## ***GREAT NORTHERN RAILWAY V. WITHAM (1873)***

- This case is back when requirements contracts were not necessarily well used in or understood by the courts
- Requirements contract – disput is that seller won't supply b/c price of iron went up.
    - The buyer and seller agree to required provisions for a set price and term
        - Invitation to bid
        - Bid and tender (firm offer)
        - Acceptance
        - Acknowledgment
- D's first argument is that this is nudum pactum – there was no considerations
    - Consideration is for exclusive dealing – buyer implicitly agrees to ONLY buy iron from seller
        - UCC 2-306: exclusive dealings: S and B agree to exchange goods at a fixed priced, which is fixed at time of agreement as stipulated in contract. S will do best to supply and B will do best to use that supply.
        - General spirit of the USS is that you finish what you agree to start – consideration shoudl be found b/c otherwise people would not be entering into these kinds of obligations – they'd be one-sided.
        - Lord Mansfield: no consideration is necessary in dealings btw merchants
        - Kull: in dealings btw merchants, if you don't see the consideration, you don't understand what the parties are doing
- Court wrongly trying to argue on mutuality: unless both parties are bound, neither party is bound, which is crap in cases of unilateral contracts
- Could buyer have argued that consideration is irrelevant in this case? YES
    - If seller, before buyer places order, notified him that he could no longer supply, buyer's argument would be that an invitation to bid, a tendered bid, and an acceptance of that bid made any rescission later void. SO, at the very least, seller was liable for the order made in February, but likely the later ones as well.

## ***SCHLEGEL V. COOPER'S GLUE (1921)***

- At this point, courts are used to seeing and willing to enforce requirement contracts.
- Price of glue has gone WAY up (horses going off to war, not the factories), so seller doesn't want to sell at the contracted price. Buyer is a jobber (professional middleman), supplying goods on solicited orders, kind of like a Staples or WB Mason.
- What is really the problem for the judge here? See how ordering has dramatically increased (700lbs in 1911 to 169,000lbs in 1916). Price of glue has increased and maybe buyer is stockpiling it OR the people buying it from the buyer are increasing their orders to stockpile.
    - In that case, the buyers wouldn't be using their best efforts to sell what they buy
    - If we changed the facts and made everyone honest and good, would there be a way to find favorably for the seller? YES – UCC 2-306.
        - When teh contract was made, there was an implicity understanding of what a reasonable amount of glue would be. We could have gone with past experience or stated estimate.
        - We don't expect the seller to be responsible for any ordered amount between 0 and infinity. There has to be a reasonable amount.
        - Is there a problem then that the seller never said no – just "on the way!" Seems a little bit of bad faith – you said you would fulfill the order, but then you default.

# LIMITS ON ENFORCEABILITY: PROTECTING THE BARGAIN

- These cases are unenforceable for "internal" reasons – there is something inherently wrong with the dealing or contract. Contrast these kinds of issues, with external reasons, where the court will say that the contract is valid, but will not enforce for "policy" or other issues.

**TWO PHASES OF A CONTRACT:**

| Executory | Rescission |
|---|---|
| Time where the parties are under contract, but before they perform. | The parties have already performed or tendered |
| Claim will be breach of contract | Claim will be to undue the contract: invalidate, reverse, set aside, rescind |
| Defenses raised will be fraud, duress, etc. | Defense will essentially be restitution |

- What might be good objections to enforcing a bargain, even though there was already an offer and acceptance and consideration and/or full performance?
- Breach of fiduciary duty
- Fraud or misrepresentation

## ***ELLISON V. ALLEY (1992) – DEALINGS NOT AT ARM'S LENGTH***

- An arm's length dealing is where I look out for me and you look out for you.
- Fiduciary relationships (trustee, estate mgr., agents, partners, attys, docs, guardians, parent/child, child/parent, siblings) are NOT arm's length dealings – you are not allowed to act in your own best interest, but in the best interest of your client.
- Often these relationships are covered by areas o law removed from contracts (fiduciary law, trusts and estates), but the idea still applies
- Here, we have a seller, who thinks he's selling his property for $200k, and a buyer, who thinks that she's paying $380k for the property.
- Trial court: Judge says seller proved fraud, but only awarded nominal damages ($250), thinking that since he got paid the FMV, he didn't really get harmed. Treating this like a tort case (deceit). Buyer was the one who was actually defrauded.
    - Really, this is a case of fiduciary breach.
        - Profits that were made at the expense of the principal are taken from teh agent and given to the seller.
        - The agent made an illicit profit of $180k
        - Defrauded both seller and buyer
        - How do you split the profit then.
            - Give chance to rescind contracted?
            - What would the house sold for under a good agent? Since she was willing to pay that much, isn't that the value??

## ***SENECA WIRE V. LEACH (1928) - MISREPRESENTATION***

- Seneca wants only securities that are listed on the NYSE. Leach tells them Island Oil will be making and will get its application to the list. Seneca finds out later that IO was never applying and instead is going into receivership (i.e. bankruptcy).
- Wants rescission of contract for inducement
    - Leach will "repurchase" the securities for the amount invested in full.
- Misrepresentation here was not willful fraud, but representations made on unknown facts
- Change the facts so that instead of going bankrupt, interest goes way up and the value of stocks in general go down
    - Still can get rescission – method of realizing fraud/mispresentation or relationship btw bad result and the misrepresentation is irrelevant, as long as the misrepresentation induced the original purpose.
    - Allows someone to recoup investment even if not relevant to loss
- Change facts: What if Seneca found out about the misrepresentation, but decided to keep them anyway, and

then when IO goes under cries fraud?
    - NO rescission – this would allow speculation and a "Heads, I win, Tails, you lose set up".
- Fraud or misrepresentation?
    - Fraud is an intent to deceive and knowledge that statement is false or misleading
    - Misrepresentation is just a **material** statement made without knowledge of the truth that induces some detrimental action by the receiver of the information.
    - Materiality can be shown in one of two ways:
        - (1) If one party says the thing is important for purchase (Seneca said they would only purchase if on NYSE).
        - (2) If the fact IS important or provides a benefit known in the industry (a NYSE listing increases likelihood of purchase or increased assurity in value).

## ***EARL V. SAKS (1951)***

- Starts as a suit for tort of conversion. Strict liability – D has interfered with/manipulated/take P's property in a way that is inconsistent with P's wishes.
- Saks has a cross-claim against Barbee – breach of contract.
    - Doesn't care who pays, but just that someone pays for the coat.
    - Barbee wants rescission for coat
        - Purchase from Saks with fraud on price
        - Gift of coat to Earl for multiple misrepresentations
- Majority says that basis for recission not necessarily relating to actual misrepresentation
- Traynor's dissent is a strange reaction
    - Misrepresentation and injury: doesn't ahve to be a monetary injury, but rather that your ability to make sound judgments is somehow inhibited by the misrepresentation
        - Harm is very much a tort, not really basis of contract rescission

- Duress: not the same thing as coercion/pressure/arm-twisting, because otherwise every negotiation would result in this claim. It's not just that you had some unequal bargaining power. Rather, it's wrongful pressure, something that society finds unacceptable. A contract that has been performed under duress is subject to rescission. The basic question is going to be "will the law consider this kind of pressure legal or ok?"
- Threats of physical harm
- Threats of arrest or imprisonment
- Duress of goods (?)
- Economic duress
- "I had no choice"
- Often hard to tell the difference btw pressure and duress – fuzzy line.

## ***HARPER V. MURRAY (1920) - DURESS***

- *Motivation for applying duress. Circumstances of situation. Mental state of parties.*
- Badger game.
- E gains Harper's trust, has an affair with her. Then husband makes a wrongful threat based on that affair= duress
- What is a situation where this same pressure wouldn't be duress?
    - She had an affair willingly (not with a person who knew the ex-husband and was duping her)? She wasn't tricked into it?
    - But really, wouldn't she be worse off if the allegations were TRUE?
    - But duress is attached to lies that are used to extort.

## **LAEMMAR V. J. WALTER THOMPSON (1970)**

- Trial court here held SJ for the employers. Why? Because the men were employed at will and he has the right to fire them.

- The appellate court's problem with this is that the employer leveraged a legal advantage (employment at will = fire at will) in order to force someone into a contract.
    - Like sexual harassment!
    - What are the motives of the parties??
- Class B shares were created as a form of profit sharing
- P wants rescission: purchase price, interest, and the shares back
- How do you make this situation lawful?
    - If employer just fired them to get back the shares
    - What other facts would we like to know?
        - Price of the shares
        - What were the nature of the threats?
        - Defense of laches?
            - Doctrine of equity jurisprudence: if there is an unreasonable delay in seeking equity or rescission and as a result the other party is unreasonably prejudiced, you can't get what you want. Operates like a statute of limitations.
            - Would attach if the employees waited until the price went sky-high before they tried to rescind the agreement
- Typical blackmail case (which is criminal):
    - You find out X did something wrong (a crime)
    - You don't have an obligation to tell the police
    - You tell X that he must do what you say or you'll tell
        - Whether you have the right to do something or not is totally irrelevant in making deals with other people when using leverage to force "contracts"!!!

## ***ALASKA PACKERS V. DOMENICO (1902)***

- Similar to Davis & Co. v. Morgan. No consideration provided for receipt of extra pay for the same agreed upon amount of work.
- Why is the court all upset? Midway modification of contract --> does it result in duress upon the other party?
    - Salmon fishers out in the middle of nowhere, mid-season.
    - Owner can't get replacements
    - If they had made the demands before they left shore, and there was a willing workforce nearby, then the employer would have had an option.
- The fishers claim that the nets were defective, and since they were paid on the volume of catch, they were being screwed. BUT court questions this – what reason would the ship have for maintaining poor nets, since they stood to make far more per volume catch than the fishermen.
- Opportunism!

## ***LINGENFELDER V. WAINWRIGHT BREWING (1891)***

- There is no way that Jungenfeld didn't say he had the right to install the refrigeration unit. The dispute is over a condition – not express, but implied.
- The parties at the time compromised over $5000 to get the work back up and running
    - Settlement of "good faith" claim: sufficient consideration for the promise to continue

## ***GOEBEL V. LINN (1882)***

- This is a requirements contract – all the ice needed for $1.75/ton, OR $2.00/ton if the "crop was short".
- Price indexing
- All of a sudden, there's no ice – warm winter!
    - Getting ice at a higher price and wants to rewrite contract to increase price
    - "Agree" on a price of $3.50/ton – the parties go on like this for a few months, paying by promissory notes (seller extending credit to the buyer, like an IOU)
- Did the buyer have a valid contract for $2/ton?

  - YES – anticipated an ice shortage and fixed a price for it in the contract terms!
  - There may be cases where supervening causes can excuse you from a contract, but very unlikely that courts will do this if you state varying prices already. Shows the parties are aware of possible fluctuations in the market and are prepared to stand ready for them.
- So the brewery had a suit for recouping the difference btw 3.50 and 2.00 = 1.50 a ton
  - Who might be upset if the court allowed this brewery to get away with this?
  - All the other breweries who are holding the Ice company in credit!

### ***ELDRIDGE V. MAY (1930)***

- Fiduciary duty: normal categories or relationship with close and confidential nature (like siblings) can't contract at arm's length. Must be looking out for best interest of other party.
- Undue influence: possible fraud.
- "Over-persuasion" of dominant over subordinate
- Once a court finds these kinds of relationships, there is a burden on the dominant party to show that there was fairness in dealings.

### ***VOKES V. ARTHUR MURRAY (1968)***

- No fiduciary or confidential relationship here, BUT the idea that if you try to tell the truth, you must be completely honest.
  - P claiming fraud, but D says that what they said was opinion, not fact.
  - There is a lot of latitude given to the seller to "puff" their product, so courts often carve out other categories:
    - Not quite fraud, and not quite fiduciary duty, and not quite undue infleuce
- Here, not easy to pinpoint the time at which the "opinion" went from persuasion to over-persuasion

### ***GREGORY V. LEE (1894) - INCAPACITY***

- An infant is someone under the age of 18 – age of capacity.
- With regard to making contracts for "necessities" (food, shelter, etc.):
  - Doctrine of incapacity: not enforceable by the other party unless contract for necessities
  - Use as a shield, not a sword
  - Considered not a contract, but restitution
- This case is going to be bad news for all incoming Yalees under 18yo!

## LIMITS ON ENFORCEABILITY: OBSTRUCTING THE BARGAIN

- These cases are showing "external" limits on the contract: nothing is wrong with the bargain itself (i.e. there was consideration, no fraud, etc.) but for some reason WE won't allow the enforcement!
- Claims sought won't be for rescission or restitution, but for specific performance
- Contracts will often still be in executory, not performed
- Variations on a theme:
  - Partly illegal contracts
  - Loans at usurious rates of interest (rate exceeding maximum allowed)
    - Say A loans B $50k with %15 interest
    - The usury rate is 10%
    - B defaults and A sues to recover principal with interest
    - Remedies:
      - Give A $50k with 10% interest
      - Give A NOTHING (forfeiture)
      - Give A $50k with 0% interest (forfeiture)
    - This doesn't really hold must anymore, with credit card companies in various states; negative commerce clause)

- The Commerce Clause expressly grants Congress the power to enact legislation that affects interstate commerce. The idea behind the Dormant Commerce Clause is that this grant of power implies a negative converse — a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. The restriction is self-executing and applies even in the absence of a conflicting federal statute.

- Often, illegality/no adjudication rule depends on who brings the suit. If a bad guy, will often get forfeiture. If the victim, will often want rescission and try to get money back, and will be generally successful.
- Bribe payments are offered and acceptee doesn't perform after accepting the bribe. The "victim" will try to sue for rescission claiming an illegal contract.
  - Should we enforce this by providing restitution, or just forfeiture? Depends on whether you were a bribe-giver or a victim of extortion.
- Police sting involving a drug dealer - "We'll pay you $50k for 100lbs of cocaine." Dealer hands over cocaine and now wants his money. Does the dealer get to keep his cash? Police will try to rescind on basis of illegal contract.
  - Neither side has breached their contract, nor was dealer unjustly enriched.
  - Police will usually win – why?
    - No statutes dictating forfeiture
    - But courts will call it an illegal contract!\
- Betting on the superbowl with friends: there are a lot of common law cases like this.
  - Can you sue to collect if you win?
    - NO – when suing for performance of an executory agreement, illegality will NOT be enforced, with almost no exception.
  - What if both sides performed already and now the loser is suing to get his money back?
    - Court will ask if it was an honest wager with reasonable terms?
      - Based on consideration? YES – exchange of money for taking a risk!!
      - Unjust enrichment? NO – each side had a chance to win/lose.
    - Court will generally not enforce this suit since there was no breach of contract.
  - TO COUNTER, states, concerned with illegal gambling, have passed laws to provide remedy for losers under illegal betting. In some states, anyone can bring the action, with half going to the plaintiff, and half going to some town agency or school.

## ***HIGHWAYMAN'S CASE (1893)***

- P is suing for equitable remedies, but court won't bother to get involved in illegal contracts. Here, one highway robber trying to get his share of the bounty from another robber. Both are hanged.

## ***FARINO V. FARINO (1982) – FRAUDULENT CONVEYANCE***

- General situation: Husband (debtor), transfers assets to his brother (3rd party) to escape paying wife (creditor) in divorce proceedings, with the expectation that brother would return the assets once the proceedings were over. Now brother keeps them, and guy trying to sue to get them back.
- Fraudulent conveyance is the act of defrauding creditors by putting assets beyond their reach.
- If the creditors find out about it, the transfer can be invalidated – creditor can force rescission
- In this case, with husband trying to get assets back from brother and brother won't return, husband would claim breach of contract, unjust enrichment, or breach of trust.
  - How the courts would respond depends on state:
    - In NY, not allowed to recover b/c you're all acting illegally.
    - In others, return would be allowed.
- What about mistake of law/fact?
  - I didn't know this was illegal; or I thought I was going to owe people but now I figured out I don't and I need my stuff back.
  - Courts will often allow recovery

## ***MATTA V. KATSOULAS (1927)***

- Raffle ticket for car. Woman (debtor) gives her ticket to her friend, and leaves party. Friend wins the car from the roof garden raffle party (creditor). Friend now doesn't want to hand over the car by saying that the raffle (contract btw woman and the roof garden) itself was illegal.
- Court says that the friend was the woman's BAILEE.
- Isn't looking at contract btw roof party and woman, but only the one btw friend and woman.
    - Not a fraudulent conveyance b/c the 3rd party didn't come into the picture until after completion of the roof-party/woman contract
    - In fraudulent conveyance, the 3rd party is actively involved in illegal action.
- Suit to test te legality of roof-garden/woman contract would be if roof garden changed its mind and wants its car back or won't hand over the car.
- Fraudulent conveyance is a graduated action: graduation depends on character, intent, participation in illegality, etc.
- What if she left he party b/c her boyfriend ran the raffle and she didn't want to raise any eyebrows (i.e. raffle was fixed)? Court, then, might have rethought its position.

## ***PELLETIER V. JOHNSON (1996) – FAIR BUSINESS STATUTES***

- Regulatory statute to prevent high-pressure, door-to-door home service sales: requires that "any contract must contain a paragraph allowing homeowner three days to change mind". Ones that don't contain the provision are ineffective, void, illegal, etc.
- In this case, 72hrs go by, the work is done, everyone seems happy. When time comes to pay, the homeowners say no on basis that their contract didn't comply with the statute.
    - Contractor says fine, but your owe me for unjust enrichment – reasonable value of the work and materials
- Courts have generally recognized unjust enrichment claims to recoup costs and value when contract is void due to statute of fraud violations
    - What are the arguments in favor of granting UE to the contractor?
        - Good faith attempt to comply
        - Statute really intended to be a shield for the homeowner, not a sword.
        - No evidence of legislative intent to screw the contractor and deny any restitution; UE doesn't really seem to undermine the statute.
        - Value of his work wasn't exorbitant
        - Consumer protection wasn't undermined
        - Statute wasn't meant to allow scurrilous homeowners to screw over the contractor
- So then why did the court in CT say no to UE?
    - Didn't want to take the job of the legislator
    - COST of hearing all these gray-area cases
    - Easier to enforce a bright line rule
    - Encourage people to follow the statute
    - Have to decide what the parties understood, what is reasonable, etc.

## ***MARKS V. GATES (1907) - UNCONSCIONABILITY***

- Gates was a well known land-staker in Alaska (gold finds). Now in debt for $11k to Marks and wants "grub stake" money. Gates makes a deal with Marks to give him 20% of all the claims he makes in AL if Marks forgives his debt and gives him another $1000 (so $12,000). Gates strikes it rich and doesn't want to pay Marks.
- Marks is suing for SP rather than damages – trying to get Gates to keep up his agreement to pay 20% of what he makes in AL now and in the future!
- Why not damages? Much better for him – he gets the court to enforce the contract to its terms so that he doesn't have to keep coming into court to seek damages of 20% every time Gates makes another stake.

- (Equity courts required coming into court with clean hands, and were the only courts to grant SP. Law courts could only offer damages (legal relief). This separation was abolished in the federal courts by the FRCP in 1938.)
- Court sitting in equity had a theory of clean hands – morality and standards that weren't in courts of law. What's wrong here?
    - Calling the agreement btw Marks and Gates a "bargain made in the dark".
        - Seems more like venture capital, not unconscionability
    - Court saying there was no consideration - $1 being exchanged for vast sums (or $12000). Court thinks this is too one-sided. But isn't the court NOT supposed to be concerned with the quality of the bargain? Judge says that courts of equity are.
        - Cites cases where "imbalanced bargains" weren't upheld. But likely in those cases there was something else concerning going on – fraud, cheating, etc.
        - Judge is pretty unsympathetic towards Marks – was he a loan shark, local bad guy?
            - Unconscionability gives judge a lot of room to place judgment on bias for or against party without having to explain himself
    - Think about contract terms this way: wasn't an exchange of $12000 for 20% of X, but $12000 for the CHANCE to make 20% of X! Gates could have come back BROKE.

## ***WILLIAMS V. WALKER THOMAS FURNITURE (1965)***

*MODERN UCC CASE OF UNCONSCIONABILITY*

- **UCC 2-302**: (1) If court finds as a MATTER OF LAW that contract was unconscionable at the time it was made, may refuse to enforce in entirety or by clause, or limit application to avoid unconscionable result. (2) Parties will be given reasonable opportunity to present evidence of commercial context.
- Here, the UCC was just about to be passed. UCC Article 2 made for commercial transactions, but worded such as to be open to possibility of providing coverage to consumer transactions as well. This creates a tension as to appropriateness of application.
- This is an application in the consumer context
- Williams, welfare mom getting $217 a month to cover herself and her 7 kids. Walker-Thomas a cheap furniture store, charging high itnerest and repossessing everything for any balance defaulted on.
    - Used aggregative balancing on bill so that any time, a balance has some percentage of all prior purchases that were never paid in full. Treats purchases like leases (conditional sale – title goes to buyer upon making its final payment).
    - Normal credit payment accounting method: FIFO (first in, first off) – payments allocated to earliest debts
    - Walker spreads payments out to each purchase pro rata until you reach a $0 balance on everything, at which point you get a title to everything.
        - When furniture is repossessed, items get donated or thrown out – uses this system then to ensure payments (carries a valid threat).
        - So that means that a person will pay for it among the things that will be lost if not paid for: rent, utilities, food, then repossessable furniture, before any other discretionary spending.
    - Big question then is why would WT, knowing Williams' situation, sell her a $500 stereo?? She'd have a higher balance and almost no chance of paying it off.
- Did Williams' lawyer need to go to unconscionability?
    - (A) Duress: was there really any arm-twisting? NO, but if WT only place she can buy an item and the item was necessary
        - Sub-theme in duress cases: if you deal with a person who is in necessitous circumstances, you are not obliged to go easy on them, BUT if you do something to put them in those circumstances and try to use that situation to drive a harder bargain or take advantage of them, then its DURESS.
    - (B) Something like the Gateway Computer case – did W really understand what she was getting herself into? Does she understand the deal? Likely, the answer is YES, since others in the

neighborhood had similar treatment from WT (this is the dissent's argument)
    - (C) Constructive fraud: a bargain (although not fraud) which no man in going conscience would make and no man of good sense would enter into is constructively fraudulent.
    - (D) Judge takes unconscionability test: DONE.
        - Up until the 1960s, it was very rare to impose UC on cases to void a contract. But advent of consumer protection laws brought UC in this context as an ABSENCE OF MEANINGFUL CHOICE: considering all the circumstances surrounding a transaction, the manner of entering into the transaction, ask did each party to the contract, considering his education or lack of it, have a reasonable opportunity to understand the terms of teh contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practice? Was there a gross inequality of bargaining power?
            - How do you determine reasonableness or fairness?
                - Terms of contract considered in life of the circumstances existing when the contract was made, in light of general commercial background and commercial needs of the particular trade or case. Are there terms so extreme as to appear unconscionable according to the mores and business practices of the time and place?
        - Is this the best way to describe W's situation – was the furniture a necessity?? NO.
        - Have to think if courts or contract law is the best way to control bad situations. More like legislative control, like government controlled housing.

## ***MARTIN V. HARRIS (1985)***

- Disclaimer, clearly printed on catalog, form, seed bag. No warranties on merchantability, fitness for purpose, etc. Any damages are limited to purchase price of seeds.
- Consequential damages: your failure caused future damage
- General damages: what you were paid – what you were promised.
- How do you proceed with an argument for the farmers?
    - Expectation of black leg treatment and not notified of the change until after the seed was purchased?
        - Not really – expectation that seeds would grow into healthy plants.
    - Products liability in Tort?
        - Financial damages.
        - Why is this not a Tort case?
            - **Pure economic loss rule**: tort negligence requires for the most part some physical injury to one's self, not just property for product's liability. More like a warranty issue if causing only economic/property loss --> much better handled in contracts.
    - Breach of warranty!!
        - If expressly given, UCC 2-313
        - UCC 2-314 (implied warranty of merchantability): goods will pass without objection by trade standards and are fit for ordinary use.
        - Damages covered for breach of warranty: UCC 2-714
            - Market value of seeds = refund
            - Consequential damages = UCC 2-715(2)(a): foreseeable damages
- Seed company reply:
    - Start with 2-314: unless modified or excluded by 2-316
    - Then 2-316: if in WRITING and CONSPICUOUS, then remedies are limited by 2-719(1)
        - We disclaimed the warranty under 2-314, 316
        - We gave express remedy (the refund) per 2-719
        - We expressly excluded consequential damages (2-719(3))
- Farmers:

  - Entire disclaimer of warranty was unconscionable!
  - If not, the 2-719(3) permits consequential damages if unconscionable
- Seed company:
  - 2-719(3) gives us a hint of what would be prima facie unconscionable, but here there was no limitation to physical injury and there was no injury anyways.
  - We followed the UCC rules, so how can that be unconscionable!?
    - UCC invites you to make or exclude warranties in 2-314
    - We did that and followed the rules of 2-316 (on merchantability) [the disclaimer sounds a lot like 2-316]
    - Freedom to contract allows us to limit liability and make our own decisions.
    - The rules are statutorily dictated and judicially tested!
      - Look at official comments: 2-719 cmt3 [disclaimer of implied warranty of merchantability is permitted under (2), but with the safeguard that the disclaimer must mention merchantability and in the case that it is written, must be conspicuous.
        - The seller in all cases is free to disclaim warranties in manner as set out in 316
        - Merely an allocation of unknown or undetermined risks
- Farmers:
  - It is not wrong to read 2-302 as relevant to all of article 2, including 2-316: comments list cases where warranty disclaimers were found unconscionable [but be careful, b/c there are cases in there that are just as supportive to the sellers]
  - How persuasive if the judge's argument re unconscionability?
- Seed company:
  - See 2-302 cmt 1: unconscionability is about prevention of oppression and unfair surprise and NOT about disturbance of allocation of risks b/c of superior bargaining power. AND
  - See 2-719 cmt 3: clauses limiting or excluding consequential damages are merely an allocation of unknown or undeterminable risks.
- Farmers:
  - But, we can't get seeds without a limiting clause, so what do we do?
  - Insurance??
- Maybe the court here is saying that in the 6th Circuit, we're going to hold this unconscionable. So what about the legislature?? They could easily have enacted something with greater protection, but didn't.

# FORMALITY

- External representations of an internal importance
- Symbols: seal or clod of earth
- Formal rules: statute of frauds, parol evidence rule

## ***WARREN V. LYNCH (1810)***

- NY following Roman Law and Lord Coke: a seal is wax with an impression.
- VA has taken a more liberal stance – a scrawl in pen is a sufficient seal
- Now: In many states, enforceability still requires consideration, although presence of a seal may increase the statute of limitations. Some states statutorily invalidate seals.
- Old: A seal was enforceable regardless of intent/validity/truth of underlying contract
- As a socially acceptable institution: seems that if you want something to work as a formality, it should be pretty arbitrary.
- Kent: We require the seal b/c Coke said so, Roman Law said so, Cicero said so = Formalism
- VA: Drawing a seal or scrawl or writing "SEAL", etc. is sufficient à there's intent and that's what the seal is for anyway so who cares if there's a formal seal or not?
- If the seal were still required now, gratutitous promises, consideration, firm offer cases would all be moot.

Schnell v. Nell, Kirksey v. Kirksey, Ricketts v. Scothorn are all cases of people trying to make gratuitous promises enforceable.
    - Does the law want to be concerned with these types of promises?
    - A typical argument of the court as to why the court doesn't want to touch promise cases is b/c they aren't meant to be litigated, but in the past, with a seal, it would have been completely ok make those enforceable!
- So the argument seems to be that an IOU without a deal requires consideration, but with a seal nothing else. Is it that the seal is the consideration? Or was this change contemporary with the shift in courts requiring consideration?

### ***SCHNELL V. NELL (1861)***

- This is a case where there is a seal at the end of the contract, but Indiana has abolished seal, like VA.
- What is the substance of the seal?
    - Some judges are wrong when saying that seals are presumptive evidence of consideration
    - Actually, way of making promises legally binding BEFORE concept of consideration ever made.
    - A show of a voluntary undertaking and the valid nature of promisor's undertaking (intention to be legally bound)
- Who benefits from a sealed agreement?
    - The one who wants the contract to be legally binding or the one who tries to enforce the bargain
- Who gets hurt, or why do people want to get rid of it?
    - You have someone who doesn't put any more effort or thought into an agreement than signing and sealing, and enforcement would be on the seal ONLY rather than any underlying consideration.
    - Enforcing under the seal alone, you must be ready to enforce contracts where one was tricked or sealed unknowingly or the other side hasn't performed, etc. (not bad, however when someone wants to simply back out).

## STATUTE OF FRAUDS

- Original statute of frauds from English Parliament (1677). Almost all states have adopted some version of it in their statutes. The UCC 2-201 has a statute of frauds for the sale of goods.
- Specifies the kinds of contracts that require written agreement:
    - Marriage
    - Not to be performed within one year
    - Real property
    - Sale of goods – over a certain amount – in UCC = $500
    - Contracts of guarantee – one promising to do or pay for another's debt
- Similar statutes: consumer protection statutes (like Pelletier v. Johnson); credit card statements; written estimates for siding, auto repair, etc.
- Do the agreements have to be fully written out in paper??
    - NO – to be enforceable, must be in official memo and signed by party resisting enforcement (party to be charged)
    - UCC 2-201 – some writing sufficient to indicate sale has been made
- Why was statute of frauds invented?
    - People making up contracts and trying to sue
    - More concerned with fraudulent and perjured plaintiffs than fraudulent and perjured defendants – why??
    - Also seem to be more concerned with these distinct categories as opposed to other problem areas
- What is the substance of the form (memo) here?
    - Was the contract genuine?

  - If you don't have this, how would you prove genuineness?
    - Evidence in court or witness testimony
    - Who wins? The unsigned party against whom enforcement is tried
    - Who loses? The innocent P who is trying to enforce against a dead beat D who didn't sign
- How far do you have to go back to find in American law that a case is thrown out under SoF even though the court believes the P (but P has no memo)? VERY FAR!
  - General jurisprudence re SoF is finding ways to avoid the SoF – so then why not repeal it? The SoF has been mostly repealed in England!
- So how do you (or court) deal with problems where you have the SoF but you want to be fair??
  - (1) Take the case out of the statute (Bader v. Hycox)
    - Narrow the construction of the statute might let you set your case outside the SoF categories
    - Find performance by P
    - Find fraud by D – SoF is a weapon against fraud, but not a shield!!
  - (2) Find a valid written memo (Cash v. Clark)
  - (3) Find an admission - testimony of admission of contractual existence (Crabtree and Dixon v. Doyle)
  - (4) Find reliance

## ***BADER V. HISCOX (1919)***

- Case of seduction – man has sex with underage and unmarried girl gets her pregnant. Girl brought suit against him to recover damages for seduction and breach of promise to marry. Boy's father asks her to drop the suit and marry son, and in return, he would give her 40acres of land. She did and now father won't turn over the land.
- P accepted and performed; D not performing
- D going for defense by using SoF:
  - Contract was covered by SoF – not in writing so coid
    - Conveyance of land AND in consideration of marriage AND answering for the debt or miscarriages of another
- COURT: is this contract covered by SoF?
  - (1) Take the case out of SoF by narrowing the contruction:
    - Was the marriage a consideration?
    - Was the marriage incidental to actual intent (getting son out of jail)?
    - Dad didn't bargain for the marriage of his son, but rather the release from jail! Therefore marriage was only incidental
  - (2) Find performance:
    - P performed her part: she dropped the charges and married the son
  - Purpose and intent of SoF is to prevent fraud and the court will refuse to permit SoF to become a shield for fraud!!
    - Using marriage to get a bargain is fraudulent when not followed thru by other party!
- What about this contract being Dad trying to answer for the debts of his son?
  - Court says no! Dad acting on his own volition and was not compelled to act.
- Conveyance of land?
  - P performed so no.

## ***DOYLE V. DIXON (1867)***

- Anti-compete agreement in lease of grocery store. Lessee asked lessor to agree in written addendum to lease to stay out of grocery business in city for 5 years. Lessor says no need to put in the clause, so the parties sign (lessee assuming that they had a verbal non-compete agreement), perform, etc. Lessee pays a $500 bonus. D then violates "non-compete" in less than two years.
- D's defense is that the non-compete would have been covered by SoF and therefore, had to be in writing.

  - Category: contracts not to be performed in less than a year.
- Non-compete agreements are generally highly litigated. Viewed as a little suspect in most courts.
- Court, to take this out of the SoF, narrowly interprets the clause:
  - Any agreements that ***may or may not be fully performed within a year*** is not within the statute of frauds category which requires "any agreement not to be performed within one year from the making thereof to be in writing".
    - May be performed within a year if the person dies
      - Case about child-support until a particular age – finishing within a year required the child to LIVE past the year. If the child had died before the year was up, then the performance on other side is complete. DEPENDS on the child's life in order for performance to continue. Result?
    - May not be performed within a year even if the person dies; death merely makes performance impossible or excused.
      - Case where someone agrees to employ son for 5 years and to pay father certain amounts throughout this period, and son dies. Court found this to be within SoF.
    - If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the SoF, but if his death would leave the agreement completely performed and its purpose fully carried out, not SoF.
      - If you agree to REFRAIN FROM DOING something, and you die, you've fully performed (b/c in death, the thing will still be refrained from)

## ***PANDO V. FERNANDEZ***

- Oral agreement where D would give P $4 to buy lottery tickets with numbers selected by D. P would then pray for the tickets to win. If the ticket won, the two would split equally. Ticket won and D made public statements saying that P's prayers worked and it was all her work to bring about this "happy result", at which point she then refused to give share to P. P sues on grounds (duress, infancy, illegality) and D tries to use SoF – not to be perfomed within one year and not in writing, so therefore void.
- Court would narrow the interpretation of the agreement: the SoF started when P bought the ticket and ended when the ticket won or lost, but did not cover the time from when the agreement was made. The actual start of the statute would be when the $4 was handed over and the ticket was purchased, not on the date when they orally agreed.
- This was an agreement to start and finish something well in the future

## ***CASH V. CLARK***

- Verbal contract for purchase of corn at 60c/bushel, to be delivered at a designated shipping point. D then refused to take corn. D confirmed terms of oral agreement in deposition and signed, which P then used as the "memo" as the written agreement!!
- SoF category: sale of goods over $X
- What does the UCC say about it? **2-201(3)(b): contract enforceable if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made.**
  - In that case, is an answer to a complaint sufficient?

## ***CRABTREE V. ELIZABETH ARDEN (1952)***

- Generally, any contract for work for greater than a year falls under the "over a year" SoF provision.
- Formal rules are helpful when they expediate the decision you want to reach anyway
- Not so great when they seem to make you decide unfairly: here, judges will come up with ways to wiggle around it.

## ***BOONE V. COE (1913)***

- Why is this case under the SoF?
    - 12 months from date arrived in TX, which is greater than a year from date of signing
    - Lease is an interest in real property
- What is this claim: unjust enrichment/restitution
    - General rule: damages cannot be recovered for violation of a contract under SoF
    - Exceptions:
        - Service during life in exchange for legacy when receiver dies
        - Vendee of land under a parol contract is entitled to recover any portion of purchase price that was paid and compensation for improvements
        - Personal service within the statute an action may be maintained on quantum meriut
    - Here, what's the problem with recovery?
        - D received NO benefit – no work, etc.
    - What does P want to argue for, then?
        - A method of recovery under SoF that for an oral agreement that should fall under SoF, but no written memo, and someone detrimentally relies on the oral promise

- Alaska Airlines v. Stephenson (1954)
- Why was this an easier case to develop the SoF/reliance exception? The employer promised to put the agreement in writing! Estoppel. RoC takes this position!
- Don't make the assumption that when you see a SoF problem you can always get out of it if you can tell a true story. Pretty clear that SoF is generally invoked when it would give the right answer…

## PAROL EVIDENCE RULE

- Kull: Something like a myth or fake rule – although a lot of people aren't aware of this. Almost transparently a discretionary rule used for docket control
- What's the formality here?
    - Arbitrary rule to determine under certain circs **whether the alleged contract was real** or actually made, and what was **the substance of the agreement**!
        - What was the understanding of the parties
        - No evidence allowed to contradict or change the meaning of written documents
- Non-formal way of figuring out what the parties understood: testimony, evidence, etc.
    - If there's a written doc, though, you're going to have to work to contradict it
- **IF there is a written contract, which contains all parts of the agreement (i.e. integrated contract), AND both sides assented, THEN the written agreement is integrated AND no evidence allowed in to contradict or change the terms**
- Integration clauses: BOILER PLATE
    - The entire agreement is here. No other agreements are relevant, etc., etc.
    - BIG problem: did the parties intend this clause to represent a complete and integrated contract? HOW CAN YOU PROVE IT??
- UCC and parol evidence:
    - USAGE OF TRADE CAN INFORM THE TERMS OF THE CONTRACT!
    - Doesn't dismiss the PE rule, but makes it pretty much useless
    - 2-202 and comments:
    - 1-205: usage of trade and course of dealing

## ***MITCHELL V. LATH (1928)***

- Asking for damages of specific performance! Why not asking for damages to have it removed – would have been a lot cheaper than a court suit like this.
- Was this contract integrated?
    - Written purchase and sale had house sale
    - Oral agreement for ice house removal
    - Integrated?

- Majority says yes – with regard to the house sale (not the ice house)
  - Court is made that Mitchell didn't make sure the ice house was written in
- Dissent: We know the promise was made! So was it the intent of the parties to waive the icehouse removal b/c they failed to incorporate it in the house sale: NO!

- Would parol evidence rule, strictly apply, prevent admission of evidence with regard to whether the contract WAS integrated if it didn't have an integration clause?

### ***STATE V. CASE (1889)***

- Case wants a horse that can travel 7-8mph the distance from Roseland to Orange Valley. Makes it clear that sale is dependent on those qualities.
- P buys, seller gives warranty in sales contract that horse is "sound and kind"
- P now unhappy b/c horse can't travel as stated
- Sellers says warranty didn't mean 7-8mph
- P will argue that he understood meaning of "sound" to include 7-8mph, etc.
  - Use that testimony to construe meaning of terms in contract
- Is this contract complete or integrated? NO
- B/c no mention of negotiated terms and therefore PE allowed in to give meaning

### ***DANANN REALTY V. HARRIS (1959)***

- Distinguish from State v. Case: very clear in contract (boilerplate) that nothing outside the contract is relevant (i.e. contract is integrated).
- P and D agree on lease, but there were misrepresentations to get Harris to sign the lease
- Lease has an integration clause along with lots of other boilerplate
- Majority:
  - General merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract.
  - BUT this is not a general and vague merger clause
  - Thinks the contract very clearly says "I'm not relying".
  - So now, P can't take it back – can't use PE to get himself out of a bad bargain.
- Was there a temporal connection btw general form contracts and increases in exceptions to the parol evidence rule?
- Dissent:
  - Language of a contract cannot be use to shield someone's fraud or give someone immunity from punishment.
  - The maxim that fraud vitiates every transaction would no longer be the rule but the exception
  - Mentions Crowell-Collier Publishing case – being decided in other direction: why?
    - More general merger clause
    - Something very clear should have been in contract or there really was fraud
- I.e court using PE as a docket clearing device – here, majority likely didn't believe Harris

## MISTAKE AND SUPERVENING CIRCUMSTANCES

- Other mistake cases:
- Wood v. Boynton
- Baseball card case
- Miller v. Stanich

### ***THE PEERLESS CASE (1864)***

- Spot market what would it cost to get X now today (cash market), as opposed to futures market
- Why is P making a big fuss over the boat?
  - Likely that the price of cotton on that day was less than price agreed upon

- Why? Lifting of embargo on southern cotton during the civil war or blockade wasn't uniformly effective so some shipments were making it through

- What could be the difference btw cotton on the October Peerless vs. the December Peerless?
  - Price of cotton future at the time of sale
- PE issue: if there had been a written contract, what would it have said?
  - Price is 17.25d/lb
  - 125 bales Surat cotton
  - Ex Peerless
  - But NOT which one!!!
  - D will say that there was another part of the contract that wasn't written down: "which Peerless"
  - P will say that can't use it b/c of PE
  - D's lawyer argues that there is a latent ambiguity which allows parol evidence to be given to show that D meant one Peerless and P meant another.
    - Therefore, since they didn't agree on a substantial term, NO CONTRACT!!!

## ***KYLE V. KAVANAGH (1869)***

## ***OSWALD V. ALLEN (1969)***

## ***TRAVELERS INSURANCE V. BAILEY (1964)***

- Clerical error in writing up official document (MISTAKE IN INTEGRATION)
- B wanted $500/yr for 10yr certain
- TI writes up $500/yr for 100mos certain
  - B paid for what he wanted, NOT what was written
  - Therefore parties agreed as to B's terms à insurance company should be allowed to reform contract to support that agreement (B wants to get the better deal even though he didn't pay for it)
- Reformation: equitable remedy to rewrite an agreement to appropriately memorialize the actual agreement.
  - One would prefer reformation when the written document stands for something important in society (like insurance policies, mortgages, sale of land/deeds, etc.)
- How can we change the facts so that reformation much less likely for TI?
  - D **didn't understand the terms** and he **detrimentally relied on that set of terms** (both parts are critical)
- Policyholder tries to distinguish this case as a unilateral mistake: Mutual mistake (reformation allowed) vs. unilateral mistake (no reformation allowed)
  - Judge says not a helpful distinction here. Depends on how you look at the situation and misses the point.
- What is an example of **unilateral mistake**? Garage sale where I know the value and the other doesn't. Like a **mistake on basic assumptio**n (quality, value).
  - Example of **mutual mistake**? Wood v. Boynton
  - Precedent really ignores these distinctions!

## ***SHERWOOD V. WALKER (1887) – ROSE THE 2$^{ND}$ OF ABERLONE***

- Hypo: garage sale where one person thinks a piece is worthless, while another with some knowledge thinks the piece might have value (antiques roadshow?)
  - People don't bring these cases because American property law doesn't look to reimburse the ignorant seller.
- Sherwood is a banker (not a butcher – would make this a different case b/c would be clearer that he was buying cow for BEEF)
  - Wants a poled Angus – Walker says none of them are breeders b/c doesn't think S wants a cow for meat. But goes anyway.

    - BTW, being an expert doesn't mean you actually lose
    - What about Laidlaw v. Organ – if Sherwood knew that cow wasn't barren and Walker asked, would he be obliged to tell him?
- Sells Rose at beef prices ($0.055/lb minus 50lbs shrinkage – head weight at slaughter)
    - Graham finds out with calf – now Walker doesn't want to sell.
- What kind of a mistake is this?
    - Mistake in quality or value
- Sherwood I: court's and seller's view
    - Mutual mistake – both sides understood not a breeding cow but for beef
    - See this case like Wood v. Boynton – both sides think its a topaz – but the two cases come out differently. One results in rescission and the other not.
        - Wood – Buyer gets to keep
        - Sherwood – Seller gets to keep
- Sherwood II: buyer's and dissent's view
    - Unilateral mistake – seller thought the cow was barren, but buyer thought there was a chance the cow might be made to breed. TOOK A SHOT.
    - Like the garage sale cases with antiques.
    - What about the baseball card case? Why different?
        - Ignorant seller – seller knew the actual value
        - Buyer (kid) knew the actual seller would never have sold for $12 and knew that the agent was ignorant (mislabeled).
        - In garage sales, the buyer thought or knew that the seller was mistaken about the price
        - Raisin case: like the baseball card case, can't accept a bargain that you know isn't being offered.
- Under the majority view, this is the same kind of case as Wood v. Boynton:
    - Why did they come out differently? Neither case had warranties of value, quality, or character.
        - Not a great explanation:
            - WI court (Wood): it's the SAME STONE, just now more valuable
            - MI court (Sherwood): its not the SAME COW – they bargained for a barren cow and she turned out to be a fertile cow – two different animals.
        - Better explanation:
            - Wood: completed transaction trying to rescind
            - Sherwood: executory agreement trying to enforceability
        - Another explanation: one of these cases was wrongly decided
    - The contract was either valid or void:
        - Conditionally defective: if the contract has been completed, a mutual mistake is not grounds for rescission, but if executory, a mistake is enough to prevent enforcement.
            - NO MATTER WHAT, THE PLAINTIFF LOSES
            - Virtually all cases with this type of mistake will be decided on the grounds of EXTENT OF COMPLETION
                - Mutual mistake
                - Mistake of basic assumptions (RoC)
                    - Value or quality (Corbin)
                    - Worth a lot less or performance becomes much harder
                        - Anticipation and realization differences
                        - Risk of variation allocated from one to the other yet?
                            - In contract in writing?
                        - Allocation of risk:
                            - Ice-house case: pay $1.50 for ice or $2 if crop is short
                            - Did the parties contemplate that cow might be two species?

- Mistakes can be placed in one of two categories:
    - Obstacle to party's agreement: prevented a meeting of the minds
        - Peerless case
        - Equivocation: one person doesn't mean what he said. Did the other realize or know what he meant?
        - Armstrong v. McGhee
        - If courts aren't likely to explicitly label contract as complete or executory, are the more likely to call the bargained item "the same or different"
    - Failure to anticipate or supervening circumstances
        - Turns out its going to be a WHOLE LOT MORE DIFFICULT to perform (impossibility)
            - Sherwood
            - Raisin case
            - Wood v. Boynton
        - Did the parties anticipate, provide mechanism for occurrence? (price indexing)
    - Hypos: turn the tables
        - Wood, but B paid $1, and W will deliver the stone next week. In the intervening time, W finds out the stone is a diamond and doesn't want to hand it over
            - W will get to keep the diamond
        - Sherwood, but S paid, cow delivered, and a week later the cow is pregnant. Now W wants to rescind sale
            - No dice – S gets to keep the cow.

## ***PARADINE V. JANE (1647)***

- English civil war
- Stands for doctrine that impossibility is not an excuse to performance of a contract
    - Did the parties intend to allocate the risks? Was there insurance?
- Tenant not arguing impossibility but that he couldn't make $ b/c he was kicked off of his land to house soldiers. So why should the landlord make money at my loss?
    - Landlord's argument: risk allocation. We didn't anticipate invasion, so there was no express or implied condition.
- Allocation by law:
    - Roman law provided that crop failure would reduce or discharge a tenant's responsibility
    - Allocation of risk to the landlord
- Express allocation:
    - written down in the contract
- Implied allocation:
    - Nature of the transaction
        - The whole reason I lease the land was so that I could farm it
        - Therefore, its an implied condition of the lease that if I couldn't farm it, the lease would end.
    - Landlord's response: you made a profit earlier in the lease (pre-invasion) so since you got the benefit of the good of the land, you also get the harms in bad times
        - casual profits and casual losses
            - Why? B/c for period of tenancy, the TENANT OWNS THE PROPERTY, not the landlord
- Here, has the risk been allocated by ½ or 1/3rd? If not, what are we going to do about it?

## ***OPERA CO. OF BOSTON V. WOLF TRAP FOUNDATION (1987)***

- Supervening circumstances

## ***TAYLOR V. CALDWELL***

- Lease for 4 days at 100L per day
- Fire burns the hall down
- lessee now wants damages of expected profits or expenses from paying its performers, orchestra, ads, b/c unable to put on a show.
    - Unclear what is being requested
- Under the circumstances, the risk of damage from fire to the hall should be allocated to the owner of the hall.
    - Why? It's not expressed in the contract?
        - Who has obligation to carry the insurance?
            - Hall – owner
            - Performers' expenses – performers (business interruption insurance)
        - Who would be in best position to get this insurance?
            - Hall owner
    - Here, implied allocation – HOW?
        - Did the parties say anything? Here, NO.
        - Is there a rule (like Roman Law tenant/landlord rule)? NO.
        - What is the customary allocation?
            - Hall owner: indemnify as a package
            - But in 1863, there likely wasn't any of this insurance available
            - P will likely lose
- Different from Paradine v. Jane: tenant not accepting temporary responsibility of the property (licensee). So we have to find out where the risks should lie.

## ***CLARKSVILLE LAND V. HARRIMAN***

- Foreseeability of the water level dropping?
    - Risk allocation:
        - If foreseeable, likely implied guarantee of moving logs however necessary – log movers accepting allocation of risk
            - Stronger case here if there had been price indexing (if water high, if water low...)
            - Some forecast of weather emergency accounted for in contract
            - NO EXCUSES B/C THE RISK WAS ANTICIPATED
        - In NOT foreseeable, NO guarantee – not going to allocate risk to movers to move outside of water
            - EXCUSE B/C CONTRACTED ON EXPECTATION OF WATER STATUS QUO
- Look for implications arising out of relationship, place, contract:
    - Was there a price index?
    - Were there any express terms indicating an expectation?

## ***AMERICAN TRADING V. SHELL***

- Admiralty case
    - 3/23: made contract for TX to Bombay
        - ATRS ($14.25/ton) + 75% + 85cents/ton for passage through Suez
        - This is a price index
    - 5/15: boat leaves TX
    - 5/26: charterer paid $417K
    - 5/29: owner advises charterer to take on additional fuel at Cueta
    - 5/31: takes off through Mediterranean
    - 6/5: Advises of "troubles" - suggest delay
        - Suez closed with boat about 85 miles outside of Port Said

    - 6/6: Charterer says "owner's decision for next stop"
        - Owner says go via Cape of Good Hope
        - Reserving right for extra compensation
- Owner suing charterer for extra expenses:
    - Under supervening circumstances, contract becomes discharged/unenforceable/avoidance
    - Now, w/o contract, I took it to Bombay and now you owe me. Otherwise, I'll just float around in the middle of the mediterranean full of oil.
        - Kind of like a Cotnam v. Wisdom
        - RESTITUTION
- Charterer saying:
    - Contract covered bringing oil from TX to India at a certain price
    - Risk of closure of the Suez was allocate to the OWNER by the Charter Party
- No explicit statement that "Suez was the only route"
    - Owners: price via Suez b/c using the ARTS rate – would have been different rate for going around Cape
    - Charterers: Added 75% provided the added coverage – like a price index
    - Foreseeability – 1956 closure of Suez:
        - When that happened, people weren't reimbursed for the added expense – people in shipping know that it happened before and could happen again.
    - Cases of ships getting ready to leave at time of closure – not in any court – why?

# CONDITIONS

- Express vs. implied conditions
- Materiality of the condition
    - More important: one side is allowed to stop performance when the other side breaches a critical condition
    - Less important: not that the condition is trivial, but breach of it doesn't allow for stop of performance on other side
    - Covenant (promise) vs. a condition
    - Dependant vs. independent promises
        - Independent: promise that is independent of the actions of the other side
        - Dependent: promise that is dependent on the actions of the other side
            - THIS IS A CONDITION
- Dependent v. independent conditions
- Promises v. conditions
- Material v. plain old breach
- Express v. implied conditions
- Waiver
- Forfeitures

## ***NICHOLS V. RAYNBRED***

- Agreement: N to deliver to R a cow for $50.
- Court says this is a case of a promise ($50) for a promise (a cow),
    - R doesn't pay the $50 to N and N sues for the $50.
    - The court says that N doesn't have to say whether or not he actually delivered the cow – that's a separate suit.
- So, the condition: implied condition –
    - I agree to give you $50 for a cow
    - You agree to give me a cow for $50.
- Instantaneous promises, otherwise both are nuda pacta (no consideration?)

## ***KINGSTON V. PRESTON***

- Lord Mansfield – did he really say this or not. Buyout arrangement between apprentice and silk-mercer.
- What is the owner promising to do?
    - Employ buyer at 200£ a year
    - After 15months, give up company inventory at a fair value
    - Allow buyer to work out of his building
- What is the buyer promising to do?
    - Work for 15 months
    - Partner with the nephew for work for 14 years
    - Buy the inventory for a fair value
    - Furnish sufficient security: $ to keep the business going
        - Credit sale of business: repay at 250£/month until balance is 400£, then half of monthly income.
        - What is the security?
            - Someone else to state that you are a stand up guy = co-signer
- Buyer suing for breach for failure to surrender business
    - Seller claims that since buyer didn't offer up sufficient security, not going to turn over
    - Condition on sale
- Mansfield explains conditions:
    - If covenants are mutual and independent, breach of one side is no bar to claim of breach on other side – independent and less material; separate actions required
    - If covenants are dependent, and here, material, then breach on one side allows breach on the other.
- 3 kinds of covenants:
    - Promises that are mutual and independent: breach not an excuse to breach
    - Promises that are conditional and dependant: prior conditions that further performances is dependent on the completion of.
    - Mutual conditions to be performed at the same time: if one party is ready to perform and the other side refuses, the ready party may seek breach of contract
- In order determine whether a convenant was dependant or independent: use the contet and common sense to determine whether the parties intended the clause to be a dependent condition.
    - What were the intentions of the parties?
    - What kind of breach of an independent condition would require the seller to continue performance (although he would have a later suit for damages)?
        - If the buyer took a week vacation without permission – but still had sufficient security and purchase money
    - What kind of condition was the security?
        - Obvious from the meaning of the contract that seller would not be required to accept the word of the buyer as security, but rather what he found to be sufficient to turn over his business and reputation: prior condition (condition precedent)

## ***WARNER LAMBERT V. REYNOLDS***

- I think this case is one of a dependent condition: Lawrence would allow Lambert the use and benefit from his formula in return for royalties. The fact that the formula was a "trade secret" and is no longer should not be the tipping point, but rather that Lambert still receives benefit of the formula (even if it is now public knowledge). Royalties are a percentage of profit, so why would Lambert be that concerned – if it's not making as much anymore, they're paying less to Lawrence. What did the parties intend?

## ***NORMAND V. ORKIN***

- Normand signs up to have Orkin provide yearly service on her home. Orkin allows payment on credit (installments, made by Rollins). Normand defaults on payments to Rollins, who stops payment to Orkin. Orkin still performed inspections till 1995, when its work, via negligence, caused damage to Normand's

house. Since Orkin agreed to perform the work on credit, they can't breach for non-payment, BUT regardless of payment, Normand's breach insufficient justification for sub-standard work.

- Under UCC, there is an implied term of good faith and fair dealing in every contract. Orkin breach warranty and this express or implied condition of work quality.

## ***CLARK V. WEST***

- West asked Clark to write treatise on Corporations. Agreed to express stipulation that if he did the work without drinking at all, he would get greater than $2/page, but if he drank, he would get only $2/page. Kind of a price index.
- While Clark did not stop drinking entirely, he didn't drink in excess. Obviously the work was good quality - West was making big bucks and sales off this book, and Clark claimed that they waived the drinking clause.
- What was the importance of the drinking clause?
    - Was West really concerned with quality, in which case the drinking wouldn't be too material as long as the quality was still higher than "acceptable"?
    - Or was West a prohibitioner? Wanted purity from their writers?
    - Was the condition the very consideration of the contract (can't waive the consideration), or was it something that was less material – incident to the method of performance.
- What would a waiver look/sound like?
    - Express: C and W meet for dinner and W offers him a drink. "Since you've been doing such a good job, don't worry about the clause!"
    - Implied: W knew, did nothing about it, continued to accept further work with praise
    - Court not happy with allowing implied warranty – acceptance of the work here could just mean that it was worth the $2 a page deal, and not acceptance as "exceptional work"
    - So court wants evidence of an express waiver (oral or written).
- In this case, W got the work it bargained for…
- Waiver cases tend to be placed in contracts books somewhere between modification and estoppel. What if West really did waive the clause?
    - Could we call this as a modification? While an express waiver may look like a modification to a contract, here NO – NO CONSIDERATION given for changed in terms. Clark is doing the same amount of work.
    - Could we argue this as estoppel? Yes – since W gave C a waiver, he is estoppel from changing his mind once C detrimentally relied (i.e. drank).
        - Court really wants to create separation btw estoppel and waivers:
            - Likely still the old view that estoppel can't be based on PROMISES (see Kirksey].
- Common cases of waiver doctrine:
    - Waiver defined as intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value or forego some advantage which the party waiving it might at its option have demanded or insisted upon.
    - Insurance cases: confusing estoppel and waiver:
        - Law of waiver is a technical doctrine, imposed by the court to prevent forfeitures
            - If the words and acts of the insurer reasonably justify conclusion that with full knowledge of the all the facts it intended to abandon or not insist upon a particular defense, which is then relied upon, we have an irrevocable waiver.
            - A relief against forfeiture
            - NO consideration or injury (detrimental reliance) required
            - Giving up a right or advantage
        - Doctrine of estoppel: party is precluded form his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it.
            - Injury required
            - Losing a right or advantage

- Boilerplate: back in miscellaneous sections with the integration clause will often be a waiver clause:
    - "No waiver: the fact that we may be silent about your failure to observe a particular condition DOES NOT MEAN that we are waiving that right UNLESS that waiver is IN WRITING."
    - These clauses don't really stand up in court – making clauses re future actions.
    - But hope is that people might take it seriously and seek advice when deciding to modify.

### ***GRAY V. GARDNER***

- Whale oil price indexing agreement: 1st note ($12,381) an unconditional promise; 2nd note ($5,158) a conditional promise paid only if less oil arrived this year btw 4/1 and 10/1 than last year btw those months.
- Should have been something like: Pay 60¢ per gallon for oil or 85¢ per gallon if the crop is short.
- Ship came in close to midnight and no one was sure whether the ship came in 10/1 or 10/2…
    - Materiality: does the ship showing up in the wee hours affect the price index?
- Condition precedent vs. condition subsequent:
    - Precedent to an obligation is one that must be satisfied before the obligation is effctive
        - Burden on promisee to prove satisfaction of condition before cause of action could be stated
    - Subsequent is one that will discharge the promisor's stated obligation, if the event in questions fails to take place
        - Burden on promisor to prove that condition not satisfied
    - So big question here is who had the burden of proof?
    - Holmes said that conditions could be classified as either depending on how you looked at them, and therefore the precedent/subsequent distinction was meaningless.

### ***WATSON V. GERACE***

- Mortgage contingency: exist to protect the buyer from incurring damages from suit for breach of contract if they can't get a mortgage. If they can't obtain a mortgage (bad credit, etc.) then they are off the hook. MCs do NOT protect the seller.
- In this case, the sellers got a better off and are trying to get out of the deal. Saying that letter from mortgage company was not a binding commitment, and therefore contract void.
- But a buyer has the option to WAIVE a MC…at which point they would be liable to the sellers if they couldn't pay in the end – but this does not permit the seller from backing out.
    - Independent conditions?

## FORFEITURE AND RESTITUTION:

This is the first set of cases we get where someone can breach a contract, but then sue the other party on the basis of restitution.

### ***BRITTON V. TURNER***

- P hired to work for 12mos on farm for $120, but only works for 9, then quits, but b/c he left at the low season, no damage to D. At trial, jury instructed to permit pay for 9months under quantum meruit (how much he deserved/reasonably worth). D thinks since they had express agreement to work for full term, P forfeits all pay.
- Judge thinks D's rule is a little hard to swallow: general rule is that P gets no recovery for a voluntary failure to finish term.
    - Unfair with regard to the relative "badness" of the breacher:
        - If someone contracts and never does any work at all, only responsible for damages to D which are usually very small.
        - But if you contract and you're almost done, you forfeit everything and the other party got the benefit of your work! And still responsible for damages.
    - Compare to house building: if you contract to build, but finish with some minor variations, the owner not allowed to take the house and not pay. Must pay builder the reasonable value for the

house.
    - Says that this term contract, while stipulated for 12 months, is really accepting part performance on a daily basis.
    - If the farmer gets a benefit over and above his damages, he must pay for reasonable value of work, which here would be something like $10 a month.
    - Labor actually done and the value received, furnish new consideration and the law thereupon raises a promise (implied) to pay the reasonable value of benefit received.
        - If the employer sets out a clause where he can refuse any benefit, then allowed
            - Since receives no benefit, not liable to pay b/c express promise was to pay for the whole thing.
        - But where the party takes material or has advantage from labor, liable to pay the reasonable worth of what he received.
        - **General understanding in the community**: hired laborer shall be entitled to compensation for the services actually performed and such contracts must be presumed to be made with reference to that understanding, unless there is an express stipulation that shows otherwise.
    - **Judicial economy**: this new rule is more equitable and deters abuse. An employer might use final payment as hook to retain employees and be able to mistreat them.
- These forfeiture might be a little more acceptable if there was an express clause, but generally disfavored: did the P really know what he was getting into?
- What happens if we look at the $120 as a BONUS to be paid for a full year's service – employees also get room and board!

## ***SMITH V. BRADY***

- This court doesn't like the way Britton v. Turner turns out. But doesn't really answer the matter of concern that brought about Britton's result [an employee that works for 0/12 months is better off than one who's worked 10/12 months].
- Builder must obtain an architect's certificate in order to receive final payments. Architect refuses to grant b/c builder didn't follow desired terms (number of beams, etc.).
- What we have in this case:
    - Express conditions in contract defining holdbacks, etc.: bright lines to avoid what happened in Britton v. Turner or Nichols v. Rainbred.
    - Forfeiture: Builder will lose $2000 without the certificate
        - Builder willfully disregarded the conditions – should have talked to owner if thought the number of beams were unnecessary, etc.
- Quantum meruit can mean two things:
    - Implied contract to pay a certain reasonable amount for services received
    - Restitution: no implied contract, but can't keep benefits received for free
- Builder agreed to do the work that the owner wanted, regardless of what was customary in practice
    - It's one this to substitute "trade customs" when the terms are ambiguous, but not when they are expressed in the contract clearly.
- Court concerned with FREEDOM OF CONTRACT:
    - No right that the court can refuse to enforce a contract whose express terms have been willfully disregarded by the builder
    - What more can a party do to ensure that he gets the work he wants, regardless of custom
    - Shouldn't be able to use the courts of NY to help you when you choose to violate the terms of your agreement. We're not going to make people pay for shoddy workmanship.
- In cases where the buyer can elect to accept the final product or not:
    - If he accepts, he waives objections and pay according to contract
    - But use or partial enjoyment not a waiver?
    - New assumpsit arises as though no prior contract existed – implied offer and acceptance like

Young and Ashburnham

- Where contract is such that buyer MUST receive benefits in advance of full performance, under no obligation to pay until performance is complete.
- Slight omissions should be considered insufficient breaches of contract.
    - But if he fails to perform when the requirement is plain, and when he can perform at his will, he has not right to call upon the courts to make a new contract for him, or for remedy.

## ***JACOB & YOUNGS V. KENT***

- Reading pipe case. Cardozo.
- Omission was neither fraudulent nor willful. Result of oversight and inattention. Same quality, appearance, market value and cost as Reading.
- How do we decide when to strictly enforce the express terms of a contract with forfeiture attached, or when to do equity and required restitution?
    - An omission both trivial and innocent, will sometimes be atoned for by the allowance of the resulting damages and will not always be the breach of a condtion to be followed by forfeiture.
    - Some promises are so plainly independent that they can never be conditional upon one another. Others are so plainly dependent that they are always conditions. Others, thought dependent and conditional when there is substantial departure, are independent and collateral when departure is insignificant.
        - How do we tell those apart? Justice and intention of the parties.
        - The simple and uniform are dealt with differently than the complex and intricate
            - The margin of departure within the range of normal expectation upon sales of common chattels will vary from margin allowed for construction of skyscrapers.
    - WAS THERE GOOD FAITH??
        - Intentional vs. intentional disregard for express terms?
        - Here, yes (unintentional or trivial departure), but Smith v. Brady – NO (willful and fraudulent).
    - WHAT WERE THE INTENTS AND UNDERSTANDINGS OF THE PARTIES?
        - Did owner really want Reading pipes, or a house that had functional pipes?
    - THEREFORE, DISPROPORTIONATE INJURY TO SUBJECT BUILDER TO FORFEITURE.
- Arguments for the flexible standard:
    - Equity and fairness
    - There is no general license to install whatever may be regarded as "just as good"
    - Weigh purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence.
    - The law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion with the oppression of forfeiture to the other party.
- Measure of damages:
    - NOT the cost of replacement, which would be great, but the difference in value, which is nominal or nothing.
    - Cost of replacement is the general measure, but not when the cost of completion is grossly and unfairly out of proportion to the good to be obtained. In that case, use difference in value.
- Under UCC? Would have been clear – trade and custom would tell you the two forms of pipe were fungible and therefore there was NO breach of contract.

## ***RUXLEY V. FORSYTH***

- Building pool – builders made shallower than asked by owner. Here is a good place to apply cost of replacement. Owner asks for 7'6" but B says their standard is 6'9" – owner willing to pay more to get the deeper pool. While an expert says that the pools are the same objective value, the owner really wanted the deeper pool and made that clear. While there's no reason to suspect that there was willful deviation (likely miscommunication to actual workers who are used to building 6'9" pools), there is a substantial departure from the intention of the owners. Argue that benefit to be received (owner's subjective value) is not out of

proportion to cost of replacement, which would be a lot higher than difference in value (which expert says is nothing).

# REMEDIES

## *HAWKINS V. MCGEE*

| As promised | Status Quo | As delivered |
|---|---|---|
| Good hand – 100% | Burned hand | Burned and hairy hand |

- Sued for 2 claims: tort (negligence) and contracts (breach of warranty)
- 2 kinds of damage measures:
    - Torts = [status quo – as delivered]
    - Contracts = [as promised – as delivered]
        - Put person in as good a position as if the contract had been performed correctly
    - UCC 2.714(2): when party has accepted goods and paid, but goods don't conform, and time for revocation has passed, receive damages for breach of warranty
        - [Value as promised – value of goods received at time and place of acceptance]
        - Benefit of the bargain
        - Expectation damages
    - Special set of contracts cases that don't get expectation damages? Detrimental reliance.
        - Loss from change in position
        - Put back in status quo
        - Reliance damages – compensating the harm done
        - Think Kirksey v. Kirksey:
            - If we gave her expectation damages, she would get [value of nice house – value of old cabin]
            - If we give her reliance damages she would get [value of old life – value after return] = what she lost in the move/change in position
- What about when you have contract for sale of goods, but they are never delivered [Acme]? Value of damages:
    - Market value for item exists: seller fails to deliver and not price is higher?
        - Market price – contract price
    - No market value for item?
        - Price actually paid – contract price
- When buyer doesn't pay? Default?
    - Market value for item exists: buyer won't pay and now seller has to sell for lower price?
        - Contract price – market value
    - No market value?
        - Contract price – price sold for (resale value)
- Reading pipe case:
    - Value of house desired – value of house as received = expectations
    - Price to get house to desired condition = cost to complete, fix, repair, CURE
        - Might be specific performance
        - Generally more expensive than expectation damages
    - How do you choose btw expectation and cost to cure?
        - Bad faith of builder
        - Innocent and trivial deviations
        - Purpose to be served and the desire to be gratified
        - The excuse for deviation from terms
        - The cruelty of enforced adherence

## ***ACME MILLS V. JOHNSON***

- Johnson and Acme agree to sale of 2000 bushels at $1.03/bushel; Johnson then sells that wheat to Liberty at $1.16. When scheduled for delivery to Acme, market value was $0.975.
- Proper measure of damages:
    - Contract price – market value at date and place of delivery = Acme actually MADE MONEY off of Johnson's breach!
- What would really happen?
    - There's plenty of wheat now, b/c the price went down. Contract is now an ASSET to the farmer (worth 5.5¢/bushel). So he would work soemthign out with Acme to let them out of the contract for some price in btw – say 4.5¢/bushel.
    - So why is Acme so pissed?
        - Claims the sacks
        - Conversion – this was MY wheat!
        - Johnson sold THEIR wheat at a profit to Liberty.
    - But this really looks like a restitution or conversion case, not breach of contract.
    - Why does court not go for the estoppel argument?
        - Wheat is wheat – fungible!
        - How can you prove that was your wheat?
- Futures in commodities:
    - If foresee market going down, you sell promises to deliver wheat at some point in the future with price locked in at today's value
        - At delivery date, you either buy the wheat and deliver or offer to let the other party out of the contract for slight reduction in price
- When you sell in a rising market, you raise your liabilities and risks if the market continues to rise that you will need to pay actual damages to Acme.
    - What about if Johnson was next to broke and he sole to liberty to make a little extra to pay liens? Wheat was his only asset. Makes Acme's argument re screwing us over a little stronger.
- Holmes' lecture: free agency and the law:
    - The law doesn't make you do anything: you either perform or you pay damages when you break a promise.
    - Acme can argue for SP: we contracted for performance, not a lawsuit.
        - Goebel v. Lin (ice case): contract rights are binding, legal and enforceable but only as valuable as your defendant has the money to pay.
        - Enforcing legal rights in court is VERY EXPENSIVE!!
- There might be a claim in restitution for a breach of contract – be selling the wheat at a profit!!! Unjust enrichment at Acme's expense.
- Specific performance: court enforces performance of contract terms as opposed to monetary damages:
    - Marks v. Gates: Why would Marks want SP as opposed to money damages?
        - He would have to keep going back to court with each of Gates' purchases to collect his 20%. Hard to set a value to the future assets.
        - Judge, in equity, upset over unconscionability of contract. Courts of law didn't care about moral character of parties – equity courts did.
- Equity vs. law: results of FRCP creates single action – did most to destroy jurisprudence of equity law and equitable remedies.
    - Holmes: in law we can't require anyone to do anything – perform or pay damages.
    - If you don't pay, sheriff will attached and sell your assets at auction – legal remedies are in rem, collecting against property.
        - Equitable remedies are in personam – court can bind the D to do or refrain from doing something – contempt of court – jail
    - Inadequate remedy: to get into equity courts you had to show that you couldn't get remedy in law courts – that damages were inadequate.

- When are damages inadequate?
    - Unique item – real property, horses, etc.
    - Difficult to calculate damages – speculative
    - Specific performance possible and D is otherwise judgment proof or insolvent
    - Recurring litigation would be required
    - UCC 2-716: make specific performance more liberally available for sale of unique goods or other property circumstances – as the court may deem just.
- Test for adequacy: should be if you get $, can you just go into the market and buy what you wanted?
    - BUT don't forget the American rule re lawyers fees – damages are reduced by the amount you have to wind up paying your lawyers.
    - In this way, damages are never enough!
- When would court say no SP?
    - Inadequate remedu
    - Difficult administrative burden
    - Undue burden to the D vs. benefit to the plaintiff = balancing the equities and hardships.
    - We just won't: policies in precedent – contracts for personal service!
        - If the person wanted to do it, they would have done it.

## ***LUMLEY V. WAGNER***

- Makes a contract to sing in London, and before she even arrives, she signs another contract with the Italian theater in Paris.
- Had exclusivity clause: don't need it because it would generally be implied by courts
- L wants SP/injunction
    - Wagner is to sing here per her contract
    - Wagner NOT to sing in Paris
- Argument:
    - (1) inadequate remedy: hard to value damages:
        - Lost profits
        - Lost reputation
        - Unjust enrichment of other theater
    - Judge will say that he can prevent her from singing in Paris, but can't make her sing in London. We can make her show up, but no way to enforce "best effort" performance
        - Undue admin burden on court – personal service contract
        - Inconsistent with freedom of action and autonomy
    - BUT, prohibiting W from doing Paris may actually encourage her to do London shows and would also cut down on L's damages
- What about L v. Guy (Paris)?
    - Tortious interference with contract
        - Knowingly interfered
        - Induced W to breach contract with L
        - Tort Claim!!

## ***VAN WAGNER V. S&M***

- Owner of property (wall of building and rest of building): leases wall to VW and then later sells the building to S&M.
- Contract interpretation: what does this clause mean?
    - Lessor or successor may terminate and cancel lease on not less than 60 days prior written notice in the event on ONLY IN THE EVENT of a bona fide sale of the building to a 3rd party unrelated to the lessor
    - D's interpretation: S&M can terminate with 60 days notice
        - Seems more plausible
    - P's interpretation: owner could terminate 60days prior to sale, but if not pre-sale, then purchase

is encumbered with the lease

- P seeking SP:
    - (1) Are damages inadequate?
        - P will say that property is unique
        - Court goes through law review style argument:
            - Leaseholds are lesser property interests than sales (NO – both are estates)
            - Uniqueness not a magic door to SP:
                - Physical difference – all property is different
                - Economic interchangeability – not a great description: more like "Hard to value"
    - (2) How hard is it going to be for the court to set a value to the damages for loss?
    - (3) Balance of hardships?
        - P: lost one of best locations in NYC – hardship!
            - Why else?
                - Loss of other lease
                - B/c the D is developing the are, that billboard space is 1000x more valuable! Sounds a little bit like a TAKING!
        - D: planning to develop the area – great hardship!!
    - (4) Policy objections? Not a personal service contract.
    - (5) Unclean hands? Was this a deliberate default??
- Did P seek the right claim?
    - Ejectment – don't seek damages, no equitable relief or discretion of the court involved
    - Force delivery of possession – hard to lose, as long as convince the court of your interpretation of the clause

## ***CAMPBELL SOUPS V. WENTZ***

- Outputs contract for all the carrots W could grow on 15 acres. Remember that a requirements contract is for a set amount delivered at some periodic timing. Contract: varied from $23-$30 a ton, but at time of dispute, price up to $90/ton!! W not willing to sell to C for that much loss.
- W sells to L, who then sells to C; C figures it out and sues for SP – why??
    - They had a liquidated damages clause: if they held to terms of LD, C would be entitled to only $50/acre = $750.
    - Damages for breach would have been: $90 (price paid) - $30 (contract price) = $60/ton
        - Wants SP: for the actual kind of carrots
        - Case took years to get to court: SP would mean getting rotten carrots since they're perishable.
        - THE CARROTS WERE ALREADY USED BY C!!!
    - What actually happened?
        - C paid W $30 a ton, and then put $60/ton into an escrow account pending the outcome of the suit.
        - Very artificial arguments for SP – impossible and the court knows it! Seems simpler to seek damages to get the money that's in escrow!
- Law on LD:
    - When breach of contract would result in a difficult to evaluate value for damages (like Wagner, singing) the parties can make a reasonable and good faith estimate of those damages = LDs that are valid and enforceable
    - Penalty clauses on breach (Muldoon, $10/day late) are generally NOT enforced. CL view of contracts is that penalties are NOT OK!
    - If LDs are unreasonable, too large or too small relative to actual resulting damages, won't be enforced
    - Unlike Holmes' talk about damages, LDs do not present an option to perform or not
        - C can't say we'll pay you either $30/ton or $50/acre

- Court pulls a Marks v. Gates – says you might have been entitled to SP, but the contract was unconscionable – P9 makes it sound like you can unreasonably refuse the carrots for no reason and then prevent W from selling them to someone else. This is a force majeure clause to protect against supervening or unexpected conditions.
    - Grower not obligated to deliver and C not obligated to receive or pay for carrots when due to some supervening condition
        - Circs beyond control of either party
        - Labor disturbance
    - C not liable for delay in receiving carrots
    - G must get C's permission to sell elsewhere and not allowed to sell if can't deliver to C
- What would be a legit reason for putting this clause in?
    - To ENSURE COMMUNICATION!! Not to screw the farmer.
        - Should have said "with consultation" or "confirmation of supervening conditions" or "which consent may not be reasonably refused"
- WOULD A JUDGE LOOK AT A CLAUSE THAT IS UNRELATED TO A THE ACTUAL CASE AND USE THAT TO MAKE AN UNCONSCIONABILITY CLAIM??

## ***RESTATEMENT §356: LD AND PENALTIES:***

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

## ***NERI V. RETAIL MARINE***

- P trying to rescind, but there's nothing to rescind since hasn't received boat yet. He's repudiating b/c he can't pay and now wants this deposit back. Instead of going into the office and asking nicely, he got a lawyer.
- N suing for restitution.
- UCC 2-718: Buyer entitled to restitution for his breach of contract:
    - Price paid = $4250
        - (2)(a) – liquidated damages? $0
        - (2)(b) – 20% or $500, whichever is less? $500
    - Results in $3750 UE to seller
        - (3)(a): bring in 2-708 for damages due seller
    - Buyer says no loss b/c seller sold to another for the same price.
    - 2-708(a): contract market differential = contract price – market price = $0
        - Makes it clear that CMD works for something like carrots or wheat, but not for boats!
    - 2-708(2): inadequate damages – seller had an unlimited source of boats
        - He's not a used boat seller with only one boat to sell
        - Seller's loss was the profits from one boat! B/c could have made 2 sales if buyer had taken the boat.
            - Think apartments – if 25% vacant (apply 708(2)) vs. only 1 to rent (apply 708(1))
- Outside of the UCC, what is the measure of damages? PUT THE PERSON IN THE SAME POSITION THEY WOULD HAVE BEEN IF CONTRACT HAD GONE THROUGH!
    - Would be PROFITS FROM SALE + Incidental damages!

## ***PEEVYHOUSE V. GARLAND COAL MINING***

Contract terms and consideration:

| **Peevyhouses** | **Garland** |
|---|---|
| License to Garland to remove coal | Royalty of the coal mined<br><br>Restore the land – fill in holes |

- Peevyhouses WOULD NOT HAVE AGREED TO CONTRACT if they didn't get the restoration!
- Garland takes out the coal, and then won't restore bc too expensive!
    - Cost to restore: $29000
    - Value of restoration: $300 [price whole – price as is]
    - P's asked for $25000
    - Jury gave $5000 (felt sorry for the Ps)
    - Actual value of the farm as promised/whole: much < than $5000
- Proper measure of damages:
    - Cost of performance, i.e cost to cure
    - Diminution in value
- Majority quotes Cardozo in Jacobs and Young, but bastardizes the opinion
    - Cardozo would have looked at the mindset of the parties – was there good faith?
    - NO! Willful breach of contract
    - Majority: why shouldn't the Ps get the $29000?
        - Not fraud, mistake, supervening circs, not against public policy
    - So unreaslistic or unreasonable that parties would not have intended to contrat for it?
        - If the Ps got the $29k, would they really use it to restore the farm or just move somewhere nicer?
        - Does it matter? They're injured and should be able to get the cash!
    - Court could have granted SP if they wanted to see what Ps would do:
        - Grant injuction
        - Watch and see if P and D don't negotiate for sale of the injunction – at what value would they sell the their farm?
            - You will see this happen a LOT in tort and property or nuisance cases.
            - Although Farnsworth says this doesn't actually happen
- Notice how court doesn't ask about the value of the coal mined, and how much the Ps were getting for royalties? They could have bargained for restoration in contract by accepting less in royalties!
- Hypos:
    - Owner and landscaper: O pays L in advance for work. L doesn't do the work and O sues. L tries to say that the trees he was asked to remove were pretty and by removing he would have been reducing the value of the property. Therefore, he saved O money by breaching.
    - Exxon v. US: exploratory drilling off coast of NC – in order to get permit, had to pay fee in advance ($100MM). The US reneges, saying that even if you got the permit, you wouldn't have been able to get the oil anyways. Therefore, no damages and you don't get the value of the permit back.
- Rescission or repudiation should result in unwinding - $ goes back to where it started!
    - Works for payments in advance!
- How do we look at P's case to see that $29000 was "paid in advance"?
    - Say standard royalty rate was 10%, but P's want restoration.
    - D knows how much restoration will cost, average $29000
    - D drops royalty rate to reflect and cover $29000
        - Arm's length transactions – no surprises here!
            - The P's have already paid for the work!

- **Difference btw general and special damages:**
    - General: damages incurred in every case
    - Special: damaages incurred given specific situation
- Examples:
    - General: seller promises to deliver carrots, fails, buyer has to get elsewhere for more, asks seller for difference (cost of cover).
    - Incidental: damages above, but had to hire extra hands, etc.
    - Special: had to shut down as a result and lost profits.

- General: ktt/market, incidental damages
    - natural and immediate consequences of breach
- Special: secondary, further down chain of causation (consequential damages)
    - How far down the chain do you go?
    - Unreasonable to hold ppl liable for all identifiable consequences of breach.
- Fundamental difference btw causation and liability (torts)
    - You failed to deliver carrots, I had to shut down factory – is seller liable?
    - Question in ktt context: diff bargain may be made – parties may behave differently if parties knew of circumstances upfront.

## ***HADLEY V. BAXENDALE***

- Can't have this type of case go to jury w/o any guidelines and let them sort it out as they see fit.
- Have to take crank shaft to Greenwich, mill had stopped, need this thing fixed, go to go right away
    - 1st version: we don't have a backup mill crank around
    - Last version: just do this quickly, no specific reason
- Point: want judge to tell jury if both parties knew of circs at time of ktt!!
- Orthodox:
    - if special circs and potential specific damages were foreseeable, then must pay for them.
- Facts need to be communicated (we don't have backups)
    - Given knowledge, damages for breach would be reasonably contemplated
- Why does court think it makes difference whether special circs were communicated or known?
    - Typical liability: no consequential damages (cabbage seed case)
    - Liable for general damages, not liable for consequential damages at all
- Focus on what was said at counter b/c D has to be aware of special circumstances
    - Otherwise, has no choice to make appropriate decisions – may choose to refuse all together, or set a higher rate, limited liability, special attention.
    - If guy doesn't make clear we have no backup, no liability on other guy for consequential damages
- Holmes: must know, understand and agree to voluntarily undertake liability for consequential damages before being liable for them.
    - Must necessarily get this from agreement at time of ktt
    - too difficult to say mere foreseeability is enough
    - Today, question would not come up – everyone limits liability for consequential damages!
- UCC and consequential damages
    - If Pickfords was a crackshaft dealer and gives wrong size:
    - breach of warranty? Yes
    - Damages? Yes
    - Liable for consequential damages?
        - 2-714: may be recovered
        - 2-715(a): any loss from which seller had reason to know and could be prevented by cover
        - Possibly liable here.
        - OC3: not necessary to have conscious acceptance of liability – may limit liability
- Kull: extreme disproportion btw what was promised and what consequences were – too much!
    - Nothing about seller's consequential damages:
    - Buyer's breach: failure to pay
    - Fungible
    - Seller not supposed to have consequential damages

## ***GLOBE REFINING V. LANDA COTTON OIL***

- Contract for 10 tanks of cotton oil – contract for sale of goods.
- How big are the tank cars??

- Price is in terms of gallons – need to know how many gallons per tank car
- F.O.B.: free on board means buyer tenders goods in a particular place (generally at sellers place) and pays the shipping expenses.
  - A section of the UCC covers FOB for all states
- What kind of breach do we have here? Failure to deliver.
  - What would we expect a reasonable buyer to do with his empty cars?
    - Go somewhere else and buy oil from someone else
    - Then sue for damages – for failure to deliver seller pays the difference plus incidental damages (extra shipping costs, delay)
      - EXPECTATION DAMAGES – put in same position as with contract
  - Why didn't he? Not impossible to obtain and the price didn't go up much.
    - Average size of tank is ~80000 gallons, which would result in < 2.5¢/gallon
- Instead buyer sits down and cries…

| Formation | Breach | Complete performance |
|---|---|---|
| 10 empty tanks in Louisville | 10 empty tanks in TX | 10 full tanks in Louisville |
| Reliance damages put you here in case of breach | | Expectation damages or cost of cover put you here from Breach. Remedies are the equivalence of performance. |

- But what the buyer wants is reliance damages. Wants seller to cover the buyer's cost of performance
  - Buyer owns the tanks and even if he couldn't use them, he would still be entitled to "rental value" – what a party would have paid to use them for that period of time.
  - Cost of performance:
    - Buyer: cost of oil and cost of shipment
    - Seller: loading oil
  - Buyer doesn't want performance, but reformation (status quo ante)! Why?
    - Venture failed:
    - Value of performance to him is LESS than his cost of performance!
- Damages:
  - Common sense: how can you be entitled to lost profits if you don't do what was reasonable – getting oil from someone else and then suing for the difference in price?
  - UCC: Required to mitigate damages (exert a reasonable effort to find cover or otherwise) in order to receive consequential damages à UCC 2-712
- When you have a case where (1) consequential damages are foreseeable but (2) grossly disproportionate to the actual expectation damages à NOT ALLOWED.
  - Holmes:
    - (1) P willing to incur expenses to get the oil
    - (2) Can't get both expectation and reliance damages
    - (3) Holmes: can't elect which one you want

## ***SECURITY STOVE V. AMERICAN RY EXPRESS***

- Cotton Oil --> Security Stove --> Armstrong Rubber: judges trying to get at proper damages rule
- Sending stove to show in Atlantic City: not for sale, but show with expectation of future business.
- Asked for delivery by 10/8 and Express says give to use by 10/4; Stove ready for 10/2
  - 20/21 packages get delivered on time – 21st the most important!!
  - Stove tried really hard to have pkgs ready and clear for safe shipping.
- What is Stove's claim? Failure to deliver within a reasonable time (common law) breach of contract.
- What are the damages?
  - Court: normal rule for failure to deliver is the normal measure for general damages:
  - Market value at time shipping – value of goods at expected delivery time/place
    - Works with items like wheat or carrots

        - Not such a great measure for the stove (a unique product w/o a real market value)
    - But where shipping aware or on notice of special circumstances, responsible for the real damages sustained.
    - Is this a Hadley v. Baxendale problem? NO – damages were foreseeable b/c D knew and was told many times of special circs.
    - Expectation/benefit of the bargain/lost profits/put in place if contract had been performed...is this what Stove is requesting? NO
    - Why? Value too difficult to ascertain!! Inestimable value to Stove.
    - So asking for reliance damages instead.
        - 2 kinds of reliance damages: those sought in a case like this and those sought in a promissory estoppel case (are these actually different measures???)
    - What's the value then, for damages?
    - Court offering P WHAT HE SPENT as a presumptive minimum estimate of what he would have made in profit if the contract had been performed.
        - Shipping fees and freight, rail fare for president and assts., hotel, lost time, rental fee
    - Favorable presumption (becomes rebuttal presumption in Armstrong)
- Why does RD work here, but not in Landa?
    - In Landa, we knew the value of ED!!
    - If you know the value of ED, you can't choose btw ED and RD.
    - If value of ED is unknowable, court will presume, absent evidence to the contrary, that ED is at least the value of RD.

## ***ALBERT V. ARMSTRONG RUBBER***

- Failure to deliver 2/4 refiners. P orders 4 machines to be delivered in 8/43. D delivers 2 in 8/43, 2 more in 8/45 (2 years late!). P rejects all 4 in 10/45.
- Can the buyer reject?
    - Seller will say that timing was unreasonable – he never rejected the first 2 in time
    - Buyer will say that he had a contract for 4, not 2 and 2.
    - Argument boils down to divisibility of contract.
- Damages:
    - Buyer doesn't want ED/lost profits, but RD – why?
    - Figures out that even at height of WWII, rubber recycling not a profitable business at all. Operating at a loss.
    - Here, we don't really know the value of ED/lost profits.
    - Buyer asks for 3 values:
    - $118k – investment into refining business
        - Court says no – you would have lost these since your business was bound to fail and there's not causation btw the failed delivery and your failed investment.
    - $27k – buying rubber scraps
        - Court says no – same as above.
    - $3000 – cost of cement foundations
        - Court willing to buy this – outlay in unique preparation for the refiners – causation!
        - D argues that since P's company was going to fail, he would never have made $3000 in profits, so this value of RD too high!
        - The $3k was lost the day P decided to enter the venture
- When can P get RD vs. ED?
    - When value of ED unknowable.
    - Did P make expenditure in reliance of P's performance – was there causation?
    - Recovery of RD subject to D's ability to show P wouldn't have made that much or how much P would have lost if D had performed the ktt.
    - D HAS BURDEN OF PROOF!
- P sets prima facie case for damages:
    - Outlay made in reliance of D's performance

  - D failed to deliver
  - Rebuttal presumption set that RD = outlay
- D gets chance to prove offset
- Why?
  - Holmes: we will not put P in a better posittion that he would have been in had the ktt been fully peformed
  - Imposes the risk that P was willing to take on his business on D
  - Would make D an insurer of the P's venture
  - This is unfair!

# ANTICIPATORY REPUDIATION

- Common senses, efficiency, fairness to injured party
  - Reduction in damages
  - No wasted time
- If P elects to treat AR as breach, not necessary that he sues RIGHT AWAY! He can sue later!
- In American courts, we allowed this British idea, but held that it didn't apply to certain cases or contracts, such as promissory notes:
  - Promise to pay money: D says I'm not going to ay P the note.
  - Why not allow the remedial option?
    - How could you possibly cover?? THERE IS NO ALTERNATIVE!
    - Promissory notesare valuable b/c they have a market value as an assignable thing. When D repudiates promise to pay, that value is far diminished! Think bonds, etc., when the insurer has no money to pay them.
  - There aren't a lot of cases with this premise – why not?
    - These days, in commercial settings, people write in "acceleration clauses" to may the entire balance due immediately if the creditor "feels insecure" among other reasons.
    - SEE UCC §1-208 (reasonable insecurity)

## ***HOCHESTER V. DELA TOUR***

- Formation on 4/52, with tour to start 6/1. D repudiates on 5/11 and P sues on 5/22. P to start with Ashburton on 7/4.
- P is suing for damages for the loss from June 1st through July 4th
  - D's defense is that there was no breach possible until June 1st.
- Court compares this case to an engagement for marriage:
  - A promises to marry B on X
  - A then reneges on promise before X
  - A marries C before X
- It's been long held that if you somehow make perfrmance on your side IMPOSSIBLE, we allow remedy for breach.
  - Why? Not b/c it prevents B from performing – intervening circumstances may make performance possible against (A could change mind, or C could die)
  - Why? Implied promise to maintain performability of contract in the intervening period btw formation and start of performance!
- Wheat case: is Johnson selling wheat to Liberty this kind of case?
  - NO – wheat is fungible and he can always get more wheat to sell
  - YES – if he had been selling unique goods
- D's argument: shouldn't I have time to change my mind?
  - P will say – "what about me"?? How long am I suppose to wait around for you?
- All contracts like this have an implied promise that you can rely on this future performance!
  - You're not going to do ANYTHING that will make it impossible to perform
  - Secure expectation of performance and benefits to be derived from that performance

- Measure of damages: Should the court created a remedial option for the P to sue immediately?
    - Court: does NOT call anticipatory repudiation a breach, but rather that it creates a remedial option of P to either:
        - (1) sue immediately ("breach" route)
        - (2) wait until time to perform and then sue for performance (wait and see)
    - Why allow?
        - Efficiency and fairness.
        - P can wind up screwed.
        - Stupid and wasteful actions with larger-than-necessary damages
        - Mitigation option: while you can await performance, you have the option to mitigate. You get money in your pocket NOW, which is in some cases worth more than awaiting judgment of fulfilled performance.
        - If we don't give H the option, and knowing that D has repudiated, he is asked by Ashburton on the trip and H accepts? H is now in breach b/c unable to perform on 6/1 if D changes his mind and will lose ANY claim against D for ANY damages!!!
    - If the case had been instead of repudiating on May 11th, D had gotten on a ship bound for Australia, makes a very ease case b/c D CAN'T still perform. Same as if A marries C rather than telling B not going to marry her.

## ***FROST V. KNIGHT***

- What is the value of "marriage" in Frost?
    - MAINTENANCE – how Knight would have cared for her monetarily
    - REPUTATION – a woman's rights were strongly influenced by her marriage and stature in society
- What happens if we don't give Frost an option?
    - She will have to give up other options to marry others or risk losing her claim against Knight.
    - HOW ABOUT letting people move on?
- IT'S IN EVERYONE'S BEST INTEREST TO SETTLE THINGS AS SOON AS POSSIBLE.
    - Reduce damages
    - Don't have this big thing hanging over your head.

## ***MISSOURI FURNACE V. COCHRAN***

- Is this a requirements contract? NO – not based on the need or will of MF, but rather a specific amount per periodic delivery.
- Ktt is to deliver 9x13tons per day at $1.20 a ton. Price skyrockets to $4/ton so C repudiates.
    - STRIKE!!
    - MF makes forward contract right away @ $4/ton for rest of time left unperformed by C.
    - Within a few weeks, the price comes back down to about $1.30/ton.
- P is suing for market differential: [$4 - $1.20]/ton of the rest of the contract term (Cost of cover)
- D wants and court gives P the wrong market differential: [MP at time/place of delivery - $1.20]/ton
    - Value at market price for each day the coal is delivered.
- Under the UCC, to get cover damages, must make reasonable effort to make cover contract at a reasonable price under the circumstances. Here, the $4 negotiated was actually BELOW the MP.
    - Seems reasonable (unless you think that P knew the market price would come down soon and should have waited to make a forward contract until then?)
    - CAN'T FORESEE THE FUTURE!!
    - YOUR ARE NOT REQUIRED TO USE THE SPOT (DAILY) MARKET!!
- Court wants MF to chill out, wait unti lend of contract and then seek damages, to be measured as above.
    - Quotes Brown v. Muller: saying that P is "bound to finding a new covering contract". This was a case where the D is arguing that P has to cover, not wait for damages later on spot market purchases.
    - BUT, if court had had more backbone, they would have said NO – P's not obligated to get a new

contract upon repudiation.
    - HERE, HE CAN'T WAIT – HE'S GOT A BUSINESS TO RUN!!!
- MF got a substitute forward contrat – why not spot market?
    - Why should he have to go out every day and make a new contract everyday??
    - He has a mill to run and he's entitled to the benefit of his bargain with C!
        - Contract at $1.20/ton
        - Continuous supply from ONE seller
        - Reliance on daily shipment from ONE seller at ONE price for the period
- Is making the contract @ $4 just P's way of making a profit at D's expense?
    - NO: he's already spent the $4 a ton!! D is just paying damages to make him whole at $1.20 a ton, NET!
        - Put him in the position he expected to be in if D had performed the contract!

## ***OLOFFSON V. COOMER***

- C agrees in April to deliver to O 20k bushels of corn in October @ $1.12 ¾ and 20k bushels in December @ $1.12 ¼
- In June, C says no corn (not planting) → Repudiation
    - Would have been nice to have a reasonable discussion and settle:
        - "what's the current market price for delivery of corn in October and December?"
        - C could pay O for the difference (it was $1.16 on 6/3) and they could both be on their ways, but C/O have nasty argument
- O is doing what the court in MF v. C wanted MC to do: sit around and await performance or persuade C to retract his repudiation.
    - BUT the UCC is clear: P can CHOOSE:
        - (1) Wait for performance - §2-610(a)
        - (2) Resort to breach - §2-610(b)
- Key observation in this case:
    - Why didn't C just cover his own duty (go out and buy some corn in October and deliver)?
    - Does it seem fair that C can repudiate, and the put the obligation or burden on the injured party??
    - Court effectively takes O's choice away under the UCC!!

# MITIGATION AND REPUDIATION

- Why does court think MF was wrong in getting the contract right away?
    - The market went down after he made the new contract!
- Why does court think O was wrong to way?
    - The market kept going up!!
- Is it fair to expect P to FORESEE THE FUTURE AND THEN BEAR THE COST WHEN WRONG?!!?
    - NO: under the UCC, the repudiated buyer HAS THE OPTION!!
- In O: don't think that O was waiting around in bad faith – he come's out the same way regardless of whether he waits or not!!!
    - He still has to pay the ktt price
    - He can't foresee the future – waiting in spite for the market is a huge risk!!
- IT ALL COMES BACK TO FROST V, KNIGHT!!!!
- Was it commercially reasonable for MF to lock in the new ktt at $4/ton if he knew that the strike would be over soon? NO.

- ***Mitigation; the buyer not under any duty, as long as commercially reasonable. Buyer is not entitled to damages that he could have reasonably avoided.***

## ***CLARK V. MARSIGLIA***

- M sues C for non-payment. Lot A – restore for $75; Lot B – restore for $156. When M part-way done with restoration of lot B, C repudiates. BUT, M finishes ANYWAY!
- TCt judge screws up: M has the right to the benefit of his bargain, NOT the right to finish what he started!
- What is the proper measure of damages?
    - F –(1)----------(2)----------(3)----P
    - If C repudiates at (1):
        - Breach? YES
        - Damages: benefit of the bargain is measured as "lost profits"
            - [$156 – M's cost of performance SAVED] = closer to strict profit
            - Cost of performance saved is often called SALVAGE VALUE
            - The output/effort/materials/etc. that he now doesn't have to do/use
    - If C repudiates at (2):
        - [$156 – M's cost of performance SAVED] = closer to $156
    - If C repudiates at (3):
        - [$156 – M's cost of performance SAVED] = must closer to $156
- Opportunity costs: was M busy? Did he have time to resell?
    - Reminiscent of Neri boat case!
    - Will depend on whether the item for sale (here, restoration) was "unique" (like a used car, private seller) or "one of a lot" available.
- Courts will protect P's interests, but by going on and finishing after notice, he's being unreasonable.
    - Is there a situation where P might NEED to get the job done or hurt by stopping early?
        - YES: what if P was trying to establish himself and his business in the restoration field? He might have agreed to take on C's work at a bargain in order to stir up business – at which point there would have been a loss involved and the $156 may not have been representative of profits at all or of M's value of P's full performance.
- (KULL) Does he have a duty to mitigate? NO, not a duty, but mitigation acts as a limit on the measure of damages – you can't recover for unreasonable conduct!

### ***MOUNT PLEASANT STABLE V. STEINBERG***

- Long-term carting contract btw M+S – partway through, S repudiates. M sues S for breach.
- Sues for lost profits = $1/team/day = X – cost of performance (feed, pay drivers, maintain carriages)
    - Court gives him this (for full 450 days remaining)
    - But NOT the $140 loss on horse resale.
- Ps not happy b/c thinks should get the $140 extra for the horses
- D's not happy b/c think P should only get the lost profits only btw the date of repudiation and the date everything was sold.
    - M failed to get a cover contract even though there was plenty of other business!
- Why does the court NOT require mitigation here?
    - NOT a personal service contract or a contract for a unique item
    - This was a non-exclusive contract, and P can make the argument that he, like the Boat case, had the ability to make many contracts and that D's repudiation made him lose!
    - This loss is a lost profit to him!
    - Like a landlord with multiple open apartments
- If P had a waiting list or something, then a different story – would be like the landlord with only 1 available apartment and a willing renter!
- Kull: very misleading to say that you have a "duty to mitigate" – more just that you lose your chance to make full damages back without reasonable effort.

## EMPLOYMENT MITIGATION CASES:

### ***PARKER V. 20$^{TH}$ C. FOX***

- If employee is discharged without cause, i.e. the employer is in breach, what happens with the mitigation expectation?
    - (1) Need a TERM employment ktt, not at will
    - (2) The option for another job ("mitigation") – does it have to be comparable or inferior?
        - Does breach by employer give something back to the employee that he can "resell"?
            - In Clark v. Marsiglia, unused oil and varnish
            - In Parker, availability??
        - Why are these two things not clearly the same?
            - Personal or autonomy issues?
            - The more "special" the thing is, the less like you'll be expected to find comparable substitute contract.
            - The more fungible, more likely you'll be expected to resell

### ***TEICH V. AETNA (1958)***

- Month to month employment ktt with a 6-month notice requirement before firing. T took unexpected vacation (like Davison v. McGee), and A sends letter asking for immediate resignation. When T says you owe me 6 months notice (pay), A says you can come back to work for the 6 months.
    - T says no!
    - Isn't the work EXACTLY the same (not like Parker, where work was less desirable or at least not comparable)??
        - Not necessarily – what if the job is no longer the same? The environment is different, and the security is no longer there – who wants to work for a crazy boss??

### ***BUFFALO BAYOU V. LORENTZ (1915)***

Same kind of story – captain hired to run tugboat, then asked to take demotion b/c they weren't happy with his performance. WHAT PART DOES "GOOD CAUSE" PLAY HERE??? If the company isn't happy with your performance, aren't they able to demote you without having to continue paying you the same salary??

## THIRD PARTY BENEFICIARIES

*-- Promissor makes promise to promissee for benefit of a 3rd party.*
*-- This doctrine is still not yet accepted in England.*

### *Restatement of Contracts (2): §302 – Intended and Incidental Beneficiaries*

(1) Unless otherwise agreed btw promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
    a. The performance of the promise will satisfy an obligation of the proimssee to pay money to the beneficiary (CREDITOR)
    b. The circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance (DONEE)

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

### *Restatement of Contracts (2): §304 – Creation of a Duty to Beneficiary*

A promise in a contract creates a duty in the promisor to any intended beneficiary to perform, and the intended beneficiary may enforce the duty.

### *Restatement of Contracts (2): §315 – Effect of a promise of incidental beneficiary*

An incidental beneficiary acquires by virtue of the promise to right against the promisor or the promisee.

## ***LAWRENCE V. FOX (1859)***

H owes P $800. H loans D $300, asking him to pay P the next day. D agrees, but then decides not to pay P.

- Majority: where A makes promise to B for the benefit of C, C may maintain action upon it. Therefore L may sue F for failure to pay.
    - Bases 3rd party beneficiary right of action upon cases where has been allowed in trusts.
- Dissent: the party who sues for a promise must be the promisee, OR must have some legal interest in the undertaking. Therefore, here, H could sue F, but L cannot.
    - There is a logical misstep in allowing L to enforce a promise that he had no part in forming or has no control over!!
- Contract law takes on a whole new dimension when there is a 3rd party involved.
- What would be D's arguments against allowing 3rd party beneficiary right?
    - There was no privity btw F and L.
    - F: I don't know L, I never dealt with him, I never promised him anything, and therefore, I owe him nothing.
    - There was no consideration from L.
    - H is still liable to L, and F is still liable to H.
        - H and F may decide to rescind or modify their agreement at any time!
- When there is a 3rd party beneficiary, parties are limited in their ability to modify or rescind their agreement – derived from promissory estoppel!!
- Court mentions cases where they have found an "implied promise" (in trust cases): there is an implied promise from Fox to Lawrence!!
    - In trusts, the triangle works like this:

## ***SEAVER V. RANSOM (1918)***

- Is the Judge's promise to his wife enforceable??
    - Does the judge receive consideration for his promise?
        - Maybe that he wouldn't have gotten the life estate if he didn't promise?
    - Or is it better to use promissory estoppel?
        - The wife detrimentally changed positions with the promise.
    - Can niece enforce this promise?
        - Based on L v. F?
            - 3rd party beneficiary can recover if the 3rd party was a creditor beneficiary
            - Niece is not a creditor – this is a gift!
        - Trust?
            - No – court says that judge didn't take the house as a trust
            - All the money is now with the MSPCA!
        - Judge (in equity) says she's the only one who can now enforce this promise. We'll let her in equity.
- What is the difference btw an intended and incidental beneficiary?
    - Like the ripple effect in torts – how far separated are you from the directly harmed individual? How foreseeable is it?

## ***LUCAS V. HAMM (1962)***

- This is a perpetuities issue with the will. The common law will not assume that anything will happen within a reasonable time.
- What is the best claim here?
    - Negligent infliction of pure economic damage – remember that there is an exception where the defendant is a lawyer, or other person capable of professional malpractice.
    - Is there a claim for this kind of tort malpractice in CA?
        - Court starts off talking about Buckley v. Gray (1885), where court would only allow negligence claim btw lawyer and his client, not with some other party. Required privity of contract btw parties.
        - In Biakanja v. Irving (claim by 3rd party against a notary public), court rejected strict privity requirement and instead substituted a foreseeability/balancing test. Court says here that the same test applies to lawyers making wills, etc.
    - Here, it is much easier to argue the tort claim – so why does court start talking about 3rd party beneficiaries? Likely that statute of limitations is the issue – tort usually has 2yr SoL, while contract claims have 6 years.
- What is the problem with the court's finding re 3rd party beneficiaries?
    - They say that clear or express intent isn't required. Rather, they will adopt a foreseeability test – did the promisor understand that the promisee had the intent to benefit the 3rd party?
    - Why is this a problem? In the other cases we had with 3PBs, the promisor made a promise that he would pay the 3PB. Here, the lawyer likely wants to have no liability to another party outside of his own client. He did not promise to benefit some 3rd party, but rather his client.
- In the end, it's all moot – the court says that a mistake with rule against perpetuities are so common that they cannot be attributed to negligence – the law for all intents and purposes should be repealed.
- This case is way out on the edge of 3rd party beneficiary law: most will require some specific manifestation on the part of the promisor to benefit the 3rd party.

## *Restatement of Contracts, §309: Defenses Against the Beneficiary*

(1) A promise creates no duty to a beneficiary unless a contract is formed btw the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.
(2) If a contract ceases to be binding in whole or in part b/c of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.
(3) Except as stated in (1) and (2) and in §311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.
(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

## *Restatement of Contracts, §311: Variation of a Duty to a Beneficiary*

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement btw promisor and promisee is ineffective if a term of the promise creating the duty so provides.
(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.
(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifest assent to it at the request of the promisor or promisee.

## *Problem set on 3rd party beneficiaries:*

(1) Say A promises B to pay B's debt to C. A doesn't pay, so C sues A.

a. May A assert claims or defenses it has with B against C?
b. May A assert claims or defenses that B has with C against C?
c. May A assert claims or defenses it has directly against C (outside of this contract with B)?

(2) A promises B to pay C.
a. When can A and B agree to modify or change or release A's obligation to C?

(3) A buys insurance from B with C as beneficiary. Later, A and B agree to substitute D for beneficiary. A dies, B pays D, C sues B.
a. Did C know that he was a beneficiary? If yes, did he materially change position to his detriment? §311(3).
b. Did the contract btw A and B provide for express modification rights, which would have put C on notice as to his inability to claim estoppel? §311(1-2).

(4) A buys insurance from B for C as part of settlement. C wants to protect her rights as beneficiary. What can she do? Under §311(1), she can require a clause prohibiting any modification of beneficiary – the contract is therefore irrevocable.

(5) A buys insurance from B for C, but then stops paying. What happens to C's right?
a. Under §309(2), contract btw A and B ceased to be binding because A failed to perform. So no right for C.

***ROUSE V. UNITED STATES (1954)***

# ASSIGNMENT AND DELEGATION

***BOSTON ICE V. POTTER (1877)***