CHAPTER 1: REMEDIES FOR BREACH OF CONTRACT

**Goal of contract remedies is to place the injured party in its expectancy position.**

- **Groves v. Wunder**
  - If a contractor willfully breaches a **contract to improve land**, the non-breaching party is entitled to compensation in the amount of the cost of performance of the work, even though the cost of the work may be significantly larger than the market value lost due to nonperformance.
    - Willful breach → substitute performance
    - Lack of value in land shouldn’t release contractor from ordinary consequences of breach
    - Objective = improvement of real estate – physical structure not money value
    - Breach defeats π’s right to contract and build for the future
    - Cost of completion (performance) places non-breaching party in expectancy position
      - Peeveyhouse v. Garland Coal & Mining Co.
        - D = diminution in value (strip-mining at residential property), no accounting for special significance/idiosyncratic value.
      - Advanced, Inc. v. Wilks
        - Where property has special significance to owner and repair seems likely, the cost of repair may be appropriate even if it exceeds the diminution in value – idiosyncratic value. Court has discretion of using performance to complete performance.

- **Acme Mills & Elevator Co. v. Johnson**
  - If a **seller breaches** a contract for the **sale of goods** to a buyer, and instead sells the contracted goods to a third party at a price higher than the market price at the time and place of delivery, the original buyer is ONLY entitled to damages equal to the **excess of the market price (at time/place of delivery) minus the contract price**. If the non-breaching party is not injured, there can be no damages.
    - The breaching seller cannot be estopped from pleading because selling to 2nd buyer did not induce action by π.
    - The contract is enforceable but the non-breaching party was not injured – so no damages.
    - EFFICIENT BREACH – both parties benefit from efficiency standpoint – encourage.
        - (Δ removed gravel from π’s land) Deliberate breach may make inadequate limiting damages to diminution in value of the premises – not punitive/ tortious to deprive Δ of a profit wrongfully made, which the π was entitled to make.
        - Punitive damages as a sanction for breach of contract? Even willful breach is not sufficient to impose punitive damages.

  ➢ **PREFERENCE FOR RELIEF BASED ON EXPECTANCY INTEREST**
    - Sharp, Promissory Liability
      - Give as nearly as possible the equivalent of performance
    - Dawson, Restitution or Damages?
      - Expectancy reduces potential for gain through breach
    - Expectation remedy creates efficient incentives with respect to breaches of contract because it forces the breaching party to pay in damages the value of the promised performance to the breached-against party (Polinsky).
    - EFFICIENT BREACH = breaching party’s profit is greater than non-breaching party’s subjectively-measured loss (takes idiosyncratic values into account)

---

**Recovery only for those losses which cannot be avoided (doctrine of avoidable consequences)**

- **Rockingham County v. Luten Bridge Co.**
If an owner repudiates a construction contract before completion, the contractor’s damages are limited to the costs incurred up to the time of the breach plus the profits included in the original contract. The contractor is NOT entitled to recover the full contract price.

- **D = K PRICE – EXPENSES SAVED = EXPENSES INCURRED + PROFIT**
- **DOCTRINE OF AVOIDABLE CONSEQUENCES:** Can recover only those losses which could not reasonably have been avoided.
  - Leingang v. City of Mandan Weed Board
    - Π must be compensated for all detriment caused by breach – incl. constant overhead expenses (i.e. overhead should not be subtracted from damages)
  - Kearsarge Computer, Inc. v. Acme Staple Co.
    - Fixed operating costs (salaries, equipment) → breach may not produce substantial savings for π, thus should not be subtracted from damages
    - Unless contract for unique personal services, breach does not mean income from new business acquired after breach mitigates damages owed by Δ.

- **Parker v. Twentieth Century-Fox Film Corp. (Shirley MacLaine)**
  - A wrongfully terminated employee can be compensated for her expectancy (salary), less the amount she might reasonably have earned. She can reasonably reject alternative employment, if that employment is not comparable to the contracted-for employment, without the potential earnings from the alternative employment being deducted from damages.
  - **Doctrine of avoidable consequences applies to employment contracts**
    - Billeter v. Posell
      - An employee upon wrongful discharge should not be required to accept new employment under circumstances which permit the claim that she consents to a modification of the original K and an abandonment of her right of action under it → possible earnings from such employment cannot be deducted from damages.
    - Corl v. Huron Castings, Inc. (54)
      - Π’s damages reduced by unemployment compensation benefits
        - State distinction between tort and contract liabilities and remedies
        - Goal is not punishment of Δ but to make π whole
        - Applying tort’s collateral source rule in contracts → conflict with making π whole
        - Duplication of compensation; clear legislative intent classifies unemployment benefits as “compensation for wage loss”
    - Seibel v. Liberty Homes, Inc. (55)
      - Π’s damages not reduced by social security benefits received
        - Economic damages different from statutory benefits (outside common law of contracts)
    - Speech Therapist (56)
      - School hires $43K teacher when $40K teacher breaches.

- **Missouri Furnace Co. v. Cochran**
  - When a vendor breaches a forward contract for delivery of goods, the buyer (non-breaching party) is only entitled to damages equal to the excess of the current market price minus the contract price. Damages cannot be based on alternative forward contract entered into by buyer.
  - Buyer entered into alternative contract at own risk
    - Reliance Cooperage Corp. v. Treat
      - Doctrine of **anticipatory breach by repudiation** should aid injured party, not repudiator.
        - Cannot subtract damages that should have been mitigated until damages exist to mitigate – measure damages at time of breach, not in anticipation.

**If cost/market price is insufficient to achieve expectancy, foreseeable lost profits may be recovered.**

**If expectancy is insufficient/incalculable, courts turn to other remedies…**
- Neri v. Retail Marine Corp.
If the measure of $K - mkt$ price does not place seller in expectancy position $\rightarrow$ retailer is entitled to lost profits.
  - As long as the retailer has supply greater than demand, the buyer’s breach costs seller the transaction (as long as seller can supply more than 1 of $x$).

Hadley v. Baxendale
  - If can recover in breach of contract only for damages that could reasonably have been foreseen by the breaching party.
    - If can recover for consequences of breach that (1) can be reasonably inferred by contracting parties as consequences of breach, or (2) arise from special circumstances IF brought to attention of both parties.
    - Loss in this case (lost profits from mill being closed due to delay delivering faulty crankshaft) was not foreseeable.
      - Lamkins v. International Harvester Co.
        - Damages arising from special circumstances out of proportion to breach are not recoverable, even if $\Delta$ is informed of possible consequences of breach. **Mere notice to seller of interest/probable action is not sufficient.**
      - Victoria Laundry (Windsor) Ltd. v. Newman Indus., Ltd.
        - If only entitled to recover loss actually resulting that was reasonably foreseeable at time of contract as likely to result from breach.
        - Test is what “should have been foreseen”; $\pi$ need not show that the harm suffered was “the *most* foreseeable of possible harms.”
      - Restatement § 351: courts can limit damages **EVEN IF THEY ARE FORESEEABLE**

Valentine v. General American Credit, Inc.
  - No punitive damages for breach of contract. An employment contract lacks “elements of personality” – primary purpose is economic so the market standard is the appropriate measure of damages. No mental distress/exemplary damages.
    - All losses are not compensated.
    - Hancock v. Northcutt
      - Contracts pertaining to one’s dwelling are not likely to result in serious emotional disturbance if breached.

**If expectancy is insufficient/incalculable, courts turn to other remedies…reliance.**

**Losses incurred in reliance on the contract can be recovered.**

Chicago Coliseum Club v. Dempsey
  - When lost profits due to breach cannot be determined, no recovery.
    - Reasonable degree of certainty required.
  - No recovery for damages for related expenses incurred before the contract was executed.
    - No reliance interest (can’t rely on K before it exists)
  - No recovery for expenses incurred attempting to enforce the contract.
    - No reliance – contract was already broken $\rightarrow$ $\pi$ acted at its own risk
  - Recovery ONLY for special expenses incurred specifically for furthering the performance in the contract.
    - Losses incurred in **reliance** on K can be recovered.
    - If court can’t put $\pi$ in its expectancy position, can at least make $\pi$ no worse off than before K.
        - $\Pi$ entitled to expenses incurred specifically for furthering performance, including wages of regular employees
      - Anglia Television Ltd. v. Reed
        - $\Pi$ must choose between lost profits and wasted expenditures
Wrong! Doesn’t give injured party expectancy
- When expectancy can’t be proved, courts turn to reliance
- Expectancy interest encompasses reliance interest in large part in contract for performance
- Compensation for expenditures of performance is part of expectancy
- Reliance is part of expectancy if π can prove reasonable degree of certainty

If expectancy is insufficient/incalculable, courts turn to other remedies…restitution

Breaching party may recover restitution for benefit conferred on non-breaching party.
- United States v. Algernon Blair, Inc.
  - The injured party in a breach of contract is entitled to restitution for expenses from the partial performance of the contract even if the party would have lost more than that amount from completing it.
    - Two elements of restitution: unjust enrichment
      - Π confers benefit on Δ
      - Retention of that benefit by Δ without compensation
    - 3 systems of civil obligation:
      - ♦ Remedial interest in a contract
      - ♦ Restitution
      - ♦ Tort
        - Kearns v. Andree
        - Oliver v. Campbell

- Britton v. Turner
  - A party is entitled to recover payment for service performed under restitution, even if she breaches a contract to provide such performance after only partial completion.
    - Damages = value of services provide up to breach – excess cost of substitute services (to non-breaching party)
    - Recovery in restitution can’t exceed contract price because it would conflict with Δ’s expectancy of the contract; contract trumps.
    - Depending on nature of breach, some courts have denied restitution.

If expectancy is insufficient/incalculable, courts turn to other remedies…specific performance.

Enforcement in equity/specific performance only if remedy at law is inadequate.
- Van Wagner Advertising Corp. v. S & M Enterprises
  - When a lessor breaches a contract to lease property, the non-breaching party cannot receive specific performance as a remedy unless the value of the performance cannot be established with certainty.
  - Enforcement in equity: only if damages are not available; in terms of property, must be inherently unique and of uncertain value.
  - Relief is at discretion of court – even if remedy at law is inadequate, no guarantee of right to equitable relief
    - Curtice Bros. Co. v. Catts
      - Where no adequate remedy at law exists, specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land.

- Fitzpatrick v. Michael
  - A contract for personal services cannot provide a remedy in equity (specific performance), even if the remedy at law is not adequate.
    - Cannot compel provision/acceptance of personal services.
    - Even though this is not applicable in this case.
      - Dallas Cowboys Football Club, Inc. v. Harris; Pingley v. Brunson; Fullerton Lumber Co. v. Torborg; Data Management, Inc. v. Greene
- Relief in equity is discretionary with the court
- Did not award specific performance to alleviate delay in massive construction project.
  - Courts reluctant to award equitable relief unless confident won’t recur
    - City Stores Co. v. Ammerman (Tyson’s Corner)
      - Impossible to measure damages at law → court provides relief at equity
    - Grayson-Robinson Stores v. Iris Constr. Corp.

CHAPTER 2: GROUNDS FOR ENFORCING PROMISES

GROUNDS FOR ENFORCING PROMISES

- Formality
  - A substitute for consideration.

- Doctrine of consideration
  - Benefit to promisor OR detriment to promisee
    - Benefit: some right, interest, profit or benefit
    - Detriment: abandons some legal right in present or limits legal freedom of action in future
      - Even well-founded hope/expectation does not constitute a legal detriment → not an enforceable promise
  - Bargain/Exchange
    - Consideration must be bargained for
    - Adequacy
      - Ordinarily, courts will not enquire into adequacy of consideration
        - In equity, courts more likely to review
        - No “nominal” consideration – is or is not (nominal → not).
      - Consideration may be incidental to other objectives (1+ motives in negotiating exchange)
    - Claims/forbearance/settlement as consideration
      - must be in good faith
      - must have some foundation
  - Gifts – lack consideration – promise not enforceable
    - An oral charitable promise is not enforceable
    - Gift of personality consummated only by unconditional delivery of thing.
    - Gift of realty consummated only by execution and delivery of deed.
    - Reliance on gift-promise is not sufficient to enforce – consideration must be present (Kirksey)
    - Reliance → estop promisor from claiming no consideration (Ricketts v. Scothorn)

- Promises grounded in the past (previous request, subsequent promise) & moral obligation
  - Enforceable:
    - Promisor’s performance of subsequent promise indicates P’or views promisee’s service or detriment as consideration, not gratuitous
  - Not enforceable:
    - No inducement → no consideration (conscience not courts must enforce, even if refusal to perform promise is disgraceful)
  - Moral obligation is insufficient consideration unless some pre-existing obligation, which has become inoperative by positive law, forms basis for promise
    - Moral obligation invoked for promises voluntarily revived:
      - To pay obligations after statute of limitations has run out
        - Delayed part payment or new promise to perform re-start limitations
      - Of bankrupt debtor’s to pay discharged debt
      - To pay a contract obligation incurred as a minor
- Person acting entirely from humanitarian motives is not entitled to restitution; person acting in course of profession = evidence of intent to charge; non-professional person providing limited services – absent evidence of intent to charge, assume none.

- Reliance on a Promise
  - Offer & Acceptance
    - An offer is not an enforceable promise unless it is accepted – by words or other overt action.
  - Part Performance
      - Mere payment of the price in full or in part will not make specific performance available – entry into possession is key.
  - Reliance → forbearance.
    - Promissory estoppel (π relies on promise) is a substitute for consideration to enforce promise.
    - Equitable estoppel (Δ misleads π on matter of fact)
  - Employment
    - Permanent employment = employment at will, terminable by either party, unless there is detriment to employee AND benefit to employer, constituting additional consideration.

- Mutuality of Obligation
  - Detriment at exchange of promises, not upon breach
  - Both parties must have obligation/provide consideration to make promises enforceable.
  - Flexibility of parties – limits when only one party has flexibility.

---

**CHAPTER 3: THE MAKING OF AGREEMENTS**

**THE MAKING OF AGREEMENTS**

**SECTION 1: MUTUAL ASSENT**

- Objective manifestation: if reasonable person interprets as promise, enforceable despite contrary intent
  - not subjective manifestation (meeting of minds, actual intent of parties)
  - Assenting to disclaimers:
    - Disclaimer language must be conspicuous to be binding
    - Presumption is document is a contract
    - Embry v. Hargadine, McKittrick

- Offer & Acceptance
  - Offeree’s acceptance of offer completes contract – binding
    - What is an offer? Determined by context – again, objective (would reasonable person understand as offer? Newspaper ads generally not construed as offers)
    - Moulton v. Kershaw

- Problems
  - Indefiniteness
    - Failure to make included term definite
      - Courts construe contract to determine parties’ intent
      - Fairmont Glass
    - Failure to include a term
      - Agreement to agree/renew is unenforceable unless methodology is included
        - Exception: history of renewals
    - Ambiguity
      - Meaning/terms
Where parties attach different meanings to term, and there is no basis for choosing one over other, contract is not enforceable (sale of goods)

If neither/both parties could win claim, no K
  - Rest: if parties have reason to know the other thinks something else, K is void
  - Beware Posner 361

Raffles v. Wichelhaus (Peerless)

**Time/period**
- Offer effective when received
  - Acceptance effective when sent (mailbox rule)
- Assent cannot occur until the offer is heard
- Offeror is master of offer
  - To bind offer, acceptance must occur in reasonable time, determined by:
    - Words of offeror
    - Subject matter of transaction
    - Spoken/written offer
    - Trade usage
- Past practices of parties.
- Caldwell v. Cline
- Textron, Inc. v. Froelich (1973)(supp. 19)

**SECTION 2: CONTROL OVER CONTRACT FORMATION**

- **Types of contracts**
  - **Unilateral contract**
    - accepted only by performance, not promise to perform (no promisor receives a promise as consideration for a promise)
    - Irrevocable once offeree starts performance (= acceptance)
      - Immediately, fully protects both parties, with cost: once offeree accepts, offeror can’t revoke
        - Brackenbury v. Hodgkin
        - Limits offeror’s mastery of offer
      - Offeree can’t rescind acceptance
  - **Option contracts**
    - Rest. § 87: An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
    - B entitled to specific perf if S reneges after B exercises option to buy
      - Adequacy of remedy at law (other K obligations allow spec perf)
      - Performance (offer to pay is allegation of offer to perform)
      - Renunciation (option K paid for at outset – offeror cannot revoke after offeree’s acceptance)
        - Mier v. Hadden
        - UCC 2-205 (p. 403): circumstances make offer irrevocable even with lack of consideration
        - Can’t reconcile with Fischer v. Union Trust?
    - Promise to sell property – buyers’ preparations for performance (securing financing) did not constitute part performance without tendering/beginning tender of purchase price.
      - Ragosta v. Wilder
  - **Bilateral contract**
    - promise to perform can constitute acceptance
mutual promises between two parties to the contract, each party being both a promisor and a promisee
  • Contract for services extending after death of offeror are enforceable
    ♦ Davis v. Jacoby (Cal 1934)
  • Guaranties are revocable at death
    ♦ Jordan v. Dobbins (Mass 1877)
➢ Presumption: bilateral > unilateral (Rest. § 31)
  • unless intent of offeror and individual case circumstances indicate otherwise
➢ Courts of equity have flexibility in assigning relief
  ♦ White v. Massee (389)

Davison v. Davison (NJ 1861) (388)
  • Court appoints receiver to take control of property, parties not forced to live together – but Brackenbury court does?

SECTION 3: PRECONTRACTUAL OBLIGATION
❖ Rescinding an offer
➢ Offer can be rescinded prior to acceptance
  • If an offeree learns that an offeror has rescinded an offer for sale of land etc., the offeree can no longer complete the contract by accepting – the offer is revoked – even if the offeror rescinds before the specified termination of the offer.
  ♦ Dickinson v. Dodds
➢ Subcontractors’ bids to General Contractors – bilateral contracts
  • Submission of price offered for acceptance is revocable after GC uses in bid
  • Offer is not an enforceable promise until a return promise is made
    ♦ Baird v. Gimbel (J. Hand)
  • GC’s reliance on sub’s bid makes offer irrevocable
  • Applying irrevocability of unilateral promise to bilateral promise:
    ♦ Reasonable reliance holds offeror in lieu of consideration to make offer binding
      ➢ Can reliance both imply promise and provide reason for enforcement?
    ♦ Implied subsidiary promise not to revoke; consideration = commencement of performance
      ➢ Drennan v. Star Paving (J. Traynor)
      ➢ Rest. § 90: promise that reasonably induces action or forbearance of a definite and substantial character is binding if injustice can only be avoided by enforcement of the promise.
  • UCC § 2-205: offer for goods that is a “signed writing which by its terms gives assurance that it will be held open” is irrevocable – “authentication by a writing is the essence.” No terms declaring it will be held open ➪ revocable.

SECTION 4: CONDUCT CONCLUDING A BARGAIN (shift from offeror to offeree)
❖ Acceptance
➢ Counter-offers
  • A counter-offer rejects the original offer, which cannot be accepted without consent of original offeror (master of offer)
  • Offeror is free to bargain with others
  • “cannot reduce price” in response to a counter-offer constitutes renewal of the original offer, which offeree can accept
    ♦ Livingstone v. Evans (Alberta 1925) – UNIVERSALLY ACCEPTED
➢ Objective manifestation
If offer is objectively still open, contrary intent – even sale to third party – has no effect
- Unlike Fairmont Glass, Caldwell v. Cline, Davis v. Jacobi – all look at whole agreement and intention of party using language

- Mirror-image rule: acceptance must include all and only the terms in the original offer
- Qualification: immaterial variances

Deviant acceptance
- Objective theory of assent: conduct which imports acceptance or assent is acceptance or assent in view of the law, whatever the actual state of mind of the party
- Assent must be communicated (K requirements: consideration, reliance, mutual assent)
  - Silence as assent
    - If history/context indicates silence would be construed as assent, it is
      - Despite contrary intent (Rest. § 69(b))
    - Standard of reasonable understanding > duty to speak (context)
      - Ammons v. Wilson (Miss 1936)(449)
    - Keeping goods that are clearly not a gift → acceptance, implied agreement and must pay value
      - Austin v. Burge (MO 1911)
- Hobbs v. Massasoit Whip Co. (Mass 1893)

SECTION 5: THE EFFECTS OF ADOPTING A WRITING

Varying a writing
- Parol evidence rule
  - If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, evidence of a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.
  - Rest. (First) § 240: An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration...if the agreement is not inconsistent with the integrated contract, and (a) is made for separate consideration, or (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.
  - Reasons for rule (PER):
    - prevent fraud by parties willing to lie about K items
    - distrust of juries’ willingness to prefer written agreements > later recollections
    - protects against persuasiveness of party with faulty memory
    - MISNOMER:
      - Cluster of props/exceptions, not rule
      - Substantive rule of law of K, not law of evidence
      - (applies to written agreements outside K too)
  - To alter a written agreement with parol evidence:
    - Parol agreement must be collateral in form
    - Parol agreement cannot contradict express or implied provisions of written K
    - Parol agreement must be one that parties would not ordinarily be expected to embody in writing
      - (distinct from written agreement such that term would not be included in the written contract)
        - Mitchell v. Lath (NY 1928) (icehouse eyesore)
    - Rest. 1st test
      - Is agreement inconsistent with writing?
      - If not, is it such as might naturally be made into a separate agreement?
    - Presumption: writing intended to be complete integration
      - Must consider intent: complete or partial integration?
        - Inconsistency with an implied term of writing is not enforceable
          - Hayden v. Hoadley
♦ Inconsistency with express or implied term of writing is not enforceable
  ➢ Mitchell v. Lath

- Parol evidence rule does not preclude evidence of fraud
  - Promissory fraud: falsely making promise. Promise can serve as fraud, with all other elements present, if and only if promissor didn’t intend to fulfill promise at time it was made.

- Statutory prohibition on parol evidence
  - Where a written lease agreement exists, but surrounding circumstances indicate an oral agreement regarding additional terms, parol evidence of the oral agreement should be admitted to the jury despite a statute prohibiting the admission of parol evidence.
  - Ct interprets statute as consistent w/ common law
    ➢ Hatley v. Stafford

- Multiple interpretations
  - If language of K is reasonably susceptible to more than one interpretation, extrinsic evidence may be admitted if relevant to prove one of meanings.
    • PG&E v. GW Thomas Drayage & Rigging Co.
  - A contract clear on its face may not be altered by testimony – it must be enforced on its terms (adhered to by increasing # of courts)
    • Bethlehem Steel Co. v. Turner Constr. Co.
  - Four Corners Rule: extrinsic evidence is excluded if contract is clear on its fact.
  - Contract must be read in context…
    - …to determine whether ambiguity exists (Robert Indus. v. Spence)
    - …to give effect to intent (Spaulding v. Morse)

SECTION 6: MODERN CONTRACT NEGOTIATION

- Assent in modern contract negotiation (standardized forms, disclaimers)
  ➢ Signature is manifestation of assent
    - Bound by what you sign, even if unread
      ♦ Assumes reasonable time to read
        ➢ Allied Van Lines, Inc. v. Bratton (Fla 1977)(511)
  - Exceptions:
    ♦ Person presenting document misrepresents its nature
    ♦ Recipient reasonably perceives document to be something other than contractual
      ➢ Agricultural Ins. Co. v. Constantine (parking lot tkt)
    ♦ If presenter of document prevents other party from reading or tries to induce party not to read, presenter risks losing benefit of protection in document
  ➢ Document must be clearly labeled (disclaimers)
    - Test: whether a person of ordinary intelligence reviewing document with known purpose is unlikely to be misled as to whether doc limits liability
      • Sharon v. City of Newton (Mass. 2002)
    - If circumstances do not lead party to assume document limits liability, unenforceable (baggage claim/ticket cases)
  - Document must call attention to changes/key parts
    - Casual reading would give adequate notice (no fine print)
    - Disclaimer ineffective if casual reader is expected to ignore it
      ♦ Weisz v. Parke-Bernet Galleries (NY 1971)
        ➢ Indicated by language used, understated presentation, failure to refer to it explicitly at auction – suggests disclaimer is a mere technicality to casual reader.
        ➢ Reversed because of prominent placement of unequivocal disclaimer – caveat emptor.
Warranties

- To limit a vendor’s liability, context must signify to an ordinary reasonable person that he is relinquishing the right to make a claim
  - Unfairly procured if not brought to buyer’s attention and he was not made understandably aware of it, or if not clear and explicit
  - Strict construction: what does language mean to ordinary person?
  - Henningsen v. Bloomfield Motors, Inc. (NJ 1960)

- Express & implied warranties
  - Implied = not expressed by seller but law attaches to transaction as matter of public policy
    - exists unless expressly eliminated
    - exception to “bound by what you sign” – if important term is hidden, inconspicuous, or confusing – not binding
  - Llewellyn, 517-19: these rules merely encourage vendor to make changes e.g. separate agreement, clearer wording, call attention to provision – real problem is whether manufacturer/vendor should be able to escape liability
  - Economic losses arising out of commercial transactions are not recoverable under the tort theories of negligence or strict product liability (except those involving personal injury or damage to other property)
    - Superwood Corp. v. Siempelkamp Corp. (Minn. 1981)

Unequal bargaining

- Court may consider public policy and protect party with lesser bargaining power by voiding a contract’s exculpatory clause if the contract:
  - (1) does not clearly identify its exculpatory purposes in the title,
  - (2) has an extremely broad release, AND
  - (3) is a standardized agreement with little or no opportunity for negotiation.
    - Combination of factors required to void contract, unlike Henningson where single factor is enough
      - Richards v. Richards (Wisc. 1994) – lawyer too good – would have served client better with some restraint
  - If a vendor includes additional terms of contract with shipment of goods, and the purchase can reject the additional terms by returning the goods, but does not, the purchaser is bound by the terms, whether read or unread.
    - Vendor is master of the offer
    - Practical considerations support enclosure of additional terms with products.
      - Presumption: purchaser is offeror (master of offer), vendor is offeree, unless evidence to contrary

Contracts of Adhesion

- Characteristics:
  - Standardized, take-it-or-leave-it
  - Not negotiated
  - Presented as condition of treatment
- To be enforceable:
  - Must be within adhering party’s reasonable expectations, and must not be unconscionable
    - Reasonable expectations intertwined with knowing consent
      - Broemmer v. Abortion Services of Phoenix (Ariz. 1992)
    - Outside reasonable expectations:
      - Exclusion that is bizarre or oppressive
      - Exclusion that eviscerates terms explicitly agreed to, OR
Exclusion that eliminates the dominant purpose of the transaction

Possible responses to unequal bargaining:
  • Develop new rules of mutual assent
  • Develop new controls over substance of deal (infringe on freedom of K?)
    ♦ Henningson, Richards do both
    ♦ Broemmer focuses on assent
  • Maintain status quo?
    ♦ Gateway

Rest. § 211. Standardized Agreements
  ♦ (1) Except as stated in (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.
    ➢ Signing or other assent → signer accepts as integrated agreement.
  ♦ (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
  ♦ (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

---

CHAPTER 4: POLICING THE BARGAIN

Implicit in earlier cases: courts police the bargains made by private parties
  ➢ Tension with freedom of contract

Constraints on freedom of contract
  ➢ Contracts is a system of private law-making – parties determine own rules. This chapter: constraints on parties’ ability to act as lawmakers
  ➢ Modifications of rights and duties, resulting from bargaining advantages gained by virtue of an existing contract → what is proper conduct?
  ➢ Doctrines/principles for refusing to enforce contracts (even when mutual assent and consideration are present:
    ▪ Mistaken language
    ▪ Lack of mutuality
    ▪ Obtuse terms in standard documents

SECTION 2: REVISIONS OF CONTRACTUAL DUTY

Motivation is irrelevant as long as there is consideration – as long as motivated in some part by promise
  ➢ Should Promisor’s motive be considered more seriously?

Coercion – tools
  ➢ Duress
    ▪ Physical/restraint of body (only duress at first); 18th c., expanded to duress of goods (wrongful withholding) – must be against contracts and tort
Contract voidable for duress when established that party making claim was forced to agree to it by means of a **wrongful threat precluding exercise of free will**

- must appear that threatened party could not obtain goods from another source of supply, AND
  - (Other source can be limited to select group of approved suppliers)
- ordinary remedy of an action for breach of contract would not be adequate
  - (Sub’s threat to withhold goods from GC unless GC agrees to additional terms, endangering GC’s fulfillment of main contract, makes ordinary remedy inadequate)
  - **Austin Instrument v. Loral (NY 1971)** (new interpretation of duress, but duress itself is old doctrine)

Modern trend toward greater recognition of duress

Duress only exists where the unlawful act of another has deprived one of free will

- Not so where π tilled land for 3 years, then Δ raised price and π paid rather than lose land and labor (could sue for specific performance)
  - **Smithwick v. Whitley (NC 1910)**
- “Duress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim.”
  - Determine whether threat was made, whether π believed it would be carried out, and whether π’s will was thereby overborne.
  - **Wolf v. Marlton Corp. (NJ 1959)**

Pre-existing Duty Rule

- A promise to do what one is already contractually obligated to do is **NOT** consideration
- Bars modification of single term in contract – modifications must affect more than one term
  - Blunt instrument, easily manipulated – avoidable by sophisticated over-reacher and harsh toward honest party
  - Clashes with Duncan v. Black (surrender of claim is consideration so long as there is basis for the claim – encourages settlement as policy)
  - Yields to settlement – law favors compromise to limit litigation
- Acceptance of check claiming to be full payment indicates accord and satisfaction → no further course of action
  - Writing “not full payment” does not separate a single unliquidated claim into two elements, disputed and undisputed.
  - An accord and satisfaction of a single claim is not avoided merely because the amount paid and accepted is only that which the debtor concedes is due.
    - **Marton Remodeling v. Jensen (Utah 1985)**
- If facts do not establish a bonafide dispute over the price owed, debt is liquidated
  - **School Lines, Inc. v. Barcomb Motor Sales (Vt 1985)**

**SECTION 3: Mistake, Misrepresentation, Warranty, & Nondisclosure**

- **Mistake & Misrepresentation**

  - **Factors:**
    - Self protection (look out for yourself)
    - Can there be assent for mutual mistake?
    - If party acquired information can that party trade on it without sharing?
      - Difference if buyer or seller?
      - Information casually or deliberately acquired?
      - Knows other party is operating under mistake?

  - **Mutual mistake**
    - Voidable:
• Sale contract not binding if thing to be sold is discovered to be different in **substance, not merely in quantity**, than that bargained for by both parties
  ♦ Metaphysics: mistake as to nature of thing, not mere quality
    ➢ Sherwood v. Walker (Rose 2d of Aberlone) – **REMAINS APPLICABLE LAW**
• Rest. **Mistake as to basic assumption** → not binding
• Voidable because of mutual mistake **even if one party is indifferent**.
  ♦ Aluminum Co. of America v. Essex Group (Pa 1980) (no facts)
• Contract voidable where both parties are honestly mistaken as to identity of subject matter
  ♦ In sale by description (“this Stradivarius”), there is a warranty that goods will correspond to description (now under UCC § 2-213)
    ➢ Smith v. Zimbalist (Cal. 1934) (not-so-rare violins)
• Failure of a party to investigate (property zoning) will not always preclude rescission if reasonable not to investigate. Mutual mistake of fact → conveyance can be rescinded.
  ♦ Gartner v. Eikill (Minn. 1982)
  ▪ Not voidable:
    • Not voidable where parties know there is doubt in regard to a certain matter and contract on that assumption
      ♦ Even though one party is disappointed in the hope that facts accord with his wishes – risk of the existence of the doubtful fact is assumed as one of the elements of the bargain
        ➢ Beachcomber Coins, Inc. v. Boskett (NJ 1979)/Rest. § 502
    • Parties must be conscious of the uncertainty of the “pertinent fact” for this rule to apply.
  ▪ **Warranty**
    • Where land is conveyed subject to restrictive covenants, there is an implied warranty that the land may be used for the specific purpose to which it is restricted
    • If later discovered it cannot be used for the specific purpose, and this could not reasonably be discovered prior to conveyance, grounds for rescission.
    • NOT voiding for mutual mistake (slippery slope)
    • Hinson v. Jefferson (NC 1975)
      ♦ Suit under implied warranty rather than mistake – if both parties are free from fault, there is no compelling reason to require seller rather than purchaser to bear fortuitous losses.
        ➢ Cook v. Salishan Properties, Inc. Or. 1977 (633)
  ▪ **Nondisclosure/misrepresentation**
    • **Fraud**: if a seller fails to disclose full information she possesses, and buyer relies on seller’s words and actions, bringing about consequences seller desires.
      • Cushman v. Kirby (Vt 1987)
      • **Duty to speak**: If a statement amounts to an inadequate disclosure constituting misrepresentation, the party who has full information has a **duty to speak** to correct misrepresentation.
        ♦ Duty to speak based on superior knowledge of seller, whether for sale of corporation or of RE.
    • **Damages**: In misrepresentation in the sale of a house, damages are determined on a case-by-base basis (not limited to repairs) – depend on character of property and nature and extent of injury.
      ♦ Price says something about nature of item – seller not required to warn item is less of a bargain than buyer thinks.
        ➢ Eytan v. Bach (not-so-old-paintings)

**SECTION 5: UNCONSCIONABLE INEQUALITY**

❖ Unfair bargain
  ➢ An unfair bargain need not be enforced in equity
Grossly inadequate price of purchase can only be accounted for upon ground that non-performing seller was misled and acted under gross misapprehension
- Woollums v. Horsely (country bumpkin v. worldly biz)

**Unconscionability**

- A court of law can refuse to enforce an unconscionable contract for sale of goods
  - Williams v. Walker-Thomas Furniture (DC 1965) (cross-collateral clause)
  - Where party has little bargaining power, abandon rule that terms of agreement are not to be questioned ➔ court should consider whether the terms are so unfair as to withhold enforcement.
  - Unreasonably unfair to buyer > unreasonably favorable to seller

**Definition:** Absence of meaningful choice, determined by circumstances and generally reflected in a gross inequality of bargaining power, plus contract terms which unreasonably favor the other party.

- Absence of meaningful choice:
  - Unequal bargaining power
  - Formation process (tactics, opportunity to understand terms, etc.)
- Unreasonably favorable terms for other party:
  - Commercial settings
  - So extreme as to appear unconscionable…
- Inherent contradiction in test: if every merchant uses a particular term, then B has no choice (Henningsen v. Bloomfield Motors, Ch. 3); but if all merchants use this term, then use of term is consistent with commercial practice

- New doctrine to enforce agreement (already have mutual assent & enforcement)
  - Llewellyn: covert tools are not reliable – permit courts to declare unconscionable and refuse to enforce or limit enforcement on those grounds
  - UCC § 2-302 (2): Question of unconscionability is one for judge, not jury.
- Unconscionable does NOT mean bad faith – can have good faith performance of unconscionable or illegal term
  - Tymshare v. Covell

- Why NOT void contracts?
  - Judicial paternalism (Shapiro excerpt, pp. 698-99)
  - Courts reluctant to override a clearly expressed intention to sell a produce ‘as is,’ warts and all, or to hold a manufacturer liable for dangers that the buyer should have understood when he bought the product.

**Henningsen, Williams v. Walker-Thomas = exceptions, not the rule**

- A contract for delivery of goods allowing buyer to terminate all or part of the purchase order for goods that have not yet been shipped is so one-sided as to be unconscionable
  - Gianni Sport v. Gantosa
    - Primary consideration: Reasonableness of term (makes disparity in bargaining power moot).
    - Cancellation-at-will clause undermines existence of contract.

- Door-to-door sales inherently problematic – very unequal

---

**CHAPTER 5: THE MATURING AND BREACH OF CONTRACT DUTIES**

- What happens when something the parties said would happen, doesn’t (vs. mistake, where something parties assumed would happen, doesn’t), ~ Ch. 1 (what are the consequences if party does not perform?)
- Contract in which parties expressly provide that one of both are obligated to perform only if x event occurs.
- INTERPRETATION & CONSTRUCTION OF CONTRACT
  - Interpretation: process of determining meaning (PG&E)
  - Construction: process of determining legal effect of language without regard to what parties think it means (Caldwell v. Cline)
CONDITIONS

- preceding/subsequent
- Contract – point of reference = obligation to perform
  - ~ all conditions = precedent

Section 1: The Effects of Express Conditions

- Promises and conditions are means to bring about certain desired action by another person
  - Condition: some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend
    - Purpose: the postponement of an instant duty (or other special legal relation).
    - Occurrence creates a duty.
    - Non-occurrence will prevent the existence of a duty in the other party, but it may not create any duty to pay damages at all, and it will not unless someone has promised that it shall occur.
  - Promise:
    - Purpose: creation of a duty or a disability in the promisor.
    - Fulfillment discharges a duty.
    - Non-fulfillment is called a breach of contract, and creates in the other party a right to damages; it is the failure to perform that which was required by a previous duty

- Questions:
  - Whether language creates a condition
  - Consequences of condition being found
  - Circumstances under which performance due even if condition did not occur

- How to differentiate:
  - Presumption = promise > condition
  - (EITHER promise/obligation OR condition – may be both, see Kingston v. Preston below)
  - Parties’ intent (Glaholm v. Hays, 1841 – time of the essence in vessel voyage)
    - Language of provision
      - Expressio unius est exclusio alterius (expression of one thing is exclusion of another)
      - Howard v. Federal Crop Ins. Co. (violation of inspection clause not expressly labeled conditional did not constitute a forfeiture)
    - Circumstances (custom, past dealings of parties, trade usage, context in which occurs, purpose of provision), Wood v. Lucy
  - Policy against forfeitures (insurance premiums)
    - Construe in favor of insured (against drafting party – contra preferentem)

- Condition can be suspended – and reinstated – or relinquished entirely
  - Wavier: intentional relinquishment of known right (gone forever)
  - Estoppel: inducing party to act in a certain way and party so acts (gone only for period of reasonable reliance)
    - When an insurance policy includes a time limitation for the bringing of a claim, and after the insurer had been estopped from claiming the time limit, the estoppel is lifted, the time limitation recommences – the condition reappears, becomes enforceable.
      - Once π acquired knowledge that Δ would protest any claim, π could no longer rely on alleged promises or representations of the company.
      - Waiver v. Estoppel: Insurer was estopped from claiming time limit for a time, but did not relinquish its right to abide by it once estoppel was lifted (estoppel not waiver). Difference = reliance.
  - External events (Civil War) rendering compliance with condition impossible removes non-fulfillment of condition as bar to recovery.
    - Semmes v. Hartford Insurance Co.
Where an express condition precedent to Δ’s obligation to pay has not been performed, π can recover payment if the condition is unfair or unconscionable, or its enforcement would entail a forfeiture.

- To recover insurance despite failing to fulfill condition to payment that would result in forfeiture if enforced, π must rebut presumption that delay was prejudicial to insurer (cannot recover merely as matter of law).
  - Aetna Cas. & Sur. Co. v. Murphy
    - Contract of adhesion – no occasion to bargain
    - Insurer’s legitimate purpose of fair opportunity to investigate can be protected without the forfeiture.
      - But Δ failed to rebut presumption delay was prejudicial to insured, so no recovery.

Section 2: Conditions of Satisfaction

- Circumstances under which performance is due even if condition did not occur, under Δ’s obligation to perform arising only if performance of other party is satisfactory
- Standards for excusing condition:
  - (1) Malicious
  - (2) Bad faith
    - Second Nat’l Bank v. Pan-American Bridge (Supp. 33) – π can only recover if architect’s refusal to accept work is done in bad faith, that is, a refusal or failure to exercise honest judgment (not so in this case).
      - Architect = independent, expert professional – neither parties nor court should second-guess
      - Court’s enforcement of excusing condition only if arct is in bad faith facilitates use of condition in first place – encourages parties to structure K’s this way b/c arct’s decision will be final.
    - What is bad faith? (supp. Cases p. 36)
      - Following owner’s wishes instead of exercising own judgment (in cahoots) (Fay v. Moore)
      - Refusing to examine/exercise judgment (Hartford)
      - Refusing to issue certification because of some matter not entrusted to the contract (Maurer)
  - (3) Unreasonable
    - Haymore (note 776 after Fursmidt) – satisfaction of building contracts dependent on reason, not taste
  - (4) Mistake
    - Encouraging settlement vs. preventing coercion (Mark Remodeling, Ch. 4; Duncan v. Black, Ch. 2)
      - Courts don’t create settlements – merely enforce settlements of parties acting in good faith, if they’re on the same terms.
      - When condition of satisfaction = satisfaction of one of the parties to the contract, risk of dissatisfaction getting something for nothing or being able to escape transaction.
  - Another standard: subjective v. objective satisfaction
    - Satisfaction with performance of a contract to provide valet and laundry services for hotel guests can be measured by the party for whose benefit the contract was made (in terms of fancy, taste, sensibility, or judgment), rather than by a “reasonable man” (in terms of operative fitness, utility or marketability).
      - Fursmidt v. Hotel Abbey
      - Closer to subjective than objective standard – not firmly in either category, but impossible to make objective standards to measure performance of goals. Factors:
        - Δ was to exercise strict control of π’s operation.
        - Δ’s primary objective = ensure guests proper services as an integral part of the overall personal services rendered by the hotel.
        - Δ did not bargain for a particular service but rather for a relationship between the π’s organization and the hotel’s guests as would protect and enhance the good will so essential to the operation of the hotel business.
Section 3: Constructive Conditions: The Order of Performance

- Promise = condition and obligation
  - Whether performance of one party is conditional even though not expressly stated
  - Independent promises = unconditional
    - Nichols v. Raynbred (1615), court enforced payment regardless of whether cow has been delivered
      - Unconditional promises → nonperformance of one is irrelevant to other
  - Concurrently conditional promises
    - Dual nature of promise: may be both an obligation of the promisor and a condition of the other party’s obligation to perform (assumption in Howard: either/or)
    - Constructive condition: court can construe as both, even if not expressly stated, based on intent of parties:
      - Available remedies (lack of remedy for breach)
      - Likelihood of performance if provision is not a condition
      - Custom
      - Preventing future breach
        - Kingston v. Preston, 1773: Party should not be forced to trust to personal security of other in giving up business – clearly a condition precedent.
  - Presumption: promises are concurrently conditional
    - Reasons:
      - Save litigation costs
      - Protect both parties
      - Focus on expectancy presumes a breaching party
      - Concurrent conditions protect Δ from danger of π not performing
    - Presumption that promises are concurrently conditional is overcome when both parties know there is a good chance that purportedly conditional event cannot occur before the date of exchange
    - Other party’s promise to perform is not waived.
      - Price v. Van Lint (international deed transfer)

- Render or tender
  - Party must show performance or tender of performance in order to recover damages for breach of executory contract.
  - Rest. § 238, p. 783: BEST DEFINITION OF TENDER: 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, offer performance of his part of the simultaneous exchange.
    - “Render or tender” requirement waived if it appears that vendor has disabled himself from performance, or that he is on the day fixed by the contract for that purpose, for any reason, unable to perform.
      - Ziehen v. Smith, vendor was not aware of inability to perform, and purchaser did not render/tender performance.
      - Even if purchaser were aware of inability to perform, must notify vendor to provide opportunity to fix defect.
      - Contract not broken by mere fact of existence of lien/encumbrance on day of performance which is in vendor’s power to remove.
  - 2 exceptions to render/tender rule:
    - where performance by one is impossible
    - where one party has repudiated (express refusal to comply with contract)
  - Court won’t permit recovery by π who wasn’t going to perform anyway
  - Where promises are concurrent, neither must perform until other performs
    - Π performs for protection from being held liable.
Caporale v. Rubine (1918): one party’s failure frees other party from obligation to perform
Bell v. Elder: neither party can claim a breach by the other until the party claiming breach tendered performance of its concurrent obligation
- Public policy and common sense → prevent claimant from insisting upon purposeless performance, or from avoiding his own obligations on pretext
Should Paul v. Rosen π be able to recover in view of fact that π did not tender own performance? Voided instead on lack of mutuality of obligation
~ Ziehen, if buyer knows seller can’t perform (can’t convey good title and can’t remove defect), then buyer’s own tender of performance is excused → B can recover from S. Risky course, however, b/c what if Π is wrong?
- Safest course: always tender performance & demand performance by other party.
- Neves v. Wright, 795: Basic test = whether defect, by its nature, is one that can be removed, as a practical matter. Goal = enhance alienability of real estate by providing necessary flexibility in real estate transactions.
Law v. Equity (Williston excerpt):
- Equity → greater flexibility in fashioning relief.
  - Court of equity can ensure Δ is not compelled to perform – relaxed requirement of tender – may grant specific performance even though party getting relief has not tendered own performance.
  - Court of law: judgments are absolute and unconditional → can only protect exchange through concept of tender – no relief unless tendered own performance.
Ziehen shows this is not always satisfactory: Δ gets to keep π’s deposit even though couldn’t and wouldn’t perform.
- Possible claim in restitution?
  - 796, Willener v. Sweeting, allowed recovery under restitution.
  - Not so in Neves, 795, and Bell v. Elder, 792.

Section 4: Protecting the Exchange on Breach
Oshinsky v. Lorraine Mfg. (1911) (omit comment 818-20)
- Time is of the essence in a contract specifying delivery of goods “at” certain dates, so the vendor cannot bring action against the buyer for refusing to accept goods delivered after that date.
  - Including “time is of the essence” boilerplate language is not sufficient to make time of the essence
  - Courts strictly enforce terms in contracts for sale of goods
  - This is a reversal from Nichols v. Raynbred
    - Reversal: Raynbred, party didn’t have to perform at all. Late 18th c., π must perform to the last respect or can’t recover. Rest of cases this week: away from Oshimksy position back toward Nichols v. Raynbred position. Beck v. Pauli = example of cts trying to distinguish cases like Oshimksy (weak) – court not comfortable applying time is of the essence rule to facts before it.
Plante v. Jacobs (1960)
- Outer range of substantial performance
- Absent an agreement making specific details the essence of a contract for the construction of a house, a builder can recover under substantial performance even though the work is not in strict accordance with the plans and specifications.
- In subtracting defects for incomplete performance, the determination of whether a defect should fall under the cost-of-replacement rule or the diminished-value rule is made on a case-by-case basis depending on nature and magnitude of the defect.
- Test: whether performance meets substantial purpose of contract. Substantial performance as applied to construction of a house does not mean that every detail must be in strict compliance with the specifications and the plans. Something less than perfection is the test...unless all details are made the essence of the contract. This was not done here (stock floor plan, no detailed sketches, standard specs)....
No mathematical rule [but closer to 100% than 50%] relating to the percentage of the price, of cost of completion or of completeness can be laid down to determine substantial performance of a building contract.

(Absent specific details made the essence of the contract) For substantial performance, π should recover contract price less damages caused Δ by incomplete performance. Damages due to faulty construction amounting to such incomplete performance = difference between value of house as-built and value of house had it been constructed in strict accordance to plans and specs (DIMINISHED-VALUE RULE). Cost of replacement/repair is not measure, but consideration in arriving at value.

- No market value lost by LR being 1’ too small.
- Whether a defect should fall under the cost-of-replacement rule or be considered under the diminished-value rule depends upon the nature and magnitude of the defect….no unreasonable economic waste.
- How to measure D to put owner in expectancy position: must deduct cost of completion OR loss in value. Ct: cost of completion not measure, diminution in value is proper test – but court awards cost of completion for most items except wall.
- Π can recover if Π has substantially performed (substantial performance doctrine ~ Groves v. Wunder – apt analogy in Groves?)
- In terms of conditions: promise to build house = obligation of builder & condition of owner’s obligation to pay.
  - insofar as promise is obligation of the builder, complete (perfect) performance is necessary to discharge obligation
  - insofar as promise is condition of owner’s obligation to pay, substantial performance suffices.
- EXAMPLE OF DUAL NATURE OF PROMISE
  - Cardozo, Jacob & Youngs v. Kent (833)

Kingston, Price: may be both condition and obligation; Plante: may be both, and the measure for fulfillment may be different, depending on whether talking about promise as obligation or condition.

We’ve encountered this before: Fursmidt v. Hotel Abbe. Performance to satisfaction of hotel was both obligation of valet and condition of hotel’s obligation to continue the contract (our focus there was on satisfactory perf as a condition – since condition didn’t occur, hotel could terminate contract. But in that case Hotel also filed counterclaim against Valet – last 2 ¶¶, court recognizes there may be different standards – can throw out valet if dissatisfied in good faith; to recover damages, dissatisfaction must be reasonable → recognition of dual nature of promise – fulfillment may be different).

Reconsider Aetna Cas v. Murphy (760): dentist failed to notify insurer he was sued. Insurer denied pmt of claim, dentist sued. Did dentist’s failure to give notice was a condition to insurer’s obligation to pay, thereby excusing insurer from payment? Court said yes, condition, but still didn’t relieve insurer from obligation to pay, even though condition had not occurred.

2 questions:
- identify why court’s use of cases like Plante, Jacob and Young is questionable
- identify why the court refuses to give effect to the express condition, and how that’s different from Gilbert v Globe and Rutgers, and how that’s different from hypos we discussed in Gilbert v. Globe.

FULL CIRCLE: GROVES V. WUNDER
- Plante ct cites Rest. § 346 1a. How can misplaced LR wall be distinguished from example 4?
- Note case Reynolds v. Armstead 834 (vs Algernon Blair).
- If Δ not in breach, π can’t enforce K but still may enforce claim in restitution (~ Britton v. Turner).
  - Massachusetts disagrees: willful breach by π forecloses recovery in restitution (p. 835). Note cases on pp. 118, 119, 123 also deny recovery in restitution to π who willfully breached K.

Turner Concrete v. Chester Construction (supp. 37)
- Where there is a bona fide dispute over installmnt amt due in monthly payments, the GC’s reasonable delay in making payment does NOT excuse performance by sub, even though GC’s contention might be wrong – sub is not justified in abandoning contract.
Another option when one party does not fully perform: cancel contract, end relationship, recover damages
- Rescission – two connotations:
  - parties mutually decide to end relationship
  - one party brings relationship to end and seeks to go back to position it occupied before contract began.
  - → NOT what we’re talking about here: here, we’re talking about ending relationship and being in position to claim damages.
  - Use cancel/cancellation not rescind/rescission.

Breach by one party, causing little damage to other, does not justify other for canceling contract.
- Encourages parties that created relationship to stay in it.
- On the other hand, if one party does nothing, other party ought to be able to end relationship.
- HOW TO DIFFERENTIATE btwn two extremes: full perf and no perf: at what point is party receiving partial perf justified in canceling?
- If nonperformance amounts to material breach, other party can sue for lost expectancy and recover on the contract.
- If not material breach, can’t cancel, but can suspend further performance until breach remedied, or continue performance and sue for damages for part of work not done or not done properly.
  - Q: Π wants to cancel → is shortfall in perf by Δ a material breach?
  - If Δ doesn’t make payment, but it does owe money, Π justified in ending – if gives notice and waits a reasonable time. Not very helpful.
- Failure to liquidate installments as they come due may justify the rescission of the contract and abandonment of work.
  - “In such cases, a substantial compliance as to advance payments is a condition precedent to the contractor’s obligation to proceed. But, of course, the builder is not entitled to rescind and abandon the contract unless there has been some wrongful act or default on the part of the owner.”
- Reasonable time must be given to comply with the demand [to pay] before contract work is abandoned.
- Difference between advance payments and payments for work already performed?
  - NOTE CASES:
    - 1-2. Whether breach goes to essence of K – if so, material breach → other party justified in canceling.
    - 3. whether breach is so substantial and important as to defeat essential purpose of parties in preparing the K.
      - look to causes of default (due to unforeseen circumstance after K? or intentional refusal by Δ to perform?)
      - Extent (quantum of nonperf – delay in performing)
      - Needs & expectations of parties in connection w/ K
      - Likelihood of the continuation of nonperformance
  - Note, Breach by Anticipatory Repudiation (856)
  - Gruenh v. Mutual of Omaha
    - Repudiation of unilateral K does not constitute anticipatory breach, so insured is NOT entitled to receive all future benefits in one lump sum.
    - Rest. § 318: In a unilateral K for the payment of money in installments after default of one or more, no repudiation can amount to an anticipatory breach of the rest of the installments not yet due.
      - Doctrine of anticipatory repudiation DOES NOT apply to unilateral K’s, nor to bilateral K’s in which one party has completed performance.
      - exists to deal with problem of what Π should do when Δ repudiates K
      - Anticipatory repudiation = material breach.
      - Limitation: ONLY if K is bilateral K AND Π has not completed performance.
- II’s options in this case when \( \pi \) has completed perf and \( \Delta \) has repudiated obligations under entirety of K:
  - wait until end of K and then sue for nonperformance
  - sue periodically (installments accruing each yr, e.g.)
    - both burdensome to \( \pi \)

- **Caporali v. Washington Nationals Ins. Co. (860):** Awarded future monthly installments, with interest, payable as they become due.

- **Reigart v. Fisher**
  - In a contract for sale of property where the acreage of the land is misrepresented and the buyer repudiates the contract, the seller obtain specific performance if the specific acreage of the land did not constitute the object and inducement of the purchase.
    - Rule: vendee in unexecuted K is entitled to have that for which he contracts before he can be compelled to part with the consideration he agreed to pay.
    - Exception: where there is substantial defect with re: nature, character, situation, extent, or quality of estate, unknown to vendee, specific performance will not be decreed.
    - Variance must be substantial and material – considerable portion of the entire subject matter, or material to enjoyment of other party.

- We saw in Plante, action at law, for party to enforce K, must have substantially performed. In this suit for equitable relief, same test: has \( \pi \) seeking to enforce \( \Delta \)'s promise, rendered substantial performance?
  - Equity may relieve obligation of tender, but ct won’t grant relief unless \( \pi \) is in position to render substantial performance if relief is granted. Ct doesn’t say 4.7 is more or less 7, but says it amounts to substantial performance. \( \Rightarrow \) spec perf is available.
  - Not a mathematical test: Able to convey less than 2/3 of K’d for – ct says it’s substantial performance.

- **Keating v. Price:** If variance is not so immaterial that he is considered as getting substantially what he intended to buy and what constituted the object and inducement of his purchase, vendee can refuse to accept defective performance of vendor.
  - Not a mathematical test: Denied spec perf even though could convey 98.8% of promised. \( \Rightarrow \) NOT A MATHEMATICAL TEST – missing qtr-acre

- **Bartlett v. Dpt of Transp:** To rescind for mutual mistake, the mistake must be such that if the true facts had been known the deed would not have been given. Can correct price, not rescind deed.