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# NATURE & LIMITS OF CONTRACT

Contract—legally enforceable promise

## Unconscionability—*Shaheen*—*Baby M*

###### Shaheen v Knight—1957

*Ineffective vasectomy—sues for the expenses of raising a child*

Knight’s argument: paying expenses AND letting him keep the baby make him MORE THAN WHOLE

**Holding:** Shaheen suffered no damages (birth of a normal child)🡪 cannot recover

###### Baby “M”—1987

*Whiteheads and Sterns contract around adoption laws—Mrs. Whitehead decides she doesn’t want to give up Baby “M” after all*

**Narrow Holding:** clearly falls under (and violates) adoption law: no money for babies🡪 unenforceable

**Broad Holding**: courts will not enforce a contract that is against public policy

## Capacity, Duress, & Undue Influence—Odorizzi—Williams

###### When the law should not enforce a bargain:

1. Lacking capacity
2. Not an exercise of free will
3. Contrary to public policy

###### Definitions:

1. **Unconscionability:** “The principle is one of the prevention of oppression and unfair surprise” (UCC Comment)—hybrid between subject and process—doctrine of fairness and *necessarily* subjective

“… has generally been recognized to include an **absence of meaningful choice** on the part of one of the parties together with contract terms which are **unreasonably favorable** to the other party.”—*Williams*

1. **Duress**: “unlawful confinement of another’s person, or relatives, or property, which causes him to consent to a transaction through fear.”
2. **Menace**: (in California) “threat of duress or threat of injury to the person, property, or character of another
* **Neither duress or menace because “a threat to take a legal action is not unlawful unless the party making the threat knows the falsity of his claim”**
1. **Actual Fraud:** conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract.
* No actual fraud—“While the amended complaint charged misrepresentation, it failed to assert the elements of knowledge of falsity, intent to induce reliance, and justifiable reliance.”
1. **Constructive Fraud**: breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice
* No constructive fraud—“no presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee”…”especially here where the parties were negotiating to bring about a termination of their relationship”
* No misapprehension🡪no mistake
1. **Undue influence:** “In essence undue influence involves the use of *excessive pressure* to persuade one *vulnerable* to such pressure, pressure applied by a *dominant* subject to a subservient object.” Requires:
2. **Deficient state of mind—plaintiff claims mental and emotional stress of arrest** *(“lessened capacity”)*
3. **Application of excessive strength, general pattern:**
	1. Discussion of the transaction at an unusual or inappropriate time
	2. Consummation of the transaction in an unusual place
	3. Insistent demand that the business be finished at once
	4. Extreme emphasis on untoward consequences of delay
	5. The use of multiple persuaders by the dominant side against a single servient party
	6. Absence of third-party advisers to the subservient party
	7. Statements that there is no time to consult financial advisers or attorneys
4. Can be either **PROCESS** (if the agreement was entered under questionable circumstances) or **SUBSTANTIVE** (assuming fair process, was the agreement overly biased?)

**\*\*\*UNCONSCIONABILITY, DURESS, UNDUE INFLUENCE, and GUARDIANSHIP are void—MINOR and INTOXICATION are voidable**

###### Odorizzi v Bloomfield School District—1966

*Odorizzi gave resignation after being in jail—his employer came to his home and “gave him advice”*

* **Capacity—**purely to do with the state of mind
* **Duress—**state of mind + an improper threat (i.e. The Godfather)
* **Undue Influence—**slightly less state of mind with a less aggressive threat—a “toxic mix” of minor lack of capacity and minimal duress
	+ Unusual place/time
	+ Immediate decision
	+ Consequences of delay
	+ Multiple persuaders
	+ No advisor to Odorizzi

**Holding:** threat of humiliation *not enough for duress* but still “improper”, disturbed state of mind *not enough for lack of capacity*🡪 called it “**undue influence**” 🡪 contract is voidable

### New Orleans Hospital Hypothetical

Selling water post-Katrina for $10/ bottle—“take it or leave it”—undue influence?

###### Williams v Walker Thomas Furniture—1965

1. **PROCESS UNCONSCIONABILITY—**is form contract enough to establish a “lack of meaningful choice” for Williams?
	1. Too complicated/expensive/onerous to bargain with each buyer individually
	2. Sellers can compete on terms—*pro-seller clause could mean lower prices for the buyer*
	3. Was the buyer victim of **UNFAIR SURPRISE**? (consider on a sliding scale)
		1. Onerous terms
		2. Less influence/opportunity to change the contract
		3. Pressure from salespeople
2. **SUBSTANCE UNCONSCIONABILITY—**contract “commercially unreasonable” with “too little bargaining power”?
	1. When do negotiations go so far as to constitute “absence of choice with unreasonable results”?
	2. What would happen if courts threw out dragnet clauses in general?

**Holding:** contract not unconscionable—Williams took advantage of the pro-buyer price 🡪 can fairly be subjected to the pro-seller dragnet clause

# Damages Default Rules

1. **Expectation damages**—benefit of the bargain
2. **Reliance** **damages**—lost expenditures (return to the promisee)
3. **Restitution damages**—disgorged profits (take away from the promisor)

### Abel & Baker Painting Hypothetical

Baker agreed to paint a house for $100, Abel gave him a $10 and spent $5 prepping his house

**Expected interest**—Baker is responsible for the damage 🡪 we look at what should have been vs. what was:

* would have spent: **$105** and received a painted house
	+ $10 deposit
	+ $5 prep work
	+ $90 balance payment
* INSTEAD spent **$140** for the SAME painted house
	+ $10 deposit
	+ $5 prep work
	+ $5 re-prep work
	+ $120 to a new painter

🡪given that the second painter was equal to Baker, Abel is owed **$35** in expected interest damages

**Reliance interest—** (assuming prep work was wasted)— Abel relied on Baker’s promise in spending the initial **$5**

**Restitution interest—$10** deposit (could get restitution even if agreement was deemed unconscionable/ void)

\*\*usually judge will award either expected interest ($35) OR reliance & restitution ($15)

### Wholesaler Bike Hypothetical

Wholesaler agrees to sell 250 bicycle wheels to Retailer in exchange for $100 per wheel. Just before the date specified for delivery of the wheels, Wholesaler repudiates the contract. As a result of Wholesaler’s repudiation, Retailer cancels a custom bike sale it had planned for the week following the expected delivery, rendering worthless $10 of promotional materials that listed the date of the sale.

* Under UCC §2-712, Retailer can claim cover damages of $2,500 (i.e., $10 per wheel) and, under UCC §2-715, consequential damages of $10.
* These are the same damages that would be available under §2-713 and §2-715 even absent cover.

## REMEDIES FOR BREACH—Tongish

###### Tongish v Thomas—1992

What was Co-op’s actual injury?

* They would have only netted the handling fee 🡪 damages way less than market price
* BUT under the UCC, Co-op gets market price less contract price as damages

Justification:

1. Under common law, difference between market price and contract price constitutes damages regardless of Co-op’s intended use of the product
2. Efficiency justification of the conclusion—it’s a good result from a public policy perspective because it maintains the integrity of the Co-op-Bambino relationship

**Holding:** Tongish must pay market price of goods NOT handling fee🡪 maintains the integrity of the Co-op-Bambino relationship

### Efficient Breach Hypothesis

Tongish *chose* to breach (**repudiation**)—given the decision in *Tongish*—sellers don’t have as much incentive to repudiate because they can’t get away with windfall profits

**While it’s fair that Tongish is required to perform or pay damages, the purpose of contract law is not to force performance**

**Bookseller Illustration**. Offer to sell a book for $100. Repudiate. Instead Buyer gets it on eBay for $150.

* Expectation damages = $50
* Efficiency implications—doesn’t matter to seller or buyer if the contract is performed. Buyer either gets a book worth $150 for $100 or gets $50 and can cover to buy the book at the market price of $150.

**Housepainter Illustration.** Agree to paint the house for $100. Realize that costs are going to be $150. Comparable painter costs $120.

* Expectation damages = $20
* Efficiency implications—if the seller/painter performed on contract *society* would lose $30. If seller/painter doesn’t perform—seller is out $20 instead of $50, buyer gets $120 paintjob for the originally agreed upon price of $100, and society doesn’t lose resources to inefficiency.
* **Charles Fried** believes that a promisor is morally bound to perform because she intentionally invokes a social convention with a purpose to induce others to expect performance.
* **Holmes** once said that a promisor commits to perform or pay damages for failure, nothing else.

## REMOTENESS—Hadley—Hector Martinez—Morrow

###### Hadley v Baxendale—1854

*Crankshaft shipper not held liable for unforeseeable/remote damages due to delay—damages “arising naturally”*

For the Shipper (Hadley) under the *Hadley* ruling—

1. Deprived of insurance. Get only ordinary loss (actual value) NOT extraordinary loss (lost profits)
2. BUT benefit from the lower shipping costs.

What if instead of *Hadley* we had an **Unlimited Liability Default** rule? (study guide practice)

**Separating equilibrium**—Individuals would have to differentiate themselves to better inform carriers of the value of their products

**Pooling equilibrium**—because of the price differential between rare expensive goods and common inexpensive goods would create a low “blended price” 🡪 free ride for shippers of expensive goods, unfairly onerous for more abundant shippers of inexpensive goods

Instead, under *Hadley* **Limited Liability Default** rule we have—

Separating equilibrium BUT it puts responsibility of declaration of value on the shippers of expensive goods—**more efficient because fewer actual negotiations** take place AND **eliminates the inefficient free-ride for shippers of expensive goods**

###### Hector Martinez v Southern Pacific Transportation—1979

*Damaged & delayed dragline—sues for lost revenue—rental value*

**Arguments:**

* **Martinez**—machine worth its rental value for the month long delay
* **SoPac**—rental value is an unforeseeable cost under *Hadley*
* ***Adler*—**the court misses a big point here. The **rental cost is roughly equal to cover**🡪 use market price to determine the damages under expectation regardless of Martinez’s intended use for the dragline.

**Decision:**

* Martinez could recover losses during delay—not while the dragline was under repair (already settled)

###### Morrow v First National Bank of Hot Spring—1977

*Coin collectors robbed—sue bank for not informing them of the availability of a safety deposit box*

**Holding:** $75 deposit insufficient to imply an insurance policy on coins

Tacit Agreement Rule: even foreseeable damages (like valuable coins being stolen) are not included in expectation damages unless the promisor implicitly assumes responsibility

## CERTAINTY & RELIANCE INTEREST—Dempsey—Anglia—Mistletoe

### Abel & Baker Concert Hypothetical

* Abel agrees to sing at Baker’s concert hall for $100,000
* Reliance: Baker spends $10,000 in promoting the concert.
* before the concert, but after promotional expenditure, Abel repudiates
* Baker hires Charley instead, for the same $100,000
* Baker reasonably promotes Charley’s concert with an additional $10,000 expenditure.
* At Charley’s concert, Baker takes in $150,000 in revenues net of trivial additional expenses

Baker sues Abel for her breach—believes that based on his initial promotion (which was entirely wasted), the Abel concert **would have generated $200,000 in revenues**, again net of trivial additional expenses, 🡪 loss from Abel’s breach is thus $60,000.

**Probable Outcome:** court might conclude that the difference in revenues between the Charley and the Abel concert were too speculative to award. But Baker’s **$10,000** wasted promotional expenditure (included in his $60,000 failed expectation claim) would be awarded here as **reliance damages**.

How might this award be recharacterized? As the provable portion of an expectation remedy.

###### Chicago Coliseum Club v Dempsey—1932—ADLER DOES NOT LIKE

CCC sued for:

1. **Expected profits**—not awarded—not a “reasonable degree of certainty”

**\*\*Adler—court should have used old fight ticket sales to estimate.** It’s almost as if they say the damages were so high they couldn’t be accurately estimated so they just assign zero.

1. Expenses incurred **procuring the contract**—lower court: ?—now: No—“plaintiff speculated”
2. Expenses incurred **trying to compel** Dempsey to perform *after repudiation*—lower court: ?—now: No—“plaintiff having been informed that the defendant intended to proceed no further under his agreement, took such steps **at his own financial risk**”
3. Expenses incurred **after signing and before breach**—special expenses are recoverable, but not salaries paid to regular employees

\*\* *expectation damages don’t include “speculative” profits*—not really the case. The court could (and probably should) have used available information to make an estimate of profits—If a party wants the court to speculate and estimate profits, the burden of providing evidence to support the speculative profits falls to him. Otherwise, ***the court assumes zero profits*** come of the contract.

###### Anglia Television v Reed (Mr. Brady)—1971 (Britain)

Anglia is awarded **EXPECTATION DAMAGES**  (not reliance damages) 🡪 court assumes that profit will be zero and expenses recouped—not too speculative

\*\****expectation*** *damages include wasted expenses, even before the contract was signed*. Since the court assumes that the project would just break even, *all* wasted expenses can be recouped as expectation damages. **These are NOT reliance damages** (which can only be awarded for expenses after contract is signed.)

###### Mistletoe Express v Locke—1988

*Locke made a capital investment in shipping equipment—relied on a contract with Mistletoe—cancelled early.*

***“Where the contract requires a capital investment by one of the parties in order to perform, that party’s reasonable expectation of profit* includes recouping the capital investment*.”***

\*\* ***expectation*** *damages include losses on capital expenditures* because the court assumes a zero profit and the cost of investment would, necessarily, be recouped to break even on the project—These recouped expenses should be thought of in terms of **profit**. Once we see them recouped on a zero profit project, the court doesn’t have to wildly speculate about potential profits and can use these wasted costs as an easy predictor of (otherwise) difficult to estimate expectation damages.

### Efficient Breach Hypothesis

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Case** | **$5** | **$10** | **$15** | **Efficient?** | **Abel—if he performs** | **Abel—if he breaches** | **What will Abel do?** |
| **V > C ?** |  **$ P – C** | **$ P - V** |
| **1** | P | C | V | Yes | -5 | -10 | Perform |
| **2** | C | P | V | Yes | 5 | -5 | Perform |
| **3** | C | V | P | No | 10 | 5 🡪 0\* | Perform |
| **4** | P | V | C | No | -10 | -5 | Breach |
| **5** | V | P | C | No | -5 | 5 🡪 0\* | Breach |
| **6** | V | C | P | No | 5 | 10 🡪 0\* | Perform |
| **\*If Abel’s breach enriches him, his value for breaching goes to 0 (cannot collect damages for his own breach)** |

## MITIGATION OBLIGATION—Rockingham County—Parker—Neri

Breaching party is only liable for natural consequences—if you value the service more than the market/best available price the additional loss of value is a self-imposed injury

**Mitigation REFINES EXPECTATION DAMAGES** (as opposed to foreseeability which limits expectation damages)

###### Rockingham County v Luten Bridge—1929

*County counsel repudiated on contract to construct a bridge—Luten continued working***Holding**: Luten can recover expectation damages equal to **anticipated profits + expenditures to date**

**Pithy takeaway**: ceasing work is *never* an undue burden

###### Parker v Twentieth Century Fox—1970

Offered Parker *Bloomer Girl*—repudiated and offered *Big Country*

**Holding**: Parker has a mitigation obligation but no **opportunity** (*Big Country* was “different and inferior”)

### Rare Roman Coin Shipper Hypothetical

* **Original agreement:** Buyer agrees to purchase a rare Roman coin from Seller for **$10,000**. Seller is obliged to have the coin shipped to Buyer’s home across the country in **four week’s** time. To fulfill this obligation, on the day of the contract, Seller promptly pays a carrier a **$100 nonrefundable deposit** for the carrier’s services. Seller keeps the coin (by itself) in a safety deposit box for $75 per week.
* **Buyer repudiates**
* **New arrangement:** Seller searches for **two weeks** for an alternative buyer to pay **$9,000**; the new buyer lives near Seller’s place of business and is willing to pick up the coin immediately.
* **Damages:** $10,000- $9,000 = $1,000 + $100 wasted cost - $75 savings = **$1,025**

###### Neri v Retail Marine—1972

*Neri put down a deposit for $4,250—storage costs after repudiation $674—lost profit $2,579*

Retail Marine had a mitigation obligation but no opportunity—without the repudiation Retail Marine would have made two sales (because they had a large inventory for sale—“lost volume” seller)🡪 Retail Marine can recover **lost profit + incidental damages (storage costs)**

###### Incidental (direct consequences of breach) vs. consequential damages (indirect consequences)

* **Under 2-718(1)**: must return all but the lesser of $500 or 20% of the value of performance ($2,517.48)🡪 Neri would get back $4,250 - $500 = $3,750
* **Under 2-718(2)**: gets what Neri actually got
* **Under 1-106** (common law): expectation remedy—ditto

###### Differences in common law and statutes:

* *Common law* awards damages at the time of repudiation
* *Statutes* reward **buyer** damages at repudiation and **seller** damages at time of performance

# SPECIFIED DAMAGES—Kemble—Wassenaar—Lake River

**Specified damages save the parties the trouble of proof in the event of breach**

###### Purposes of Stipulated Damages:

* avoid uncertainty
* avoid litigation expense
* substitute for anticipated inadequate judicial award
* provide an incentive for economic efficiency
* judicial economy and freedom to contract (added by *Wassenaar*)

###### Rules from Restatements and *Wassenaar*:

1. Can’t be too high—indication of penalty
2. Ease of calculation—if you think damages will be high and easy to calculate at breach, you can’t fairly include them as stipulated damages
3. (added by *Wassenaar*) can use stipulated damages to protect against price fluctuations—if you think the value at the time of breach could vary greatly from the time of contract, stipulated damages can be a hedge

**“To be enforceable, specified damages need both to be reasonable in amount and necessary, the latter requirement satisfied by the difficulty of proof at the time of breach.”—Adler**

###### Kemble v Farren—1829

*Theater hired comedian with lots of conditions and specified damages—comedian quits (‘big breach’)*

Kemble and Farren had an explicit contract stating that breaching “agreement, or any part thereof, or any stipulation therein contained” would warrant payment of £1000 🡪 Farren breached, Kemble sued and was awarded £750—appealed for increase to £1000.

**Holding**: £1000 was arbitrary and supposed to act as damages NOT penalty, the court found it illogical to award as “damages” something that was not, in fact, the damage as they assessed it. 🡪 judgment for £750 affirmed.

*Kemble is a “big breach” BUT court won’t award damages because then it would have to in a small breach, too.*

***COMPARE TO UCC § 356—enforces stipulated damages even if the amount would be disproportionately large***

###### Wassenaar v Towne Hotel—1983

*Failed to mitigate damages after employment terminated—paid the same to not work as he would be to do work*

**Reasonableness test for contractually stipulated damages:**

1. Did the parties intend to provide for damages or for penalty? (looks like unconsionability—indicated by uneven bargaining power)
2. *Is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract?—sometimes eliminating uncertainty at the time of contract has a material value—this was new*
3. Are the stipulated damages a reasonable forecast of the harm caused by the breach? Within “the range”?

**Holding:** “Stipulated damages clause is a **valid provision for liquidated damages, not a penalty**” 🡪 enforceable as a part of the bargain and found for Wassenaar

###### Lake River v Carborundum—1985—Posner

Liquidated damages “*must be a* **reasonable estimate** *at the time of contracting of the likely damages from breach, and the need for estimation at that time must be shown by reference to the likely* **difficulty of measuring the actual damages** *from a breach of contract after the breach occurs.”*

**Reasonableness Test—two prong sliding scale—lots of one diminishes the need for the other:**

1. If damages would be easy to determine then (less need for stipulation) OR
2. If the estimate greatly exceeds actual damages 🡪 penalty and unenforceable

### Fairground Hypothetical

If the contractor and the fairground are contractually related—inefficient overinvestment by both (if assuming expectation damages)

* Fairground would overinvest in advertising to get expectation damages high (or revenues high)
* Contractor would overinvest in construction to get rollercoaster built and avoid high damages

How could this be fixed?

1. Insurance—insurance company would probably dictate terms using a “forcing contract” to prevent moral hazard—fairground probably wouldn’t know the appropriate terms of a forcing contract 🡪 wouldn’t be able to use independently
2. Could include liquidated damages clause reflecting their personal value of the roller coaster
3. Could agree to rely upon expectation damages and allow the price to reflect

If the contractor and the fairground are the same entity—much more efficient

# SPECIFIC PERFORMANCE—Loveless—Cumbest—Scholl—Sedmark—Mary Clark

**General rule:** specific performance is NOT an available remedy

**Exception**: expectation damages are inadequate (Restatement § 359)

**UCC § 2-716:** specific performance “may be ordered where goods are unique” (as well as in other “proper circumstances” an implicit reference, at least in part, to more general common law principles) –Adler

###### Loveless v. Diehl—REAL ESTATE—1963

Loveless had a farm—rented to Diehl with an option to purchase at a fixed price of $21,000—Diehl made improvements and then decided he didn’t want to purchase—to re-coup loss he decided to exercise the option and located a buyer to net $1,000—Loveless repudiated K—Diehl sues for specific performance—Loveless countersues for $1,440.95 owed on a note

Loveless best argument: easy to determine expectation damages 🡪 specific performance inappropriate

**Holding: real estate UNIQUE**🡪 Specific performance awarded because otherwise Loveless would be “unjustly enriched for their culpable refusal to carry out their promise.”

###### Cumbest v. Harris—GOODS—1978

Cumbest sold his unique and irreplaceable stereo system to Harris with a clause in the contract that he could re-buy it in before a certain day

**Rule:** “Ordinarily, specific performance will not be decreed if the subject matter of the contract sought to be enforced is personalty. However, this general principle is subject to several well recognized exceptions, such as:

* Where there is no adequate remedy at law; (illiquid; no market)
* Where the specific articles or property are of peculiar, *sentimental or unique value*; and
* Where due to scarcity the chattel is not readily obtainable.”(not fungible)

**Decision: UNIQUE** 🡪 ordered specific performance

###### Scholl v. Hartzell—1981—Corvette (NOT dealer)

Hartzell advertised a Corvette—Scholl agreed to purchase and made a deposit—Hartzell changed his mind and returned deposit—Scholl sued for specific performance

**Holding: NOT UNIQUE**—Scholl had a mitigation opportunity—Corvette not “unique”—action should lie in contract breach NOT replevin

###### Sedmak v. Charlie’s Chevrolet—1981

Sedmaks made a down payment on an oral agreement to purchase a unique, limited edition Corvette—Charlie’s Chevrolet repudiated and claimed that the Sedmaks could bid on the car—Sedmaks sue for specific performance

**Holding: UNIQUE**

###### The Case of Mary Clark—1821

Forcing Mary Clark into indentured servitude would be more “degrading and demoralizing in its consequences…than slavery itself.” 🡪 Discharged from duty

**Holding: NO SPECIFIC PERFORMANCE**

**Negative covenants (e.g. *Dempsey*)—**where the courts draw the line with the provision “you can’t work for anyone else” and “you must work for me” is subjective🡪 look to length of time, injury, extent of the limitation, etc.

# RESTITUTION—Bush—Britton—Vines—Cotnam

Disgorgement of the unjust enrichment received by the bad actor

###### Bush v Canfield—1818

Wheat was worth $14,000—Bush made a $5,000 deposit—Canfield repudiated when wheat was worth $11,000—tried to return only $2,000 (benefit of the bargain)

**Breaching party shouldn’t recover savings**🡪 Bush gets $5,000 + interest

###### Britton v Turner—1834

Britton agreed to work for Turner for a year in exchange for $120—after 9 ½ months, he left—sued Turner for his unpaid wages—court decided: **Turner had agreed on a day-to-day basis to receive Britton’s labor** 🡪 owes him for it.

**What if we knew the cost of substitute labor?**

$30/quarter for Britton; $50/quarter for the next guy; Britton would sue for his three quarters of service—get $90 and then subtract the marginal increase for Turner to get a replacement -$20 🡪 $70 in expectation damages owed to Britton

###### Vines v Orchard Hills—1980

Deposit on a condo retained after (potential) buyer repudiates

“deposits are both a standard source of liquidated damages and a standard basis for a restitution claim” –Adler

**Holding**: generally—sellers can use liquidated damages clauses to retain deposits BUT Vines has a chance to challenge this particular clause’s validity

###### Cotnam v Wisdom—1907

Wisdom was a doctor who administered emergency services to an unconscious man—claimed (and won) restitution for “time, service, and skill” under **quasi-contract 🡪 entirely outside of contract**

\*\*had to be planning to re-coup expenses the entire time—cannot gift services and then sue later

### Quasi Contract

NO PROMISE but still enforceable as legal fiction—inverted tort law—requires a beneficiary to pay his benefactor

# MUTUAL ASSENT

## OBJECTIVE THEORY OF ASSENT—Embry—Lucy

“A meeting of the minds is not required for an enforceable contract. What is required is that each party behave in a way that gives the other party or parties reason to believe that there is a bargain between or among them; subjective intent rarely matters at all and is not a prerequisite to enforcement of a contract.” –Adler

###### Embry v Hargadine, McKittrick Dry Goods—1907

Embry wanted to renew his contract—said if McKittrick wanted his services any longer he wanted a contract for a year—McKittrick either replied “Go ahead” (Embry) or “Go upstairs” (McKittrick)

**“Go ahead” clearly manifests assent**🡪 if jury finds Embry’s story more likely than McKittrick’s the contract is ok

###### Lucy v Zehmer—1954

*Farm sold on a napkin*

Though Zehmer considered the whole contract a joke, he **manifested assent** (despite claims of vesting reservations)🡪 court ordered specific performance

## OFFER—Nebraska Seed—Leonard—Empro—Texaco—Dickinson

###### Nebraska Seed v Harsh—1915

Harsh sent a circular to Nebraska Seed—included price—NS replied with money

**Advertisement is NOT an offer**

###### Leonard v Pepsico—1999

###### Empro Manufacturing v Ball-Co Manufacturing—1989—Easterbrook

Ballco was going to sell its assets to Empro—they signed a letter of intent, including clauses that each could negotiate the deal and that the sale would be “subject to” a definitive asset purchase agreement—they reached a stalemate over a purchase stipulation and Ballco began negotiating with another company

**Holding:** parties did not intend to be bound—implications of binding parties to preliminary agreements would be “a devastating blow to business”—seek to preserve parties’ rights to negotiate

###### Texaco v Pennzoil—1987

*Parties signed an letter of intent + issued a press release*

**Did parties intend to be bound by only a formal, signed writing?**

1. Did a party expressly reserved the right to be bound only when a written agreement is signed;
2. Was there any partial performance by one party that the party disclaiming the contract accepted;
3. Were all essential terms of the alleged contract had been agree upon; and
4. Was the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected…

**Holding**: parties intended to be bound

###### Dickinson v Dodds—1876

Dodds offered to sell Dickinson his land for £800—offer expired on Friday at 9 AM—on Thursday, Dickinson heard that Dodds was negotiating with Allen—delivered to Dodds’ home a formal letter of acceptance

**Holding: an offer can be revoked until it is accepted** 🡪 court decided for Dodds, sale to Allen stands

### Option Contracts

*Two* contracts, or potential contracts, to consider.

* The option contract is the completed contract and
* the offer on which the option operates is the potential contract.

**Illustration**: Abel agrees to pay Baker $1,000 for the **option to purchase**, at any time within a year, Baker’s house for $100,000 and Baker agrees to accept $1,000 in exchange for that option. Baker has made an offer to sell his house to Abel for $100,000, an offer that is irrevocable for one year as a result of the enforceable option contract.

Baker could NOT revoke this offer for one year—counteroffer for less would not negate Abel’s option to purchase for $100,000—if Baker sold to someone else, he would owe damages to Abel

## ACCEPTANCE—Ardente—Carhill—Leonard—White—Petterson—Hobbs

“Mailbox rule”—acceptance is effective once it’s out of the offeree’s control and “reasonably” on its way to the offeror—exception: option contracts (acceptance not effective until received by offeror)

###### Ardente v Horan—1976

Horan offered to sell land to Ardente—sent a letter expressing “concern” that remain with the land… “I would appreciate your **confirming** that these items are a part of the transaction, as they would be difficult to replace.”

🡪 Did letter constitute **qualified acceptance (a counter-offer, equivalent to rejection)** **or absolute acceptance** together with a mere inquiry concerning a collateral matter?

**Decision**: letter considered items “part of the transaction” 🡪 counter-offer (never accepted--**No valid contract**.)

### Mirror Image Rule:

Effective acceptance must be **unequivocal assent**—offer expires upon counteroffer—can accept offer and propose a new offer BUT must be able to bargain the new offer and it should have its own consideration

🡪 “Yes BUT will you throw in the furniture for $X” would be unequivocal acceptance BUT “confirm the inclusion of the furniture” is NOT

###### Carhill v Carbonic Smoke Ball Company—1893

£100 will be paid to anyone who gets the flu after using Smoke Ball—has £1000 in a bank account—Carhill tries to recover her £100 and CSBC says she can’t

**Decision**: Unilateral contract 🡪 became on contract on performance

**ADLER: COURT GOT IT WRONG—NOT A UNILATERAL CONTRACT, ACTUALLY A WARRANTY—NOT AN OFFER 🡪 CANNOT ACCEPT—DOES NOT REQUIRE CONSIDERATION**

When you bargain it’s because you WANT something—it’s an enforceable promise—just an additional term in a sales contract, bargain is for smoke ball and warranty in exchange for cash (not flu)

🡪acceptance by performance is the wrong way to think about “prove me wrong” cases

###### White v Corlies & Tifft—1871

*Contractor makes generic wood purchase—insufficient to prove beginning performance/manifestation of assent*

###### Petterson v Pattberg—1928

Pattberg held a mortgage on Petterson’s home—said he could pre-pay by May 31, 1924—Petterson brought the money to Pattberg who withdrew his offer

Race to acceptance/repudiation—Petterson SAYS I’ll pay, Pattberg repudiates and it sticks

**Decision**: “it clearly appears hat the defendant’s offer was withdrawn before its acceptance had been tendered” 🡪 found for Pattberg

###### Hobbs v. Massasoit Whip Co—1893

Hobbs sent Massasoit eel skins—M. in no way indicated that they planned to reject the skins—kept them a few months—Hobbs sued to recover for the price—silence and retention of the skins “amounted to acceptance”

Unilateral Contracts. (Rewards) Offeree is not bound until performance is complete—that is when contract is formed—invited to begin work and then quit at anytime

*vs. in a bilateral contract—once offeree accepts by performance or begins work he is bound to complete performance*

Acceptance by performance. Offeror must have reasonable notice of acceptance—usually can assume that he should see the work—partial performance constitutes acceptance unless it’s a unilateral contract (i.e. reward for finding a dog isn’t a contract until you complete performance)

Option Contracts. Implicit subsidiary contract—unless dog owner specifies that he can revoke, once you start looking for the dog you can assume that you have the right to collect upon completing performance

## BATTLE OF THE FORMS—Step-Saver—Union Carbide—ProCD—Hill—Klocek—Specht—Register.com

Shrink-wrap—included in box—if you object return within a specified amount of time

Click-wrap—must assent to terms before you can download

Browse-wrap—page links to license agreement—not compelled to read, but can

### Exchanged Different (but-not-that-different) Forms Hypothetical

Buyer sends purchase order including a term to dispute in state court.

Seller sends an invoice including a binding arbitration term.

1. **Common law:** mirror image + acceptance by performance = LAST SHOT DOCTRINE—seller’s invoice was a counter offer NOT an acceptance
2. **UCC § 2-207**
	1. If the counteroffer/acceptance is “seasonable” then the terms of the ORIGINAL OFFER control on points of difference—“Dropout Rule”
	2. Any additional terms are considered PROPOSALS for change to contract (unless they’re both merchants and then the additional terms are part of the contract unless they materially change the contract 🡪 unless they would be an unreasonable surprise)
	3. When terms conflict—Knockout Rule (ignore both conflicting rules and imply the background rule)
3. **Material term:**
	1. **UCC**—additional term outside what a party would reasonably accept (even if not something *traditionally* or *customarily* used)
	2. **Union Carbide**—any adverse term—why would anyone agree to an additional adverse term for nothing in exchange if bargaining were truly still open?

**\*\*if the exchanged forms differ BUT the parties exchange the goods anyway—a contract can be inferred**

###### Step-Saver Data Systems v Wyse—1991

TSL’s product included a box-top warranty—Step-Saver said the warranty was an additional offer to negotiate—TSL said the warranty was a conditional acceptance of the terms previously agreed upon

**TSL:** Once box was opened 🡪 assent—conditional acceptance of contract—should have reasonably expected additional terms with a product like software

**Step-Saver:** phone conversation constituted agreement—box top license was meaningless—we opened our box to get our software and agreed to NOTHING

**Decision**: No—**box top license was NOT a conditional acceptance** 🡪 remand for further consideration of express and implied warranty claims

###### Union Carbide v Oscar Meyer Foods—1991

Union Carbide owed back taxes and interest ($88 and $55 for a total of $143) on sales to Oscar Mayer—language of contract: Buyer shall pay Seller the amount of all governmental taxes…that Seller may be required to pay”

**UCC 2-207: “A term inserted by the offeree is ineffectual**

1. If the offer expressly limits acceptance to the terms of the offer, OR
2. If the new term
	1. ***Makes a material alteration***, in the sense that consent to it cannot be presumed, AND
	2. There is no showing that the offeror in fact consented to the ateration—whether expressly (i) or by silence against the background of a course of dealings (ii).”

**Decision**: had the sales tax appeared Oscar Mayer would have paid it or shopped around for a better price—consent cannot be realistically inferred

###### ProCD v Zeidenberg—1996—Easterbrook

Zeidenberg purchased and (violating the license) resold information from a ProCD product—did “shrinkwrap license” included inside the packaging constitute a **material change** to the contract executed by offer (placing product on shelf) and acceptance (payment)?

**Decision:**

1. 2-206—This was a second contract (after purchase)—ProCD extended an **opportunity to reject** if a buyer should find the license terms unsatisfactory 🡪 bound by terms after they had the opportunity to read them
2. 2-207 doesn’t apply—no conflict of forms

###### Hill v Gateway—1997—Easterbrook

Computer came with terms that bound purchasers after a 30 return period—“people who accept take the risk that the unread terms may in retrospect prove unwelcoming”

**Decision**: “By keeping the computer beyond 30 days, the Hills accepted Gateway’s offer, including the arbitration clause.”—Parties KNOW that computers come with terms/licenses/etc.

**Policy Argument: Purchaser implicitly agreed to be bound by included terms**

###### Klocek v Gateway—2000—Vratil

**Traditional Contractual Roles: Offer** (oral order)—**unconditional acceptance** (promise to deliver/delivery)—**proposal for additional terms** (box-top license)

If Gateway wanted the terms to be binding—warn on the phone & give customer a change to object

###### Specht v Netscape Communications—2001

When downloading software—**what constitutes agreement**?**—when is notice sufficient to bind?**—If software is **freely offered and downloaded**, what is the role of license agreement if not expressly accepted? Binding? License agreement doesn’t require acceptance or force the downloader to read

**Decision: “Downloading is hardly unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement.”**

###### Register.com v Verio

**Verio knew or should have known about Register’s policies🡪 liable for breaching license** (Apple Stand Story)

\*\*Register did all they could to keep Verio out of their system—TSL didn’t *have* to ship to Step-Saver

# GAP-FILLING—Raffles—Oswald—Sun Printing—Texaco—NY Central Iron—Wood

### Dairy “Mid-Week” Delivery Hypothetical

* Dairy agrees to make weekly delivery for one year of a specified quantity of butter at a specified price to a restaurant, each delivery to occur **“no later than mid-week.”**
* First six months: delivers the butter **sometimes on Wednesdays, but more often on Thursdays**.
* Restaurant complains—**accepts each one anyway** when the dairy apologizes
* Seventh month—restaurant decides not to tolerate Thursday deliveries any longer—tells dairy contract is over
* Dairy sues for breach—claims damages for the lost difference between the market price and contract price of butter over the remaining term of the agreement
* Restaurant: dairy in breach—repeatedly late deliveries.

Litigation turns on the interpretation of **“mid-week.”** Restatement (2nd) Contracts **§202** provides that in general **“where language has a generally prevailing meaning, it is interpreted in accordance with that meaning”** but adds, among other things, that **“technical terms and words of art are given their technical meaning when used in a transaction within their technical field.”**

**UCC § 2-208—where do we look for definitions of terms?** “express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade”

###### Raffles v Wichelhaus—1864 (Britain)

*In ex Peerless*

**Lord Gilmore**: “to arrive ex Peerless” was used to indemnify the seller in case the ship sank🡪 Seller can enforce the agreement in December

**Lord Simpson**: Seller would have had a contract for more than price of goods on either shipment 🡪 should at least be able to recover on the contract more favorable to buyer (December)

**\*\*Court does NOT try to imply a meaning to “arrive ex Peerless” to enforce the contract as it was written**

###### Oswald v Allen—1969

*Allen sold Oswald coins in the back seat of a car*

“Swiss Coins” meant either Swiss Coin Collection (Allen) OR Swiss Coin Collection and the Swiss coins from the Rarity Coin Collection (Oswald)—court declines to find a contract absent “meeting of the minds”

**Implied-in-fact:** terms on which the parties actually agree, though not expressly

**Implied-in-law:** terms that are filled in with background rules

###### Sun Printing v Remington Paper—1923—Cardozo

Contracted for a monthly sale of paper (sale from Remington to Sun) with **price to be set by an extrinsic indicator for a fixed quantity of paper**, 1000 lbs. per month—essentially a monthly renewable option contract—Remington repudiated saying that they had **not agreed to a material term (time)** 🡪 weren’t bound

**Decision: no contract exists—**Cardozo: “We are not at liberty to revise while professing to construe.”

**\*\*** couldn’t determine reasonable damages—all Sun and Remington really agreed to was future negotitations—Remington declined to perpetuate—could remedy by definitively negotiating more terms in the agreement.

###### Texaco v Pennzoil—1987

*How specific does a contract have to be to be binding?*

**Decision:** Promises of the parties are ***clear enough*** (usually: clear enough means that the court can determine **reasonable damages**) for a court to recognize a breach and to determine the damages resulting from that breach 🡪 **contract sufficiently specific**—found for Pennzoil

###### New York Central Iron Works v US Radiator—1903

REQUIREMENTS CONTRACT—USR agreed to furnish NYCIW with their “entire radiator needs for the year 1899”—order far exceeded expectations—USR took a risk and LOST🡪 has to pay

**Common Law Rule:** Requirement contracts filled in good faith are enforceable (fuzzy line between good faith ferreting out profits and bad faith abuse of the contract)

**UCC § 2-306**: cannot be unreasonably disproportionate—look like speculation or even just deviate largely

###### Wood v Lucy, Lady Duff Gordon—1917—Cardozo

*Wood is to be Lucy’s agent—she can’t market her stuff on her own*

Decision: he claims he’s not bound to anything by the contract—requirement contract **implies** **acceptance of the exclusive agency was an assumption of its duties**

# EXTRINSIC EVIDENCE—Thompson—Brown—Pacific Gas—Trident Center

Parol evidence rule—R2C § 213—UCC § 2-202—a writing that is a final expression of an agreement discharges any prior agreement (or contemporaneous oral agreement) that conflicts with the writing or that adds a term within the scope of a comprehensive portion of the writing

* applies to AGREEMENTS not INTERPRETATIONS
* underlying principle: a final writing is the best expression of an agreement’s terms
* Merger clause—term expressing that “this document is a final and exclusive expression of all agreements…”

Is the disputed agreement an “**integrated agreement**”: a final expression of one or more terms of an agreement?

Is it **completely** (integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement) or **partially** (any other integrated agreement) integrated?

Statute of Frauds—certain agreements are enforceable only if memorialized in a signed writing—R2C § 110—UCC § 2-201—sale of land, contracts that are not to be performed within one year, and contracts for the sale of goods above a specified price

###### Thompson v Libby—1885

*Unsound logs sold with an oral warranty*

To admit extrinsic evidence “would be to work in a circle, and to permit the very evil that [the parol evidence rule] was designed to prevent.”🡪 admitting evidence assumes its relevance even if it’s later dismissed

###### Brown v Oliver—1927

*Was the hotel furniture included in the sale?*

Contra-*Thompson*—looks to extrinsic evidence—decided it was insufficient to prove that the furniture was a part of the final contract 🡪 enforced as a comprehensive document

\*(if buyer wants furniture, he can bargain with seller, but that requires consideration + add’l payment)

###### Pacific Gas & Electric v Thomas—1968—Traynor

*Thomas agreed to “indemnify” PG&E against all losses—Thomas claimed this applied to only third-party injuries—despite plain language, Traynor examined extrinsic evidence*

In California—words **“have no meaning”** apart from context in which they are used🡪 ALWAYS look to extrinsic evidence—(costly but likely to give the parties what they actually bargained for)

* **Kozinski** likely would have found indemnification clause ambiguous 🡪 justifying extrinsic evid. (same**)**

###### Trident Center v Connecticut General Life Insurance—1988—Kozinski

*Trident Center CANNOT prepay on a loan—however, one of the optionally-imposed penalties of default is compelled early payment in full (essentially a highly-taxed prepayment)*

Trident wants to force CGLI to allow it to prepay when its contract *clearly* does not allow prepayment—Kozinski looks to extrinsic evidence—criticizes Traynor’s precedent—and enforces the contract as written

* **Kozinski’s approach** is more efficient than Traynor’s but less likely to get the parties’ bargain exactly right—incentivizes more clearly-drafted agreements
* **Traynor** likely would have looked to extrinsic evidence and found that no prepayments means no prepayments (same)
* **Despite probable agreement on both of these cases—would disagree on middle-ground cases**

# THE DOCTRINE OF CONSIDERATION

Bargained-for-exchange

## GRATUITOUS—Johnson—Hamer

### The Purple Envelope Hypothetical

Adler promises Amanda $1000—Amanda promises Adler $100 in a purple envelope—essentially *Johnson*

* essentially a gift of $900—promise is not enforceable because there was no exchange of consideration—the purple envelope is **“sham consideration”**
* how could we make this enforceable? Prove that Adler places a legitimate fetish value on Amanda giving him $100 in a purple envelope

###### Johnson v Otterbein University—1885

*Johnson promises to donate money to OU—repudiates—Otterbein sues—no consideration🡪 unenforceable*

* **Act of advantage to Johnson or detriment to the institution?** (not required by R2C § 79) Either of these would indicate **EXTRACTION**
* Condition is NOT an extraction
* **Promissory estoppel:** R2C § 90—“charitable subscription” is enforceable even without any showing of reliance *[Johnson]* forced to pay

###### Hamer v Sidway—1891

*Uncle promises nephew $5,000 to stay sober—kid does it, Uncle’s estate doesn’t want to pay*

Uncle **EXTRACTED** behavior from nephew (restricted lawful freedom of action) in exchange for a promise🡪 sufficient consideration—even if he would have given/promised the money anyway (R2C § 81), extraction = enforceable

## MORAL CONSIDERATION—Mills—Webb

* 1. No bargained-for-exchange *at the time of promise*
	2. **Naked promise**—when you receive the benefit of a promise and you’re morally bound to pay/perform
	3. Re-characterize the promise—
		1. **Renewal of a prior obligation**. Why is a promise to repay a debt (after the statute of limitations has run on debt) an exception to the doctrine of consideration? 🡪 at one point there WAS consideration and the new promise just waives the statutory excuse
		2. **Quasi contract**. Could reasonably say that promisor is bound regardless of promise (i.e. wandering bull cared for and collected) if you’re fairly certain that you’re owed the money expended to preserve someone else’s property

###### Mills v Wyman—1825

*25-year-old son dies in the care of a Good Samaritan*

when services were administered they were **A GIFT** 🡪 cannot collect on a promise of repayment made later

###### Webb v McGowin—re-characterize as a quasi-contract

*Webb fell off a building to keep from injuring McGowin—McGowin’s estate repudiated on payment*

McGowin explicitly agreed to pay 🡪 looks like a **quasi-contract**—promise made after the opportunity to bargain had passed and McGowin had benefitted from Webb’s action

## MODIFICATION—Stilk—Alaska Packers

*Looking at lack of good faith—not really lack of consideration*

### Tricky Fishermen Hypothetical

Fisherman agree to work on a Captain’s boat for $50 plus two cents for every fish caught—Captain provides the industry standard of nets (lower quality than the fishermen expected)—not performing over the nets would breach the contract—fishermen owe captain expectation damages

Fishermen announce that they would not work anyway unless the Captain promises them a fee of $100 in addition to the two cents per fish—**Captain agrees, fishermen perform under “modified contract”—ENFORCEABLE?**

No—lacking consideration—fisherman agreed to do no more than their prior obligation for additional pay

**R2C § 89** modification must be “fair and equitable in view of circumstances not anticipated by the parties when the contract was made”

**UCC § 2-209** “agreement modifying a contract within this Article needs no consideration to be binding” (but notes that extortion without legitimate commercial reason is ineffective as a violation of the duty of good faith)

###### Stilk v Myrick—1809

*Before leaving port sailors agreed to do “all they could under all the emergencies of the voyage”—two sailors deserted—in port the Captain promised that if he couldn’t find two replacements the deserters’ wages would be equally distributed among the remaining sailors—no formal exchange of consideration*

**Policy argument:** what would happen if sailors were allowed to re-negotiate deals once the ship was out to sea? would devastate the relationship between captains and sailors

**Unenforceable—against public policy**

###### Alaska Packers Association v Domenico—1902

*[same as hypo]—poor nets—at sea without readily available replacements—demand additional pay—granted*

**Unenforceable—takes advantage of Captain**—rule should be to enforce *when it appears that the fishermen would not have performed without the modification*

# PROMISSORY ESTOPPEL—Ricketts—Baird—Drennan—Goodman—Hoffman

*“because of your reliance, I would be estopped from denying that my promise lacked consideration”*

### Reliance Damages

I promise to paint your house for free—you decline an offer for painting for $10—I repudiate—you cover for $12—**I only owe you $2 because BUT FOR my promise you would have gotten the house painted for $10** (even though you *expected* to get it for free and instead you have to pay $12—don’t generally get expectation)

###### Rickets v Scothorn—1898

*Scothorn, relying on a promise from her grandfather’s will, quit her job to live off the promised cash. He said “none of his grandchildren work and she shouldn’t have to.”*

* “Her right to the money promised in the note was not made to depend upon on an abandonment of her employment.” *(even a condition would not be sufficient consideration—Hamer v Siwell)*
* **no bargained-for-exchange** 🡪 couldn’t usually enforce a gratuitous promise
* BUT Scothorn **changed her position** (*at her grandfather’s implicit suggestion*)to her disadvantage, **relying on the promise** 🡪
* **Gratuitous promise is enforceable.** (“*Grossly inequitable* to permit [Grandfather] to resist payment on the ground that the promise was given without consideration.”)

###### Baird v Gimbel Brothers—1933—Hand

*Construction bids—sub bids for linoleum*

Baird relied on Gimbel’s bid in submitting his own BUT Gimbel’s offer was withdrawn before Baird accepted it (if he could prove **implicit acceptance before offer was revoked** AND that he **relied in detriment** to himself)

###### Drennan v Star Paving—1958—Traynor

Construction bids—Star relied on Drennan’s sub bid

* Firm offer
* Implied offer of irrevocability (in exchange for use in contractor’s bid)
* Conditionally accepted (and formally accepted if contractor’s bid is accepted)

\*Drennan’s bid was too low by $7,800—Star’s marginal cost of cover was $3,800 🡪 efficient for Drennan to pay reliance damages rather than perform on his original bid

###### Goodman v Dicker—1948

*Goodman implied Dicker’s app. to distribute Emerson Radios had been accepted—app. eventually denied*

Goodman held to his **insinuation** (under equitable estoppel) that Dicker would get the franchise based on “settled principles” because: “his language…**leads another to do what he would not otherwise have done**”

###### Hoffman v Red Owl—1965

*Aspiring grocer moves all over and spends tons of money*

No final agreement BUT relying on promises Hoffman incurred detriment 🡪 promissory estoppel, Red Owl owes damages

**Adler**: at least implicitly bargained for the expenses incurred 🡪 enforceable without promissory estoppel

# BREACH & CONSTRUCTIVE CONDITION—Jacob & Youngs—Groves—Peevyhouse

Damages—cost of completion or market value difference?

###### Jacob & Youngs v Kent—1921—Cardozo—Market Value Difference

Wrong Pipe. **No material breach** (Cardozo: not material because not willful) 🡪 Damages = “Market differential” 🡪 0—though it would be costly to replace the pipe, it **wouldn’t add any value to the home** 🡪 no damages

###### Groves v John Wunder—1939—Cost of Completion

**Breach was material 🡪 owes cost of performance**

Groves contracted to have his land leveled—the contracted company willfully repudiated—Groves said it will cost him $60,000 to level the land, land would only be worth $12,000 if leveled

###### Peevyhouse v Garland Coal Mining—1962—Market Value Difference

Garland supposed to do clean up work on strip mines on Peevyhouse’s property after it finished with them—repudiated—cost of the work would have been $29,000—land would be improved by only a few hundred dollars—the total value of the land less than $5,000—**granted only $300, court found no idiosyncratic value**

**\*\*Dissent: look for changed circumstances**—if the parties could not anticipate the high cost when they contracted then the court will not award the high cost of completion damages; if, however, there are no changed circumstances the parties would have been taken into account the cost of completion in their bargaining and it should be awarded

# FAILURE OF BASIC ASSUMPTION—Sherwood— Laidlaw— Nester—Wood—Paradine—Taylor

###### Sherwood v Walker—1887

*The case of the fertile cow* **both thought she was barren**🡪 $80—with calf🡪 worth $850—Walker tries to rescind

\*\*price differential insufficient to prove a material difference in interpretation

**RULE:** a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact.

*Common law*: mistake goes to the **essence** of the contract 🡪 not enforceable

*Statute*: mistake as to **basic assumption** that is material 🡪 not enforceable

**DECISION**: beef cow is substantially different from breeding cow 🡪 contract void

### Expert Painter Mis-quotes Price

I will paint your house for $10,000—you pay me after completion—I used lower quality paint than we agreed—material?

Yes—you are not obligated to pay for the work unless I cure—delay may discharge your duty to perform—giving you a claim for damages for total breach.

Assume that in this illustration at all relevant times the contractually specified paint job has a market value of $8,000 while the job as I performed it has a market value of $7,000. Assume also that we agree to these facts (and that you don’t claim to attach any idiosyncratic value to the contractually specified work, which rules out any justification for the expense of repainting). What result if I am deemed to be in an uncured material breach that amounts to a total breach?

###### Laidlaw v Organ—1817—unilateral mistake

Organ bought tobacco from Laidlaw—knew about the Treaty of Ghent (public knowledge)–Laidlaw did not—affected tobacco prices—Laidlaw took his tobacco back claiming fraud for suppression of material circumstances not accessible to the vendor

Decision: Superior information doesn’t necessarily imply fraud

*\*\*can’t look to the implicit agreement because the information is asymmetrical*

###### Nester v Michigan Land & Iron—1888—“treated his limited knowledge as sufficient”

Nester bought timber from Michigan without warranty—wanted to get for ½ price because the lot he purchased was of only half the quality timber he anticipated—Michigan refused to sell with warranty—both parties had equal access to ascertaining the soundness of the timber (which couldn’t be conclusively determined until cut)

Contract enforced as written—no annulment or mistake

###### Wood v Boynton—1885

Wood brought Boynton (a jeweler) a stone—he offered to buy it for $1—said it might be topaz—turns out, it was an uncut diamond worth $700—testified that he had no idea, he had never seen an uncut diamond before

Sale final—value open to the investigation of both parties

###### Paradine v Jane—1647—Frustration of purpose

Renting land—it was taken over by someone else and he couldn’t make the profits of the land—lessor sued for rent

COULD: look to basic assumption (that land would not be overtaken by an invading prince)—was this a material change to a basic assumption?—OR—just fill in default rule 2: **if the parties had bargained over this circumstance, what would their agreement entail?** Adler—this is a better-guided inquiry

###### Taylor v Caldwell—1863—Impossibility

Caldwell leased The Surrey Music Hall and Gardens to Taylor for a future date—it burned down—does this constitute “disable to perform without any default in him”?

**Decision**: Basic assumption = existence of the Music Hall—material change to basic assumption? Yes🡪 contract void

OR look to least-cost-avoider: lessor should be held liable because he could have prevented fire—aligns incentive to protect the building (BUT COMES OUT WRONG)

###### Krell v Henry—1903—Frustration of Purpose

Krell agreed to lease his apartment to Henry to view the royal Coronation, which was rescheduled—Henry doesn’t need the room on those days anymore and Krell is suing for his rent

**Was the coronation the basis of the contract like the Music Hall was in *Taylor*?**

1. What, having regard to all the circumstances, was the foundation of the contract?
2. Was the performance of the contract prevented?
3. Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?

**Decision:** Yes to all—contract cancelled