duress.

ii. Courts see it as misleading to say that it is not duress to threaten to do what there is a legal right to do. [support of this legal right to do whatever was seen in Stewart Miller Constr. v. NY Tel Co] There is a range of both acceptable and unacceptable levels of pressure in negotiating. Doctrines of duress are there to balance which are for the purpose of extracting an excessive or disproportionate return.

B. Contrast two cases, and why duress in one but not the other:

i. CASE: Austin Instrument v. Loral Corp

a) Court held that P did deprive D of free will. D was worried about maintaining relations with govt. and might not have received an extension from the Navy. Plus, the best date D could get from other vendors wasn’t until after the delivery was due. Court said it was reasonable for D not to ask more than the 10 vendors it was already familiar with.

1. Dissent stated that D could have asked other vendors.

2. Majority focuses on how P should only have to make reasonable efforts to secure alternatives. Yes, he lost free will, and yes, he had other alternatives, but public policy kicks in here—should we really expect him to call so many more alternatives?

ii. CASE: Smithwick v. Whitley

a) Deal to sell land, D later raised the price, P said ok because didn’t want to lose the land. This was not duress because P’s acceptance was voluntary and could have exercised free will. P could have sued for specific performance, and court could have granted it. So, he did have free will.

II. Pre-existing Duty Rule
A. **Generally:** K cannot be modified without consideration. Contractual duty owed to the other party, whether promised anew or actually performed, is not consideration for a new promise by that party. This often arises when a party threatens to breach.
   i. See **Hypo** about the workers in Nova Scotia and the blindness-causing bugs. They could only modify the K if the contractor also got something out of the modification i.e. an extension on pay date.
   ii. This policy goes against public policy wanting to encourage parties to settle on their own—so courts have to balance between these two conflicting views. (i.e. **Duncan**; Courts generally will enforce the settlement.)

B. **Exception: UCC 2-209**
   i. An agreement modifying a K within this Article [sale of goods] needs no consideration to be binding.
   ii. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
   iii. The requirement of the Statute of Frauds section of this Article (Section 2-201) must be satisfied if the K as modified is within its provision.

C. **Check Cases**
   i. Dispute arises when you send a partial payment and mark it as “full payment,” not when you just send a check. **RULE:** If you send the check without marking anything on it, then the other party can cash it and still sue for the balance because the check you sent them would just be the beginning of your payment for the full debt.
   ii. In **Hypo** about Greenfield/Ellis and the check for E helping G sell car:
      a) In situation where they had both decided on $2500, the settlement created the new consideration, and therefore it could stand alone as the new amount due (no conflict with pre-existing duty rule because they gave new consideration by not suing and paying the newly established amount).
   iii. **CASE:** Marton Remodeling v. Jensen. P modeled D’s house and presented final bill for $6500. D offered to pay only $5000, and P refused the offer. D sent P check for $5000 with condition on it stating that endorsement of the check would constitute full and final satisfaction of all claims. P wrote back, saying he refused to accept the check in full, and demanding the balance. D didn’t pay any more. P filed mechanic’s lien on D, and cashed the check noting “not full pmt” on it.
      a) Court held that the cashing of the check constituted an accord and satisfaction that could not be altered by the words “not full pmt,” because there was a **bona fide dispute** over the amount due.
      b) When a **bona fide** dispute arises and a check is tendered in full pmt of an unliquidated claim [meaning, the amount due has not been determined], the creditor may not disregard the condition attached.
         1. **Criteria:** Need either unliquidated claim or **bona fide dispute**.
            i. Then the cashing of the check would be like an informal settlement, and **ASSENT** to the amount paid.
         c) P could not successfully argue that the $5000 was undisputed and ok, and the question was only about the balance—Court relied on **Air Van Lines v. Buster, Alaska** held that a single unliquidated claim, including both its disputed and undisputed elements, is unitary and not subject to division so long as the whole claim is unliquidated.
         d) Statute in this case, which is identical to **UCC 1-207**, said that if the court was to allow accord and satisfaction to be limited the way P wants it to be, that would jeopardize a convenient and valuable means of achieving informal settlements, which courts want to encourage.
   iv. Cashing of the check signifying acceptance = **objective manifestation.** We again look to objective standard instead of meeting of the minds.
   v. **CASE:** School Lines v. Barcomb Motor Sales. D agreed to pay certain amount to P for two bus bodies. D wrote lesser check and wrote “pmt in full.” P accepted it, with endorsement “accepted as partial pmt.”
a) P sued to recover and won, because there was no bona fide dispute over the price owed. The debt was therefore liquidated, and acceptance of a lesser sum than is due discharges the debt pro tanto [to that extent] only. P can recover the balance.

vi. Note: In accord and satisfaction cases, like in the tractor example pg. 594, look to whether parties intended the accord to be an option or a novation. If option and debtor still defaults, then creditor should have the right to choose the accord or the original debt. If it’s a novation, then creditor must only seek the accord.

III. Mistake and Implied Warranty

A. Mutual Mistake: If mutual mistake goes to the root of the matter, then K can be rescinded.

   i. CASE: Sherwood v. Walker. Replevin for a cow. Mistake over whether the cow was barren or fertile.

      a) Court said it was crucial to see whether there was a mutual mistake of material fact. Court found that the barren/fertile distinction was fundamental as to change the substance of the K, that new trial was needed to see whether both parties did both think cow was barren, because if they did, then D (seller) had a right to rescind. Trial court had instructed the jury that it made no difference whether cow was barren.

         1. Dissent said D thought cow was barren, but P though barren and farrow.

         i. We can think of this as the risk that the cow was barren or fertile. Parties can engage in a K in which risk is present, and they allocate risk either way. But here, majority says, jury must see if the parties didn’t think there was any risk—they thought they were selling a barren cow.

         ii. CASE: Beachcomber v. Boskett. Both parties thought coin was real, but it was actually counterfeit. Court permitted rescission. As coin dealers, they were both aware that there was a risk that the coin was not genuine—but they didn’t contract based on the risk, because they didn’t think there was doubt as to its genuineness. This case applied Restatement § 502, below. This case was not about assumed risk; both parties believed something without leaving room for doubt.

   ii. Restatement § 502:

      a) “Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the K is not voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain. BUT, the parties must be conscious of the uncertainty of the pertinent fact for this rule to apply.”

         1. So, if the parties really do both think something is one way without recognizing an uncertainty, then there is mutual mistake.

      b) CASE: Lenawee County Bd. of Health v. Messerly. This court limited Sherwood and instead relied on Restatement. Court said not to distinguish between mistake of value and mistake of substance. Here, S and B both believed that a building had rental value, so B bought it. After sale, property was condemned because of sewer problem that neither party was aware of at the time of K. Here, mistaken belief related to a basic assumption which materially affected the agreed performance. (still agrees that party can’t rescind for assumed risk, if that had been the case)

      c) CASE: Smith v. Zimbalist. Both parties were mistaken that the violins were the original brand violins. They did not allocate any risk to the fact that the violins might be fakes, so it was clear that the mistake was as to the substance. There was a warranty stating that the goods would match the description (description being the brand) but even if this warranty wasn’t there, the mistake would have been there.

      d) CASE: Gartner v. Eikill. Failure of party to investigate will not always preclude rescission. In this case, mistake as to the very nature of the land. Even though D says P could have looked up info about the land at City Hall, P had no reason to suspect anything was wrong. There was mutual mistake of fact as to zoning codes.

B. Implied Warranty:
i. **Residential Land:**
   a) **CASE: Hinson v. Jefferson.** P bought land from D. The deed restricted to residential purposes and restricted the type of house to be built there, along with some other usage restrictions. P tried to build septic tank there, but health officials said the land was too shallow, so they denied permission for it. This condition had existed at the time of the deed, but neither P nor D knew about it. The deed did not include a warranty that the land was suitable for the construction of a residence. Issue was whether to apply doctrine of mistake to rescind the K.

   1. Court held that where a grantor conveys land subject to restrictive covenants such as for residential purpose only, and then later the parties find out that neither the grantee nor anyone after the grantee would be able to use the land in the specified manner, the grantor breaches an implied warranty arising out of the covenants.

   2. Court did not apply mistake to this case, because:
      i. Mistake here would have involved a mistaken assumption. In such assumption cases, there are problems because at least one of the parties has mistaken beliefs concerning facts that make the sale appear more attractive than it actually is. To see whether P can recover under mutual mistake, consider factors like whether mistake was bilateral/unilateral, unjust enrichment, assumed risk—court said applying these factors in mistake would make the real estate market too uncertain.

   3. NOTE: this case's holding about implied warranty would NOT apply in the Hypo about the sale of land and the mall being built across the street, because in *Hinson*, the warranty goes to the land itself, but in the Hypo, S was talking about the land across the street.

ii. **Raw Land:**
   a) **CASE: Cook v. Salishan:** P bought land from D and began building on it, after which they found out the land had soil erosion problems. P sued for breach of warranty that the lots were fit for residential use. Issue was whether D should be liable even without negligence in finding defects or without misrepresentation, if the unimproved land turned out to be unsuitable for purpose for which it was sold.

   1. Court here said land like this was different from a home, where the implied warranty applied. Sellers aren’t reasonable expected to guarantee the quality of the land. Court said *Hinson* didn’t apply to this fact pattern; if no one at fault here, D shouldn’t have to bear any loss.

   2. NOTE: P did not sue for mutual mistake, though he did sue for warranty. Relief is different; if mutual mistake, then parties are excused from performance. But this doesn’t work for Ps here as it did in *Hinson*; Ps in *Cook* were too far in performing on land.

C. **How to tell when it’s ok to use MISTAKE as reason to rescind**
   i. Hypos about gem seller

D. **Unilateral Mistake**
   i. Unilateral mistake generally is not grounds for relief or K reform.

   a) **Exceptions** to this general rule:

   1. One party knew and benefited from the other’s mistake

   2. Party trying to recover can succeed when he wasn’t aware of his mistake (i.e. the example about D didn’t realize the misprint in newspaper); this lack of awareness leads to the inference that the mistaken party did not really intend to assent to the mistake. *(from note material following Elsinore).*

      i. Restatement § 153: recognizes this exception when enforcement would be unconscionable.

   b) Note also: If the price stated in an offer is reasonably suspect as to its accuracy, and the offeree reasonably should have picked up on the mistake, K can be rescinded.
c) **CASE: Eytan v. Bach.** P thought the paintings were originals, but they were actually replicas in old frames made to look old. D made no express representations. Court said that P could not recover because it was obvious that the paintings wouldn’t be sold for $50 if they were really originals. P didn’t inquire, so D had no duty to state the obvious.

### IV. Misrepresentation

A. **CASE: Cushman v. Kirby.** P bought house from Ds, after viewing house two times. On second visit, P saw water treatment system and asked about how the water was. Mrs. Kirby (D) said it was a little hard. Mr. Kirby remained silent. P moved in and water ended up being sulfur water. P sued for misrepresentation, claiming that D represented that the water was suitable for household purposes.

   i. **Definition of Misrepresentation** (applied in *Cushman*): “Where one has full information and represents that he has, if he discloses a part of his information only, and by words or conduct leads the one with whom he contracts to believe that he has made a full disclosure and does this with intent to deceive and overreach and to prevent investigation, he is guilty of fraud against which equity will relieve, if his words and conduct in consequence of reliance upon them bring about the result which he desires.”

   ii. “Silence alone is insufficient to constitute fraud unless there is a **duty to speak.**”

      a) A duty to speak arises when the party has superior knowledge over the other…Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention [in this case Mr.’s duty arose when Mrs. didn’t fully disclose], observation, or judgment of the purchaser, the vendor of real estate is bound to disclose such facts and make them known to the purchaser.

   iii. **Options for damages in such a case:** 2 options: 1) cost of repair, and 2) difference in property value as represented and as it is now. Depending on party’s expectancy; i.e. if irreparable damage, then difference in value.

B. **Nondisclosure:**

   i. **Restatement § 551 (2):** Duty to disclose arises in situations involving facts are concealed or unlikely to be discovered because of the special relationship between the parties, the course of their dealings, or the nature of the fact itself. A duty to disclose is rarely imposed where the parties deal at arm’s length and where the information is the type which the buyer would be expected to discover by ordinary inspection and inquiry. [paraphrased in book]

   ii. Four situations in which disclosure is necessary [in line with Restatement]:

      a) Disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material;

      b) Disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the K and if nondisclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

      c) Disclosure would correct a mistake of the other party as to contents or effect of a writing.

      d) The other person is entitled to know the fact because of a relationship of trust and confidence between them.

   iii. These principles relate to how mistakes are treated. Nondisclosure may be equated with fraud and misrepresentation when it affects material facts/terms.

### V. Changed Circumstances Justifying Nonperformance

A. **Impossibility**

   i. Involves cases in which parties rely on a fundamental assumption, just like in mutual mistake.

   ii. Two Questions to Ask with this Issue:

      a) When we say impossibility, what kind are we talking about to make it ok to excuse parties?

      b) Should we be talking about impossibility at all? (Is that the test?)

   iii. Types of Impossibility:

      a) **Objective:** Physical impossibility i.e. concert hall burns down 3 days before concert

         1. **Hypo:** A contracts to build B’s garage; A starts working and then his work to that point is burned down—*no impossibility*, because he can rebuild. **BUT,** if A
contracts to build B a room over B’s garage, and B’s garage burns down, then A’s task has become impossible, because there is no garage upon which to build.

2. CASE: Taylor v. Caldwell. P was to use D’s concert hall. After making the agreement but before the day P was supposed to use it, the hall burned down in a fire which was neither P nor D’s fault. K didn’t include a term as to what to do in this situation.
   i. In Ks in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse performance. This excuse is implied by law; need not be expressly in K.

3. Connection to Sherwood/mistake: In Sherwood, mistake was about a present fact, and Taylor, the mistake was about a future event—courts limit future situation to the way Taylor did it. But note the similarity: both rely on an assumption that is so fundamental.

4. CASE: The Isle of Mull. P rented D’s ship for a certain monthly rate to last around 5 years. D began service, and then the ship was requisitioned by the British Admiralty, which took control and paid the ship even more per month. P sued for the difference in price that D got, as D would be unjustly enriched.
   i. Court found that where the frustration was total, if compensation paid for the requisitioned asset exceeded the K rate, this was the owner’s gain, just like it would be his loss if the amount paid was less than the K rate. The K was wholly discharged when requisitioned.

5. Modifying Rescission—One Party Only: In a case like Rugg v. Minett [cited in Taylor], where a K of sale is made for chattels which are to be delivered by the vendor at a future day, if the chattels, without the fault of the vendor, perish in the interval, the buyer still has to pay, though seller is excused from performing.
   b) Subjective: Not literally impossible, but difficult/expensive impossibility—“impracticability” i.e. concert hall burns down 7 months before concert and D could rebuild hall before concert date.
   1. CASE: Mineral Park Land Co. v. Howard. D had K with P to remove all gravel required for certain price per cubic yard. After D took a certain amount of gravel, D found that the remainder of P’s gravel lay below water level, and it would cost 10X as much to remove. D got the rest of the gravel from another source. P sued for D’s failure to take the remaining gravel.
      i. There was gravel on P’s land, but D’s could only take it at a prohibitive cost. To all fair intents, it was impossible for Ds to take it. A thing is impossible when it is impracticable, and it is impracticable when it is at an excessive and unreasonable cost.
      ii. Note: D couldn’t get off the hook if it were just a matter of cost, showing D would suffer a loss because of the K; but where the difference in cost is as great as it is here, making performance impracticable, the situation is the same as one where there is a total absence of earth and gravel.

2. Difficulty of Establishing and/or Winning on Subjective Impossibility
   i. Hypo: Suntan lotion shipment to Hawaii:
      1. This shows that it is hard to establish subjective impossibility. In this hypo, even though it would be more expensive and time consuming to sail around S. America because the Panama Canal was closed, it wasn’t impossible per se.
   ii. CASE: Maple Farms, Inc. v. City School Dist. P was seller of milk, and contracted to supply D’s requirements for milk for a school year at a certain price. Then the Dept. of Agriculture mandated a 20% price increase for raw milk, so now, P would lose thousands of dollars on its K
with D and in other Ks. P sued for declaratory judgment that its performance had become impracticable through unforeseen events.

1. Court said this was foreseeable and P assumed the risk when entering into a fixed-price K.
2. This case showed that except for the most exceptional circumstances, a party claiming discharge from obligation because of unexpected financial burdens caused by a shift in market conditions is unlikely to get far.

iii. **CASE:** **Kel Kim Corp. v. Central Markets, Inc.** P leased a supermarket from D, which lease specifying the he had to have a certain amount of insurance. P got the insurance and then lost it. D sent notice of default, and P sued for impossibility or because inability to get insurance was within the force majeure clause of K.

1. Impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against the K. P’s inability to get insurance was foreseeable.
2. Force majeure clauses generally only apply to circumstances beyond the parties’ control or things that parties actually list in the clause. Here, the insurance was in neither of these categories.

iv. **HOW TO CONNECT** the cases: Look at whether the impracticability came from foreseen or unforeseen circumstances, and how much was allocated risk.

1. In fixed price contracts, see whether the change that allegedly makes the K impracticable to perform came from circumstances that the parties did or should have taken into account when fixing the price
   a. Maple Farms = mkt price increase, and Mineral Park = gravel underground and SO much price increase
2. Foreseeability:
   a. Kel Kim, P could have foreseen not getting the license
3. Synthesizing all factors:
   a. Suntan case—see what you allocated the risk for and what was foreseeable, and how much the cost increase was—maybe argue that the more the price increases, the less likely it was that you allocated risk for it.

iv. **Frustration of Purpose**

a) **CASE:** **Krell v. Henry.** D rented space from P so that D could get a view of king’s procession. The procession was cancelled, and D refused to pay the balance owed. P sued to recover and D counterclaimed, saying that the event never took place so there was no consideration.

1. Different doctrine from **Taylor v. Caldwell.** The rule should not be limited to cases involving destruction or nonexistence of some thing that is subject matter of K or condition of it—
   i. Need to ascertain, either from K terms or from inferences, what is the substance of the K, and then ask whether that substantial K needs for its foundation the assumption of the existence of a particular thing. In this case, the whole purpose of choosing this room was the procession.
   ii. Contrast to cab driver **Hypo** in this case: If you hired a cab driver to take you somewhere because of a derby there, and the derby was cancelled, you couldn’t get out of the K because of frustration of purpose. Both parties need to have the same purpose.
   1. Compare cab driver hypo to the Canadian uranium **Hypo.**
2. Skating rink/zoning code Hypo—why is this in frustration of purpose and not subjective impossibility?

b) From Krell: Questions to Ask:
   1. What, with regard to all the circumstances, was the foundation of the K?
   2. Was performance of the K prevented?
   3. Was the event which prevented the performance of the K of such character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the K?
      i. If all these answers are yes, then rescind K
      ii. Test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against

c) Damages Following Discharge
   1. Chandler v. Webster: Money due before the frustrating event must be paid, so any down payments are not recoverable—“suspension in mid air”
   2. Fibroska Spolka v. Fairburn: rejected suspension in mid air.
      i. Nearly all U.S. courts have rejected suspension in mid air.
      ii. If party had made expenditures in preparing to perform before the frustrating event, that party can recover in restitution. [American courts: value of performance already rendered, limited by degree of fault]
   3. Restatement 2d § 272:
      i. Comment B: recovery in impossibility and frustration cases “may go beyond mere restitution and include elements of reliance by the claimant even though they have not benefited the other party.”

B. Combining Impossibility/Impracticability/Frustration:
   i. Note: All three of these go to a basic assumption of the K; if not a basic assumption, then it can be none of these.
   ii. First see whether it can be impossible
   iii. Then go on to see whether impracticable/frustrated
   iv. If you decide it’s any of these, then the duty is discharged, but ONLY IF:
      a) No fault of the party claiming the impossibility, etc. (or something the party could have guarded against, like the $50 application fee), OR
      b) The risk had not been allocated for.

VI. Unconscionability
   A. In Equity
      i. Specific performance is not an absolute right; court must use discretion and only apply it when it is totally fair. An unconscionable bargain will not be specifically enforced
         a) CASE: Woolums v. Horsely. D was uneducated and knew little of what was going on. P had a lot of business experience and had researched D’s land. P entered K to purchase D’s land for 40 cents per acre. When P later demanded the deed, D refused and P sued for specific performance.
         b) CASE: demonstrating the difference between rescinding because of mistake and granting specific performance because of mistake. Kleinberg v. Ratett. P gave down payment on a plot of land. K called for a deed saying the land was free of encumbrances, and P refused to pay the balance because there was a pipe with a stream of water running below the land. Court said that because it was from nature, it was not an encumbrance. There was no fraud, so P couldn’t rescind, but great hardship would result from specific performance. Refuse specific performance.

      1. Notice in both cases, there was no remedy in equity, and they would have to sue at law instead—it’s ok to value consideration to come to this conclusion because you’re not looking at whether it is enforceable in general (in which case you can’t value consideration), but you’re just looking at whether a particular remedy is available. Consideration is an indication of unconscionability in either case (see below with William-Walker case applying this analysis to a case at law).
ii. Specific performance may be awarded when there is conflicting evidence as to value of the transaction. **Saymour v. Delancy.** Here, the land value was not concretely determined, but as P already had the other 2/3 of the land in question, the value could have been different to him as a whole.

iii. **The Clean-Up Principle.**
    a) “Principle of completeness”—when an equity court acquires jurisdiction of a case, it will proceed to give whatever remedies are needed for a complete and final disposition of the issues stated. i.e. when a court is giving equitable remedy and uncovers issue that needs to be decided legally. (Sometimes court of equity will also give legal remedy in lieu of equitable remedy, instead of only to supplement it.)

B. **At Law**
   
   i. If a K is unconscionable, it is even unenforceable at LAW.
      a) **CASE**: **Williams v. Walker-Thomas Furniture Co.** First time court decided K unconscionable at law and not just in equity. Cross collateral clause in K. P defaulted and D was going to take all of her belongings she had purchased. Unconscionability implications and also public policy, value to individual person.

   ii. **Criteria for determining unconscionability**, according to **Walker-Thomas**
      a) **Absence of meaningful choice**—*Procedural/Non-substantive*
         1. upon entering the relationship (necessary to purchase? Other stores?)
         2. upon forming the K (obtuse language?)
         3. Note: do not use reasonable person standard; each person has different bargaining power, so need to consider individually
      b) **Terms unreasonably favor the other party**—*Substantive*
         1. compare value of the term to one party versus to the other (like the used pillowcases in Walker)

   iii. Note: There is an inherent contradiction in this test/criteria from **Williams**. If every merchant in a particular context is using a particular K clause, then there is an absence of meaningful choice. BUT, if everyone is using it, then it’s consistent with the commercial practices, so the terms are not unreasonably favorable; they are consistent with the standards of the trade.

   iv. **Courts can modify the terms and enforce to reasonable extent**: Courts can say K was unenforceable, and still have the suffering party perform in a fair way, different from what he was supposed to do under unconscionable terms.
      a) **CASE**: **Frostifresh Corp. v Reynoso**. P demanded balance due on fridge, but court found that the negotiations had been in Spanish and the customers (D) didn’t speak English. Salesman had explained misleading terms and then charged more than double the cost of the fridge. Court said it was unconscionable because of price/terms/D’s lack of language skills, but because D had kept the fridge, court at least made them pay the reasonable value of the fridge.

   v. **UCC 2-302 Unconscionable Contract or Clause**
      a) If the court as a matter of law finds the K or any clause of the K to have been unconscionable at the time it was made the court may refuse to enforce the K, or it may enforce the remainder of the K without the unconscionable clause, or it may so limit the application or any unconscionable clause as to avoid any unconscionable result.
      b) When it is claimed or appears to the court that the K or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

   vi. **Commercial setting**
      a) Unconscionability is uncommon in commercial settings.
      b) **CASE**: **Gianni Sport Ltd.**. D, a retailer, had K with P, a manufacturer of clothing, for certain clothing. K had a clause saying D could cancel at any time for goods not yet shipped or late goods. D cancelled one order that hadn’t been delivered yet, and P then agreed to a 50% price reduction if P would accept the goods anyway, but court held this K valid because of the cancellation clause.
1. Test as in Walker-Thomas. UCC Comment paraphrases: “in light of the general commercial background and commercial needs of particular trade, clauses involved are so one-sided as to be unconscionable at the time of making the K.

2. **Specifically apply this test** from another case, in line with UCC:
   i. What is the relative bargaining power of the parties?
   ii. Even if there are unequal bargaining powers, enforce the agreement if it is reasonable—reasonableness is primary consideration*

3. In Gianni Sport, there was unequal bargaining power (small manufacturer taken advantage of), and the cancellation clause not reasonable.

c) Important to consider why the following doctrines did NOT apply in Gianni:
   1. mutuality of obligation (The buyer had the power to terminate at any time.)—the buyer would still be obligated to pay if the seller so much as shipped the goods, relate to the San Francisco hypo from last chapter)
   2. preexisting duty rule (Buyer promised to pay X amount and then later said he’d pay half of X dollars.) (buyer cancelled the K as he had the right to do and therefore ended the K and cancelled any duties that the parties had, so therefore the seller’s “offer” to sell for 50% of the price was like a new K)
   3. duress (there was no wrongful threat)

**CHAPTER 5: THE MATURING and BREACH of CONTRACT DUTIES**

I. The Effects of Express Conditions
   A. **Definition of condition:** Some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend. Such a fact may be an act of one of two contracting parties, an act of a third party, or any other fact of our physical world.
      i. The term “condition” is more properly restricted to facts subsequent to acceptance and prior to discharge.
   B. **Distinction between condition and promise:**
      i. A promise is always made by the act or acts of one of the parties, but a condition can only be made by the agreement of both parties of by the construction of law.
      ii. The purpose of a promise is the creation of a duty or a disability in the promisor; the purpose of constituting some fact as a condition is always the postponement of an instant duty.
         1. * The fulfillment of a promise discharges a duty, but the occurrence of a condition creates a duty.
         2. A party cannot be compelled to perform a condition unless the party promised to perform it.
      iii. HYPO: If S and B had a K, and S was to fulfill a condition, but S did not do so, B could not compel S to perform if S hadn’t promised that he would, nor can S compel B to perform because the condition giving rise to the duties to perform had not occurred.
      iv. **CASE:** Glaholm v. Hays. When ambiguous as to whether a condition or promise has been created, look to intent of parties. Courts also tend to favor promises, because of a policy against forfeiture.
      v. **CASE:** Howard v. Federal Crop Ins. Ps sued to recover for losses to their tobacco crop due to rain damage. D issued insurance policies to P covering for such damage, rains damaged the crops, and P gave timely notice, but P plowed his fields before D inspected. There was a condition stating that in order for P to recover from the policy, P wouldn’t destroy the fields until the inspection was made.
         1. Two prong test as to whether something is condition or promise:
            a. **Language** of the document to reflect intention of the parties
            b. **Presumption of a promise** over a condition
         2. Also, go against the party who drafted it (because he could have been clearer) and against policy of forfeiture.
3. In *Howard*, there was one clause that was stated as a condition, and another clause not labeled like this, so that one was labeled as a promise.

vi. **CASE**: Merritt Hill Vineyards v. Windy Heights Vineyard. S failed to get two things he was supposed to in the agreement, and the court found them to be conditions.

1. **Different damages for conditions, as opposed to promises**: Here, P could only get the down payment back because the breach of condition entitles the other party to be excused of the performance, but it does not (without separate promise to do so) entitle P to get damages.

C. **Conditions as Convenient Time Limits**:

i. Parties may include time-is-of-the-essence clauses, and if not expressly contained in the K, courts can interpret that time is of the essence by looking at intent/language/circumstances

1. **CASE**: Doctorman v. Shroeder. Payment made 30 minutes after due was held as too late, because parties had “deliberately and solemnly” contracted as to the time pmnt was due. Various courts could apply various damages to this situation.

ii. **HYPO**: S wants to sell her house and she borrows money from L, saying she’ll pay him back when she makes money from the sale. But then no one buys house.

1. It’s not likely that lender never wanted to be paid; courts don’t want to enforce policy of forfeiture. So it’s likely just a convenient time limit. The loan will still have to be repaid at some point in time, even if the convenient time never arrives.

2. No need to distinguish between an absolute condition and a flexible-time condition.

   a. To analyze a case like this: Describe what you would need to distinguish between a promise and a condition (parties’ intent, favoring promise, etc.) but ultimately show that it was not the parties’ intent for S never to pay L back, so it can’t be a condition, but rather a promise with a reasonable time limit attached.

D. **Waiving of Condition and Estoppel**

i. Waiver and estoppel are distinct but related doctrines. They function to terminate K rights and discharge K duties.

ii. Waiver is the voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such a waiver, would have been enjoyed.

iii. Estoppel, on the other hand, arises when one party has made a misleading representation to another party and the other has reasonably relied to his detriment on that representation.

1. Note: reliance is necessary for estoppel, but waivers are more complex.

iv. **CASE**: Gilbert v. Globe & Rutgers Fire Ins. Co. D issued policy to insure P’s cottage against loss through fire, and the policy required any lawsuit to be brought within 12 months. Cottage was destroyed in fire. When the house burned to the ground, P wanted to rebuild it, so he bought supplies from Astoria. But P didn’t have cash to do that; he was waiting for the insurance money. P didn’t get money, Astoria got impatient, so served D with writ of garnishment, saying that D owed P anyway, so instead of paying P, D should pay Astoria.

1. If a party relinquishes a known right (waiver) awarded him by K, he cannot, without the consent of the adversary, reclaim it.

2. HOWEVER, a ban of estoppel may be lifted by the party against whom it is revoked by the giving of proper notice. [Here D made P believe/rely that the claim would not be contested within the time period D was waiting for the garnishment proceedings to finish; but once D told P it would not pay P, the ban of estoppel was raised, and P had another 12 months to sue.]

v. In HYPO above, if it had been a condition but then the house burned down, then performance of the condition would be impossible.

1. **CASE**: Semmes v. Hartford Ins. Co. P didn’t sue within the specified 12-month period, but that was because of the Civil War. The time period was lifted when the war broke, and could not be revived again.

E. **Party in Control of the Condition’s Occurrence**

i. If, in HYPO above (still about selling the house), S borrowed the money, fixed the house, but then decided not to sell it, could L recover? YES
1. Implied obligation to use good faith to perform condition when the condition is within the control of one party. Failure to try to fulfill implied obligation would breach the K.

2. In Gilbert, the control of the condition is with promisee (P), but D induced P not to make the condition occur. So D could not thereafter blame P for not making the condition occur.

ii. CASE: Aetna Causualty v. Murphy: P sued D to recover for damage D allegedly caused to a building it had insured. D filed a third party complaint impleading his comprehensive liability insurer, Chubb, as third party D. Chubb moved for summary judgment and won on the grounds that D inexcusably and unreasonably delayed in complying with notice provisions. Chubb’s claim based on the fact that D ignored 2 provisions: 1) notice to be given as soon as practicable, and 2) if claim is made, insured would bring forth all paperwork about it. D conceded that he broke these two provisions. D appealed, claiming that he is entitled to insurance coverage because Chubb has failed to allege or to show prejudice because of his late notice.

1. Need to consider two competing principles of law: 1) supporting principal that Ks should be enforced as written and parties are bound by the terms to which they have assented, and 2) occurrence of a condition may, in appropriate circumstances, be excused in order to avoid a disproportionate forfeiture.

2. Restatement 2d § 229: Excuse of a Condition to Avoid Forfeiture: “to the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.”

   a. Comment: forfeiture is the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially…In determining whether the forfeiture is disproportionate, a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which protection will be lost if the nonoccurrence is excused to the extent required to prevent forfeiture.

3. ***Cardozo—“we must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition.”

4. Need to notice that this is a K of adhesion, enforcement of the condition will operate as a forfeiture, and that insurer’s purpose for the condition is to protect itself from prejudices.

F. SUMMARY OF CONDITIONS THUS FAR:

i. Nonoccurrence of condition  \(\rightarrow\) no obligation to perform

ii. Impossibility of condition before performance  \(\rightarrow\) no obligation to perform

   1. Impossibility of condition as a term of K (i.e. suing w/in 12 mos.)  \(\rightarrow\) condition excused

   iii. Estoppel  \(\rightarrow\) excuses condition; may be lifted/condition revived

   iv. Waiver  \(\rightarrow\) excuse condition; no revival

   v. Condition in one party’s control  \(\rightarrow\) implied obligation to perform condition

   vi. Condition in one party’s control  \(\rightarrow\) if nonoccurrence of condition, weigh against prejudice to other party to see whether to excuse condition

II. Conditions of Satisfaction

A. Upon Third Party Satisfaction (e.g. architect)

   i. CASE: Second Nat'l Bank v. Pan-American Bridge Co. P was to build structure for D; payment to be given upon periodic certificates from the architect, and 15% of each to be retained and paid at the end. Detailed drawings made, and P was to use “standard” connections for the beams. Upon completing 6 stories without objection from D, D then objected by saying that the connections were not the proper “standard.” D refused to pay.

      1. Architect’s certificate (satisfaction) = condition = the thing without which owner is not obligated to pay

      2. RULE: The condition could only be excused if payment was withheld in bad faith, not if it was just unreasonable.
a. Example: Most people consider 8 rivets standard, but the architect happens to fall in the 30% who think the standard is 10 rivets, while the builder thought it was 8. Architect would be unreasonable to not give certificate, but not in bad faith so ok.
   i. But if there had been shop drawings specifying 8 rivets, and the architect still withheld payment, then this could be bad faith.

b. Can’t waive condition just because unreasonable here, because that would undermine the point in having a condition/third-party approval in the first place.

ii. **CASE: Maurer v. School District No. 1.**
   1. RULE: When there is only one condition under which architect can withhold pmt, the architect cannot withhold the certificate for any other reason.

iii. **CASE: Fay v. Moore**
   1. RULE: Architect must act impartially, and not only to favor one party.

iv. **CASE: Hartford Elec. Applicators v. Alden.**
   1. RULE: When payment is conditioned on architect’s approval, the architect owes the subcontractor a reasonable duty to inspect the work and specify what needs to be corrected.
      a. If architect does not inspect as he should, this constitutes a waiver of the condition, and P should be able to recover the money due.

B. **Upon D’s Satisfaction**
   i. **CASE: Haymore v. Levinson:**
      1. RULE: Nonoccurrence of the condition would be excused if the expression of dissatisfaction is unreasonable, even if no bad faith, BECAUSE the owner himself was to judge satisfaction, so apply a higher standard here.
      2. RULE: When the nature of the performance is utilitarian like in buildings, the test that will be used is whether the party who is not satisfied is acting reasonably. But if the purpose is aesthetic, the idea of reasonable dissatisfaction is more subjective.
   
   ii. **CASE: Fursmidt v. Hotel Abbey Holding Corp.** P worked for D as laundry valet. P and D made a K to render such services for 3 more years, and D was to pay per month based on his satisfaction. D soon fired P, claiming dissatisfaction.
      1. Test whether satisfaction was for operative fitness/utility, or aesthetic/fancy/taste.
      2. Court found valet service of the latter type, so jury would only need to see if D acted honestly.
   
   iii. *Restatement 2d § 228:* if it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.
      1. For operative/fitness category ⇒ use reasonable person standard.
      2. For aesthetic category ⇒ good faith standard.

iv. **SUMMARY OF SATISFACTION CONDITIONS:**
   1. Third party: only excuse if bad faith, not just unreasonable
   2. Defendant/Objective/fitness: unreasonable enough to excuse condition
   3. Defendant/Subjective: subjective + good faith

v. How to relate to mutuality of obligation?
   1. implied obligation to act in good faith

III. Constructive Conditions
   A. **Three types of promises [according to Kingston, below]:** (note, all based on timing)
      i. Mutual + independent (either party may recover damages from the other for the injury he may have received by breach of covenant in his favor, and where it is no excuse for D to allege a breach of the covenants on the part of P.)
      ii. Conditional + dependent (performance of one depends on the prior performance of another, and therefore till this prior condition is performed, the other party is not liable to an action on his covenant.)
      iii. Mutual + dependent (if one party was ready and offered to perform his part and the other neglected or refused to perform his, he who was ready and offered as fulfilled his engagement
and may maintain and action for default of the other, though it is not certain that either is obliged to do the first act.)

B. Progression in considering promises as conditional
   i. **From Patterson**: Where one party’s promise requires a substantial time for performance, some extension of credit is practically unavoidable. The rule laid down for all such promises where the other party’s performance does not require a substantial time is that the latter’s duty is conditional on performance by the former; the party whose performance requires time is to extend credit to the latter. Common example of this: contract to do work for money.

   ii. From Nichols to Price: presume independent → consider both ways → presume dependent

   iii. First, **Nichols v. Raynbred**, in which P could sue and recover from D even though he didn't take any action himself.

   iv. Then, **Kingston v. Preston** [P was to serve D for one year, after which D would hand over his business to P if P got security], which introduces the dual nature of promises:

      1. ***Obligation + possible condition*** for other party’s obligation to perform:

         a. Promise of P is **always** obligation of P, but we must see whether it is **ALSO** a condition of D’s obligation to perform. Kingston says that it is, sometimes. We have to see in the particular case whether the promise is a condition.

         b. In Kingston, the only way to preserve the essence of the agreement is to have the security come before—it makes no sense to allow security to come later. So make this a constructive condition, even if the K didn’t say “at or before” in it.

         c. Main consideration of the court here: is it a promise or a condition?

   v. Then, **Price v. Van Lindt** [D was to give P a loan to purchase land upon which to build house. P had to give mortgage deed and D had to give loan money. Both parties knew that deed had to go to Amsterdam and back, P had made substantial preparations with dealers to build house on land]

      1. **RULE**: Promises should not be viewed as independent unless circumstances point to that; presume dependent promises. Way to put party in expectancy, by giving breaching party a constructive obligation.

      2. Distinction from Kingston: note how surrounding circumstances determine whether promise is dependent or independent. Cases may be reconciled this way [need to reconcile the fact that there is a security deposit due in both cases, without which the other party would not be able to recover anything if he were to sue].

         a. In this case, court did say to presume dependent, but here the surrounding circumstances led to the holding that the promises were actually independent, because both parties knew that P might not have been able to perform before D because of the Amsterdam situation.

   vi. **Restatement 2d § 234: Order of Performances**

      1. Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary

IV. The Render-or-Tender Rule

A. **Restatement 2d § 238: Effect on Other Party’s Duties of Failure to Offer Performance**

   i. Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a **condition of each party’s duties** to render such performance that the other party either render, or with manifested present ability to do so, **tender** performance of his party of the simultaneous exchange.

B. **CASE: Ziehen v. Smith.** D was to convey to P a good deed to the land. P was to pay. Neither party knew that there was another mortgage on D’s property from the previous owner, and D became aware 20 days before making the K. P tried to sue D for not performing on the decided date, but P had not first tried to perform before suing.

   i. **RULE**: In order to entitle a party to recover damage for the breach of an executory K of this character, he must show performance or tender to perform on his own part. He must show the other party is in default.
ii. **Exceptions**: Qualifications under the rule arise where the necessity of a formal tender is obviated by:

1. the anticipatory repudiation, OR
2. when it appears that he has placed himself in a position in which performance is impossible
3. so if the vendor of the real estate is unable to perform on his part at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract or for damages.

iii. Court in *Ziehen* stated that it was not impossible for D to perform here, so P did have to tender before suing; but Greenfield points out that even if it was not impossible, D still would not have performed.

1. This leads into contrast between law and equity courts:
   a. Equity courts are flexible and can condition their judgments on things, i.e. giving P a time limit to perform. Law courts are rigid, as in *Ziehen*. Not always a good thing; doesn’t always seem fair—if D wouldn’t have performed anyway, why should P have to tender first? Just because D didn’t fit into the two exceptions to the render-and-tender rule.
   b. **CASE**: *Willener v. Sweeting* allowed P to recover in restitution, essentially rescinding the contract because it put the parties back to their pre-contract positions.

C. **Anticipatory Repudiation by D**:

i. **CASE**: *Caporale v. Rubine*. K for the exchange of lands, deeds to be exchanged on a certain date. P later sued D for conveying D’s land to a third party, but P actually only had a K right to purchase the land that was supposed to convey to D (so he couldn’t legally convey it anyway).

1. P’s claim that he didn’t need to have good title until the date of performance was rejected by the court—
   a. Court stated that D’s conveyance to third party excused P from making a tender of his own performance, but in order to actually recover damages from it, he had to show that he was willing and able to tender performance on his part, which he did not do.

D. **Considering whether the defect may be removed**:

i. **CASE**: *Neves v. Wright*.

1. **RULE**: Seller need not have legal title throughout the entire executory period of a real estate K. Purpose of this rule is to enhance alienability through flexibility. (apply carefully). **Basic test**: see whether the defect, by its nature, can be removed.
   a. This Rule was applied in subsequent case, which stated that where the contract contemplates simultaneous performance and contains no declaration that time is of the essence, the K obligations can continue for some time period beyond the agreed closing date—in other words, party who wants to sue must still put the other in default.

2. Also illustrates the point that it’s always safer to try to perform before you sue.

E. **Practicability/policy for the render-and-tender Rule**:

i. **CASE**: *Bell v. Elder*. P had K to purchase land from D, and D had to furnish water, for which P was to pay installation fee upon getting a building permit. P unsuccessfully sued for rescission. Court stated that the issue was about which order the parties were to perform. No time was stated in the contract, so the law implies a covenant and condition that performance should have been concurrent. Parties had to render or tender before suing.

1. The rule isn’t merely a formality; here, P’s tender would show the purposefulness of D’s performance. There would be no point in D providing the water line for land that wasn’t surely going to be used. So the rule, among other purposes, prevents P from insisting upon purposeless performance, or from avoiding his own obligations on pretext.

V. **Perfect Tender Rule**

A. **CASE**: *Oshinsky v. Lorraine Mfg*. K called for delivery “at Nov. 15.” But goods weren’t delivered until Nov. 16. Issue was ambiguity; what did “at” mean (“on” or “on or about”)? Perfect tender rule for goods
already established—need not accept late or imperfect goods (even if not expressly stated, time is always of the essence with sale of goods). Here court said the language was very clear; Greenfield disagrees.

B. **CASE: Prescott & Co. v. JB Powles & Co.** Seller had to ship 300 crates to P, but only 240 fit on the ship because the U.S. govt. filled up the rest of it unexpectedly; but this still wasn’t a good enough excuse to get out of the perfect tender rule.

C. **Modification:**
   i. **CASE: Beck & Pauli Lithographing v. Colorado Million.** P was to deliver lithography by a certain date, but actually delivered it all within a few days after that date. Court stated that these weren’t standard goods, so the perfect tender rule shouldn’t apply; these were artistic and not commodities, so D couldn’t refuse them based on lateness alone—if anything, D entitled to damage for the goods being late, but here, D was not damaged.
   ii. Shows courts trying to carve exceptions for a strict rule.

VI. **Substantial Performance**

A. **Overview:** Under *Oshinsky* and *Kingston*, P would only be able to recover if he fully performed. But construction cases are different, because the owner gets the benefit of the substantially performed part (kind of like restitution). This leads to using substantial performance as a basis for recovery, unlike perfect tender with goods. Substantial performance balances the hardships of the two parties.
   i. **Modification of the Dual-Nature of Promises—Different Standards for Recovery:**
      1. Obligation of P is discharged only by absolute performance, BUT
      2. Condition of D’s obligation to pay arises when P substantially performs.

B. **General Standard/Application**
   i. **CASE: Plante v. Jacobs.**
      1. First issue: **Substantial Performance?**
         a. **TEST:** See if performance fulfilled the essence of the K.
            i. NO mathematical formula. (i.e. in *Britton* where 9.5 of 12 months labor was still not substantial performance.)
            ii. In this case, drawings weren’t that detailed, it was a pretty standard house, and Ds got essentially what they had bargained for.
      2. Second issue: **Damages**
         a. **Measure:** Unpaid balance on the K (because D’s obligation to pay has arisen), minus the damages to D, which can be either:
            i. cost of repair (like c/c), OR
            ii. difference in value between substantially performed and fully performed
         b. *Plante* court notes it’s generally the difference in market value, but where there is no confusion in using the cost of individual repairs, then ok to go with that.
   ii. **CASE: Reynolds v. Armstead.** Express condition to match brick color. P failed to use such brick even though he used bricks of sound quality. Court found this a material breach, so no substantial performance. P could only recover in restitution.

C. **Difference Between Willful and Honest Default**
   i. **CASE: Jacob & Young v. Kent.** P completed building house. D moved in, but a year later said the pipes were the wrong brand. Architect hadn’t even noticed, but then withheld certification. Court held that P’s default was trivial and unintentional, so he had substantially performed. The significance of the grievance was significantly out of proportion to the oppression of the forfeiture.
   ii. **CASE: Glazer v. Schwartz.** P had substantially performed but left it willfully undone. Court said that in order for P to recover, he would have had to have 1) substantial performance 2) that was not willful.
      1. However, in *Ficara v. Belleau*, when, after builder willfully abandoned, the owner paid the balance to get builder to finish work and then sued to recover in that amount, court said no. That would be like giving the builder punitive damages because it would give the owner a $6K heater for $4K.

D. **Application to Employment Pension Ks: Modification of Willful Standard**
i. **CASE: Hadden v. Consolidated Edison Co. of NY.** Even though the employee had been disloyal in doing things previously that would have been grounds for cause and losing the pension money at the time, employer could not withhold pension payments from him.

1. **CONTRAST** to builder situation, where willfulness could ruin the whole substantial performance claim.
   a. Here, consider willfulness as a factor, but not totally determinate. Employment Ks are divisible, like installment Ks. In this case, while P’s willful misconduct may have been material breach with regard to a specific term of employment, it does not impair the value of his entire 40 years working with the company.

---

E. **The Owner’s Substantial Performance**

i. Courts term this “material breach.” If one party materially breaches, other party can get out of the K, but if it’s not material, then the party can’t get out of it. Alternatively, party can suspend performance until the other performs.

ii. **How to determine whether there has been material breach?**
   1. Look to whether it goes to essence of K. Also consider
      a. Cause of the default
      b. Extent of the default
      c. Needs and expectations of the parties
      d. Likelihood of correction

iii. **CASE: Turner Concrete Steel Co. v. Chester Constr.** [note, we’re not talking about rescission here (P wanting to go back to pre-K position), but rather cancellation (P wants expectancy)] At one point, P claimed that more money was due for additional labor, and D made the payment he thought was the full payment, stating that he understood it to be full payment. Without pointing out what sum was still claimed to be owing, or giving notice of any kind, P, on the same afternoon, abandoned the K. Six days later, owner offered to pay any amount which was shown to be unliquidated, but P refused to submit its calculation.
   1. Builder must wait for a reasonable amount of time + give proper notice before he can sue
   2. This rule encourages parties to stick it out with each other and try to make it work.
   3. **Problems with this rule:**
      a. Puts burden on non-breaching party to be willing to resume performance when the other party comes around
      b. Places risk on the non-breaching party as to when to sue (like in Rockingham County)

iv. **Note on damages for substantial performance**: Courts term this “material breach.” If one party materially breaches, other party can get out of the K, but if it’s not material, then the party can’t get out of it. Alternatively, party can suspend performance until the other performs.
   1. If substantial performance, P has a claim on the K but may not have a claim in restitution (*Oliver* case—if completed K, can’t sue on restitution). If P has not substantially performed, then the P has no claim in K, and probably does have a claim in restitution like in *Britton*.

v. **CASE: Aiello**: suggests different test to see whether the breach is material—breach is material if it goes to essence of K (just like substantial performance should go to essence of K)

---

VII. **Material Breach**

A. **CASE: Greguhn v. Mutual of Omaha Ins.**

i. repudiation = material breach (repudiation need not be overt—action can be tantamount to actual)
   1. **ONLY IF** 1) bilateral contract, AND 2) D has not completed performance

ii. Repudiation discharges P’s duty to perform. The failure to perform one or two installments may not amount to material breach, but repudiation of the remaining installments IS a material breach.

iii. **Majority in Greguhn**: unilateral K for pmt of money installments after a default of one or more, no repudiation can amount to an anticipatory breach of the rest of the installments not yet due. Majority of decisions permit recovery under disability policy only of installments accrued and unpaid.
iv. **Dissent in Greguhn:** No problem with the rule stating that mere failure to pay 1 installment is not repudiation of future payments, but here, there was failure of one installment plus the announcement that no future payments were to be made.

v. Logically, first need to see whether there was a breach, or in this case, a repudiation.

B. **CASE: Reigart v. Fisher:** P was to buy a house from D. The contract and D’s representations showed that the acreage was about 7 acres. However, it turned out to be only 4.764 acres. P demanded return of his down payment, but D wanted specific performance.
   i. General rule in such a case of misrepresentation, when the sale can be enforced, is that the vendee shall have what the vendor can give with an abatement for so much as the quantity falls short of misrepresentation.
   ii. No error in giving specific performance here, though, because P wasn’t concerned with acreage, just with the appearance. He wanted only a home and not a farm. There are changed conditions here, but nothing such that it would be unjust to give specific performance (comparing hardship of the parties).
      1. Ps were in position to do most of what they were supposed to do; court said 2/3 performance was substantial. Contrast this with note case, where even 99% wasn’t enough—so this relates to how at law, it’s not a mathematical formula to determine substantial performance.

C. **CASE: Keating v. Price.** Only ¼ acre short here, but it gave him less land by water, which he needed for his factory (and seller knew about buyer’s plans for factory). No specific performance here.

D. **CASE: Bartlett v. Dept. of Transp.** Here, the difference in land size was not a mutual mistake to rescind the K because they still would have made the K with the difference. So, just adjust the price accordingly. The mistake didn’t go to the essence of the K (the K was for land generally, not for specific acreage.).