CHAPTER ONE

INTERESTS PROTECTED BY CONTRACT LAW

The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

—Robert Frost

A. INTRODUCTION

Restatement (Second) of Contracts § 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Hawkins v. McGee

Supreme Court of New Hampshire, 1929.
84 N.H. 114, 146 A. 641.

H1 Action by George Hawkins against Edward R. B. McGee. Verdict for plaintiff, which was set aside. Transferred on exceptions. New trial.

H2 Assumpsit against a surgeon for breach of an alleged warranty of the success of an operation. Trial by jury. Verdict for the plaintiff. The writ also contained a count in negligence upon which a nonsuit was ordered, without exception.

H3 Defendant's motions for a nonsuit and for a directed verdict on the count in assumpsit were denied, and the defendant excepted. . . . The defendant seasonably moved to set aside the verdict upon the grounds that it was contrary to the evidence . . . and because the damages awarded by the jury were excessive. The court . . . found that the damages were excessive, and made an order that the verdict be set aside, unless the plaintiff elected to remit all in excess of $500. The plaintiff having refused to remit, the verdict was set aside "as excessive and against the weight of the evidence," and the plaintiff excepted.

H4 The foregoing exceptions were transferred by Scammon, J. The facts are stated in the opinion.

■ BRANCH, J.

1 The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar

tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand." The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

2 The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "experiment on skin grafting," in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable

basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

3 The substance of the charge to the jury on the question of damages appears in the following quotation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and for what injury he has sustained over and above what injury he had before." To this instruction the defendant seasonably excepted. By it, the jury was permitted to consider two elements of damage: (1) Pain and suffering due to the operation; and (2) positive ill effects of the operation upon the plaintiff's hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but, when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

4 "By 'damages,' as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract." *Davis v. New England Cotton Yarn Co.*, 77 N. H. 403, 404, 92 A. 732, 733. The purpose of the law is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." 3 Williston Cont. § 1338; * * * The measure of recovery "is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended." 3 Williston Cont. § 1341. "The only losses that can be said fairly to come within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms." *Davis v. New England Cotton Yarn Co.* * * *

5 The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied, and it is held that the measure of damages is the difference between the value of the machine, if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew, or ought to have known, would probably result from a failure to comply with its terms. * * *

6 The rule thus applied is well settled in this state. "As a general rule, the measure of the vendee's damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor's failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided." *Union Bank v. Blanchard*,

65 N. H. 21, 23, 18 A. 90, 91; * * *. We therefore conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages (4th Ed.) § 92. Damages not thus limited, although naturally resulting, are not to be given.

7 The extent of the plaintiff's suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. It was a legal detriment suffered by him which constituted a part of the consideration given by him for the contract. It represented a part of the price which he was willing to pay for a good hand, but it furnished no test of the value of a good hand or the difference between the value of the hand which the defendant promised and the one which resulted from the operation.

8 It was also erroneous and misleading to submit to the jury as a separate element of damage any change for the worse in the condition of the plaintiff's hand resulting from the operation, although this error was probably more prejudicial to the plaintiff than to the defendant. Any such ill effect of the operation would be included under the true rule of damages set forth above, but damages might properly be assessed for the defendant's failure to improve the condition of the hand, even if there were no evidence that its condition was made worse as a result of the operation.

9 It must be assumed that the trial court, in setting aside the verdict, undertook to apply the same rule of damages which he had previously given to the jury, and, since this rule was erroneous, it is unnecessary for us to consider whether there was any evidence to justify his finding that all damages awarded by the jury above $500 were excessive.

10 . . . . New trial.

NOTES

1. We have added the marginal paragraph numbers (H1, H2, . . .1, 2, 3, . . .) to make it easier for us to refer to specific portions of the opinion.

2. The first four paragraphs (H1–H4) are what is sometimes called a "headnote." These words were not written by the judge who decided the case, but by the reporter, that is, by the publisher of the volume of case reports. In modern reports, it's usually easy to see what parts were written by the judge and what parts were written by the book publisher. In older cases, that's sometimes a bit harder.

Because these words were written by someone whose job is reporting decisions, they use quite a bit of legal jargon. The reporter is trying to

state briefly the results of the litigation that led to the opinion of the New Hampshire Supreme Court, and the reporter is doing so on the assumption that the readers are practicing lawyers already familiar with legal procedure and legal language. The jargon will become more familiar as you become more accustomed to reading opinions. In the early stages of your law school work, you will certainly need to use a legal dictionary to try to make sense of such passages.

As a first effort, try to understand the headnote, looking up the following words in a legal dictionary: assumpsit . . . warranty . . . verdict . . . count . . . nonsuit . . . exception

2. The opinion above doesn't clearly state the amount that the plaintiff sought or the amount of the jury's verdict. A later case involving a dispute between Dr. McGee and his malpractice insurer reveals that Hawkins' complaint sought damages of $10,000, and that the jury verdict—which was set aside in the case above—was for $3000. *McGee v. United States Fidelity & Guar. Co.*, 53 F.2d 953 (1st Cir. 1931).

The headnote in the opinion printed above indicates that on the issue of damages, the trial judge employed a somewhat unusual procedure, known as *remittitur*. See H3. The jury returned a verdict for the plaintiff for $3000. The trial judge thought that the amount of the verdict was not supported by the evidence. He might have refused to enter judgment, and just let the plaintiff appeal. Instead, he did something a bit different. In essence he said to the plaintiff's lawyer "Look, I won't enter judgment for the $3000 full amount of the jury's verdict, but if the jury had returned a verdict for a smaller amount, say $500, I would have entered judgment for that amount. So, I'll give you a choice: take $500 and go home, or refuse that and take your chances on appeal." (Kind of like Monty Hall on Let's Make a Deal: "$500 or Door Number 2"). The plaintiff's lawyer decided not to take the $500, so the trial judge set aside the verdict and plaintiff brought the appeal.

3. The facts call to mind a medical malpractice scenario. Patients sue doctors all the time, contending that the doctors performed surgery in a negligent fashion. In *Hawkins v. McGee*, the patient did allege ordinary negligence in his complaint. But, as the opinion indicates, Dr. McGee also said things that could be construed as a promise that the operation would be successful. So Hawkins' complaint alleged two different causes of action: (1) a tort theory of malpractice ("count in negligence"), and (2) a contract theory of breach of a promise ("assumpsit . . . for breach of warranty").

The basis of the tort theory would have been a contention that Dr. McGee had acted negligently, that is, without the care one would expect of an ordinary physician. The headnote shows that the trial judge dismissed the tort count, and the patient's lawyer dropped the matter. It's not clear from the opinion why the plaintiff did not pursue the negligence theory any further. Perhaps the patient's lawyer could not find any other doctors willing to testify that Dr. McGee had acted

negligently. For whatever reason, the plaintiff did not appeal the dismissal of the negligence count. That information is reported, albeit in a kind of secret code, by the statement in H2 that "The writ also contained a count in negligence upon which a nonsuit was ordered, without exception." Since the plaintiff did not bring an appeal on that point, it's essentially irrelevant for purposes of the case that the New Hampshire Supreme Court had to decide.

4. Broadly speaking, the opinion deals with two issues: (1) did the evidence support a jury verdict for the patient on the theory that the doctor had made an enforceable promise about the outcome of the operation (¶¶ 1–2), and (2) were the trial judge's instructions to the jury correct on the issue of how the award of damages should be computed if the jury did find that the doctor made an enforceable promise (¶¶ 3–8). We will examine those two issues separately.

5. On the first issue—whether the evidence supported a verdict for the patient on a contract theory—you need to read ¶¶ 1 & 2 very carefully. Identify specifically what facts the evidence would support, and what the Court said about whether that fact alone would suffice to support the jury's verdict. One way of forcing yourself to do that is to suppose that you are the trial judge in a similar case that arose after the *Hawkins* decision. Suppose that the plaintiff proves some, but not all, of the facts akin to those in *Hawkins*. The doctor's lawyer moves for a directed verdict on the grounds that that evidence would not support a verdict for the patient on the contract theory. What ruling do you make on the basis of the *Hawkins* opinion?

6. On the second issue—how to compute damages in the contract action, you need to consider separately (1) the conceptual issue of what the award of damages is supposed to accomplish, and (2) the evidentiary and computational issue. For the moment, let's ignore the computational issues. In ¶ 4, the Court states that the purpose of contract damages to put the plaintiff in as good a position as he would have been in had the defendant performed the promise. That's a phrase that we will state again and again and again during this course. You'll get sick of hearing your professor say it. But, you'll keep forgetting to think through the implications of the point. That's why we will keep repeating it.

In ¶¶ 5 & 6, the Court takes that general concept and applies it to the setting of an action for breach of a "warranty," that is, a promise by a seller of a machine that the machine will do certain things. In ¶ 5, the Court notes that in such a case the measure of damages would be the "difference between the value of the machine, if it had corresponded with the warranty and its actual value." So, in such a case we would have to figure out how much the machine would have been worth if it had been as promised and how much the machine is worth in the state that it was actually delivered. Now, by analogy, we apply that concept to the somewhat unusual situation of a doctor's promise about the result of an operation. Suppose that the operation caused no pain. Suppose that (somehow) we can conclude:

(a) that the value of the patient's hand if the operation had been successful would have been $1,700,000;

(b) that the value of the patient's hand in its original pre-operation state was $1,000,000; and

(c) that the value of the patient's hand in the condition it was in after the botched operation was $500,000.

What recovery would the plaintiff be entitled to in the contract action for breach of promise? By comparison, consider what recovery the plaintiff would be entitled to in a tort action for malpractice, which is designed to compensate the plaintiff for the harm.

7. Now think about how, in an actual lawsuit, one would prove what the "value" of the hand in its various conditions would be. What evidence would you want to introduce on the issue of damages if you were representing the patient in *Hawkins*?

8. The following background facts concerning *Hawkins v. McGee* (based on interviews and correspondence with the Hawkins family and a local lawyer) are reported in Jorie Roberts, Hawkins Case: A Hair-Raising Experience, Harvard Law School Record, March 17, 1978, at 1, 7, 13.

. . . George Hawkins was born in January, 1904—the second of Rose Wilkinson and Charles Augustus Hawkins' six children . . . .

One morning in 1915, 11-year-old George burned his right hand while preparing breakfast for his father on the family's wood-burning stove. At the time, George was trying to turn on the kitchen light to illuminate the stove, but an electrical storm the night before had damaged the wiring so that George received a severe shock. One of George's younger brothers, Howard Hawkins, now an insurance agent in Berlin, described George's initial scar as a "small pencil-size scar" which was between his thumb and index finger and did not substantially affect his use of the hand. Nevertheless, Charles Hawkins took his son George to skin specialists in Montreal after the accident; but there the doctors advised the Hawkinses against doing anything to restore the hand.

During this period, the family physician, Edward McGee, while treating one of George's younger brothers for pneumonia, also became aware of George's scarred hand. Later, in 1919, after returning from several years of medical service in Europe during World War I, McGee requested George and his parents to let him operate on the hand in order to restore it to "perfect" condition.

According to Dorothy St. Hilaire, George's younger sister, McGee claimed to have done a number of similar skin grafts on soldiers in Germany during the war, although he later admitted that he had really only observed such operations.

St. Hilaire recollects that McGee, in persuading George to undergo the surgery, emphasized the social problems which his scarred hand might create. McGee encouraged the Hawkinses to allow him to operate

on the hand for three years, until finally George agreed shortly after his 18th birthday . . . .

McGee operated on George's hand in the St. Louis Hospital in Berlin in March of 1922. The skin graft operation was supposed to be quick, simple, and effective, and to require only a few days of hospitalization. Instead, St. Hilaire recalls that her brother bled very badly for several days . . . .

. . . George was, in the words of his brother Howard, "in the throes of death" for quite a while after the operation because of his extensive bleeding and the ensuing infection. Moreover, the post-operation scar covered his thumb and two fingers and was densely covered with hair. Howard Hawkins remembers that George's hand was partially closed up and continued to bleed periodically throughout his life . . . .

The jury only awarded the Hawkinses $3,000 for damages, and the final settlement was for $1,400 and lawyers fees. St. Hilaire believes the jurors, while at heart solidly behind the Hawkinses' cause, were afraid to return heavier damages against McGee because he was one of the more prominent physicians in the area. Charles Hawkins took the $1,400 and his injured son back to Montreal to see if any subsequent operations would alleviate George's deformity, but the doctors there said that the grafted skin was so tough that nothing more could be done . . . .

Hawkins' crippled hand affected his employment and outlook throughout his lifetime. After the operation, George Hawkins never returned to high school, even though, in Howard's opinion, "George was very bright, learned quickly, and had a pleasing personality." He was encouraged by his parents to finish school, but would not because, in his siblings' view, he was embarrassed by his hand.

Karl Llewellyn, The Bramble Bush (1930)

Extracted from pp. 40–45 THE BRAMBLE BUSH by Karl Llewellyn (1930), By permission of Oxford University Press

[The following passage is from a book written for law students by one of the "giants" of twentieth century American law, Karl Llewellyn. It attempts to articulate some of the implicit assumptions that lawyers make when they are "reading cases." You are just starting that process, so you should not expect to master it, or even be more or less proficient at it, for a long time. A good deal of your time in law school will be devoted to the task of learning to read and interpret cases. Right now, the things that Llewellyn says in this passage are likely to strike you as fairly obvious or inconsequential. That is because you have not yet had to wrestle with the problems of trying to figure out how to read and interpret judicial opinions. Here's our suggestion: Read the passage below now, and take from it whatever enlightenment you may find in it. Then, come back and re-read this passage every month or so throughout this year (and even beyond). You will see more and more in this passage as you have more and more experience with the process of reading cases.]

The first thing to do with an opinion, then, is read it. The next thing is to get clear the actual decision, the judgment rendered. Who won, the plaintiff or defendant? And watch your step here. You are after in first instance the plaintiff and defendant *below*, in the trial court. In order to follow through what happened you must therefore first know the outcome *below*; else you do not see what was appealed from, nor by whom. You now follow through in order to see exactly what *further* judgment has been rendered on appeal. The stage is then cleared of form—although of course you do not yet know all that these forms mean, that they imply. You can turn now to what you want peculiarly to know. Given the actual judgments below and above as your indispensable framework—what has the case decided, and what can you derive from it as to what will be decided later?

You will be looking, in the opinion, or in the preliminary matter plus the opinion, for the following: a statement of the facts the court assumes; a statement of the precise way the question has come before the court—which includes what the plaintiff wanted below, and what the defendant did about it, the judgment below, and what the trial court did that is complained of; then the outcome on appeal, the judgment; and finally the reasons this court gives for doing what it did. This does not look so bad. But it is much worse than it looks.

For all our cases are decided, all our opinions are written, all our predictions, all our arguments are made, on four certain assumptions. They are the first presuppositions of our study. They must be rutted into you till you can juggle with them standing on your head and in your sleep.

(1) *The court must decide the dispute that is before it*. It cannot refuse because the job is hard, or dubious, or dangerous.

(2) *The court can decide only the particular dispute which is before it*. When it speaks to that question it speaks ex cathedra, with authority, with finality, with an almost magic power. When it speaks to the question before it, it announces *law*, and if what it announces is new, it legislates, it *makes* the law. But when it speaks to any other question at all, it says mere words, which no man needs to follow. Are such words worthless? They are not. We know them as judicial *dicta*; when they are wholly off the point at issue we call them *obiter dicta*—words dropped along the road, wayside remarks. Yet even wayside remarks shed light on the remarker. They may be very useful in the future to him, or to us. But he will not feel bound to them, as to his ex cathedra utterance. They came not hallowed by a Delphic frenzy. He may be slow to change them; but not so slow as in the other case.

(3) *The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes*. Our legal theory does not admit of single decisions standing

> on their own. If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a rule as they decide. So far, good. But how wide, or how narrow, is the general rule in this particular case? That is a troublesome matter. The practice of our case-law, however, is I think fairly stated thus: it pays to be suspicious of general rules which look too wide; it pays to go slow in feeling certain that a wide rule has been laid down at all, or that, if seemingly laid down, it will be followed. For there is a fourth accepted cannon
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> (4) Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him. You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case in hand, and to learn how to interpret all that has been said merely as a reason for deciding that case that way.

Now why these canons? The first, I take it, goes back to the primary purpose of law. If the job is in first instance to settle disputes which do not otherwise get settled, then the only way to do it is to do it. And it will not matter so much how it is done, in a baffling instance, so long as it is done at all.

The third, that cases must be decided according to a general rule, goes back in origin less to purpose than to superstition. As long as law was felt as something ordained of god, or even as something inherently right in the order of nature, the judge was to be regarded as a mouthpiece, not as a creator; and a mouthpiece of the general, who but made clear an application to the particular. Else he broke faith, else he was arbitrary, and either biased or corrupt. Moreover, justice demands, wherever that concept is found, that like men be treated alike in like conditions. Why, I do not know; the fact is given. That calls for general rules, and for their even application. So, too, the "separation of powers" comes in powerfully to urge that general rules are made by the Legislature or the system, not the judges, and that the judge has but to act *according* to the general rules there are. Finally, a philosophy even of expediency will urge the same. Whatever may be the need of shaping decision to individual cases in the juvenile court, or in the court of domestic relations, or in a business man's tribunal for commercial cases—still, when the supreme court of a state speaks, it speaks first to clear up a point of general interest. And the responsibility for formulating general policy forces a wider survey, a more thorough study of the policies involved. So, too, we gain an added guarantee against either sentimentalism or influence in individual cases. And, what is not to be disregarded, we fit with the common notion of what justice calls for. . . .

Back, if I may now, to the why of the two canons I have left: that the court can decide only the particular dispute before it; that all that is said

is to be read with eyes on that dispute. Why these? I do believe that here we have as fine a deposit of slow growing wisdom as ever has been laid down through the centuries by the unthinking social sea. Here, hardened into institutions, carved out and given line by rationale. What is this wisdom? Look to your own discussion, look to any argument. You know where you would go. You reach, at random if hurried, more carefully if not, for a foundation, for a major premise. But never for itself. Its interest lies in leading to the conclusion you are headed for. You shape its words, its content, to an end decreed. More, with your mind upon your object you use words, you bring in illustrations, you deploy and advance and concentrate again. When you have done, you have said much you did not mean. You did not mean, that is, *except* in reference to your point. You have brought generalization after generalization up, and discharged it at your goal; all, in the heat of argument, were over-stated. None would you stand to, if your opponent should urge them to *another* issue.

So with the judge. Nay, more so with the judge. He is not merely human, as are you. He is, as well, a lawyer, . . . and as such skilled in manipulating the resources of persuasion at his hand. A lawyer, and as such prone without thought to twist analogies, and rules, and instances, to his conclusion. A lawyer, and as such peculiarly prone to disregard the implications which do not bear directly on his case.

More, as a practiced campaigner in the art of exposition, he has learned that one must prepare the way for argument. You set the mood, the tone, you lay the intellectual foundation—all with the case in mind, with the conclusion—all, because those who hear you also have the case in mind, without the niggling criticism which may later follow. You wind up, as a pitcher will wind up—and as in the pitcher's case, the wind-up often is superfluous. As in the pitcher's case, it has been known to be intentionally misleading.

With this it should be clear, then, why our canons thunder. Why we create a class of dicta, of unnecessary words, which later readers, their minds now on quite other cases, can mark off as not quite essential to the argument. Why we create a class of *obiter dicta*, the wilder flailings of the pitcher's arms, the wilder motions of his gum-ruminant jaws. Why we set about, as our job, to crack the kernel from the nut, to find the true rule the case in fact decides: *the rule of the case*.

Now for a while I am going to risk confusion for the sake of talking simply. I am going to treat as the rule of the case the *ratio decidendi*, the rule *the court tells you* is the rule of the case, the ground, as the phrase goes, upon which the court itself has rested its decision. For there is where you must begin, and such refinements as are needed may come after.

The court, I will assume, has talked for five pages, only one of which portrayed the facts assumed. The rest has been discussion. And judgment has been given for the party who won below: judgment affirmed. We seek the rule.

The first thing to note is this: no rule can be the *ratio decidendi* from which the actual judgment (here: affirmance) does not follow. Unless affirmance follows from a rule, it cannot be the rule which produced an actual holding of affirmance. But the holding is the decision, and the court speaks ex cathedra only as to the dispute decided, and only as to the decision it has made. At this point, too, I think you begin to see the bearing of the procedural issue. There can be a decision (and so an ex cathedra ratio) only as to a point which is before the court. But points come before a court of review by way of specific complaint about specific action of the court below, and in no other way. Hence nothing can be held which is not thus brought up.

Lucy v. Zehmer

Supreme Court of Appeals of Virginia, 1954.
196 Va. 493, 84 S.E.2d 516.

■ BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: 'We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer,' and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out 'the memorandum' quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar

with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, 'I bet you wouldn't take $50,000.00 for that place.' Zehmer replied, 'Yes, I would too; you wouldn't give fifty.' Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete.' Lucy told him he had better change it to 'We' because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, saying, 'You don't need to give me any money, you got the agreement there signed by both of us.'

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On

this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was 'pretty high.' He said to Lucy, 'Boy, you got some good liquor, drinking, ain't you?' Lucy then offered him a drink. 'I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too.'

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, 'I bet you wouldn't take $50,000.00 for it.' Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, 'You haven't got $50,000 in cash.' Lucy said he did and Zehmer replied that he did not believe it. They argued 'pro and con for a long time,' mainly about 'whether he had $50,000 in cash that he could put up right then and buy that farm.'

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, 'you sign that piece of paper here and say you will take $50,000.00 for the farm.' He, Zehmer, 'just grabbed the back off of a guest check there' and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to 'see if I recognize my own handwriting.' He examined the paper and exclaimed, 'Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine.'

After Zehmer had, as he described it, 'scribbled this thing off,' Lucy said, 'Get your wife to sign it.' Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he 'was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm.' Zehmer then 'took it back over there . . . and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' . . . I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before."

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, 'I bet you wouldn't take $50,000 cash for that farm,' and Zehmer replied, 'You haven't got $50,000 cash.' Lucy said, 'I can get it.' Zehmer said he might form a company and get it, 'but you haven't got $50,000.00 cash to pay me tonight.' Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, 'I agree to

sell the Ferguson Place to W. O. Lucy for $50,000.00 cash.' Lucy said, 'All right, get your wife to sign it.' Zehmer came back to where she was standing and said, 'You want to put your name to this?' She said 'No,' but he said in an undertone, 'It is nothing but a joke,' and she signed it.

She said that only one paper was written and it said: 'I hereby agree to sell,' but the 'I' had been changed to 'We'. However, she said she read what she signed and was then asked, 'When you read 'We hereby agree to sell to W. O. Lucy,' what did you interpret that to mean, that particular phrase?' She said she thought that was a cash sale that night; but she also said that when she read that part about 'title satisfactory to buyer' she understood that if the title was good Lucy would pay $50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it in his wallet, then said to Zehmer, 'Let me give you $5.00,' but Zehmer said, 'No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke.' Lucy then said at least twice, 'Zehmer, you have sold your farm,' wheeled around and started for the door. He paused at the door and said, 'I will bring you $50,000.00 tomorrow. . . . No, tomorrow is Sunday. I will bring it to you Monday.' She said you could tell definitely that he was drinking and she said to her husband, 'You should have taken him home,' but he said, 'Well, I am just about as bad off as he is.'

The waitress referred to by Mrs. Zehmer testified that when Lucy first came in 'he was mouthy.' When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, 'I will give you so much for the farm,' and Zehmer said, 'You haven't got that much.' Lucy answered, 'Oh, yes, I will give you that much.' Then 'they jotted down something on paper . . . and Mr. Lucy reached over and took it, said let me see it.' He looked at it, put it in his pocket and in about a minute he left. She was asked whether she saw Lucy offer Zehmer any money and replied, 'He had five dollars laying up there, they didn't take it.' She said Zehmer told Lucy he didn't want his money 'because he didn't have enough money to pay for his property, and wasn't going to sell his farm.' Both of them appeared to be drinking right much, she said.

She repeated on cross-examination that she was busy and paying no attention to what was going on. She was some distance away and did not see either of them sign the paper. She was asked whether she saw Zehmer put the agreement down on the table in front of Lucy, and her answer was this: 'Time he got through writing whatever it was on the paper, Mr. Lucy reached over and said, 'Let's see it.' He took it and put it in his pocket,' before showing it to Mrs. Zehmer. Her version was that Lucy kept raising his offer until it got to $50,000.

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he 'was high as a Georgia pine,' and that the transaction 'was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most.' That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, § 133 b., p. 483; *Taliaferro v. Emery,* 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning 'I hereby agree to sell.' Zehmer first said he could not remember about that, then that 'I don't think I wrote but one out.' Mrs. Zehmer said that what he wrote was 'I hereby agree,' but that the 'I' was changed to 'We' after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, 'Well, with the high-

price whiskey you were drinking last night you should have paid more. That was cheap.' Lucy testified that at that time Zehmer told him that he did not want to 'stick' him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: 'I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00.' A disinterested witness testified that what Zehmer said to Lucy was that 'he was going to let him up off the deal, because he thought he was too tight, didn't know what he was doing. Lucy said something to the effect that 'I have been stuck before and I will go through with it."

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, 'We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts." *First Nat. Bank v. Roanoke Oil Co.,* 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered

Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. * * *

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. * * *

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, * * *

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

. . .

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

NOTES

1. In *Lucy v. Zehmer*, Buyer sued Seller seeking "specific performance" of Seller's promise to sell the land. What that means is that

the Buyer wanted an order from the court forcing the seller to convey the land. As we will see, that's not the usual form of remedy. Other than in cases to enforce promises to convey real estate, considered below, a successful lawsuit ordinarily ends with the plaintiff obtaining an award of damages, rather than an order to the defendant to do something. For example, in *Hawkins*, the court did not order the doctor to fix the patient's hand, instead, the court said that the patient was entitled to recover from the doctor an amount of money computed to place the patient in the position he would have been in if the promise had been performed.

2. The plaintiff in *Lucy* was the buyer, and he lost at trial; that is, the trial court ruled that the plaintiff had not proved that the defendant really made a serious promise to sell the land. As you can see from the opinion, deciding whether Zehmer seriously intended to sell or was just joking requires a pretty careful examination of the facts. Ordinarily fact determinations are pretty much left to the fact-finder at trial—either the jury in a case tried to a jury or the trial judge in a case tried without a jury. Ordinarily an appellate court will not disturb the findings made at trial on an issue of fact, unless no reasonable fact-finder could have decided the issue as it was decided at trial. The appellate court in *Lucy v. Zehmer* seems to have been willing to reverse on a largely factual matter. That's a bit surprising, and we really can't give you a convincing explanation of why that happened. For our purposes, the case is useful as an exercise in how one might treat facts at trial. That is, we'll ignore the appellate procedure points and consider how one might have argued the case to the fact-finder (judge or jury) at trial given the evidence that was introduced.

So, look at the opinion carefully to identify what facts support a conclusion that Lucy thought that Zehmer was making a serious promise to sell, and what facts support a conclusion that Lucy should have realized that Zehmer was just joking.

3. As the opinion notes, intoxication can deprive someone of their capacity to contract (in somewhat the same way as an infant is deemed to lack the capacity to contract). But such intoxication must be so extreme that the person is unable to understand the nature of the business at hand. Section 16 of the Restatement (Second) of Contracts points also to the relevance of the question of whether the other party has reason to know of the extent of the intoxication, or whether that party induced it (see Cmt b). It is rare that someone might escape contractual obligations on this ground.

B. SOURCES OF CONTRACT LAW

For most of the subjects we study in this course, the governing law is found in the rules established by judicial decisions over the centuries. As the phrase goes, this is "common law" as distinguished from rules that are the law by virtue of enactment by the legislature. For example, in *Hawkins v. McGee* and *Lucy v. Zehmer,* the principal authorities cited by the courts were earlier decision of courts in the same state, or other states if there were no cases in that state on the point. One of the principal tasks

for you as beginning law students will be to see how to work with judicial opinions in resolving new issues.

Another important goal of the first year of law study is to work toward precision in the use of language. For example, suppose that you were asked to describe the *Hawkins v. McGee* decision in a few sentences. It can be done, but it's not easy. In working toward precision in language it's helpful to see how other lawyers have expressed a point, when they have given the subject careful thought. For that purpose, one of our main tools will be the RESTATEMENT (SECOND) OF CONTRACTS, excerpts of which appear in the Selected Source Materials book that we use in this course.

Restatement (Second) of Contracts

Please read—very carefully—the Editors' Introduction passage explaining the Restatement, and look at the Table of Contents of the Restatement. It's important to understand what the Restatement is, and is not. No body having any governmental power produced or adopted the Restatement. So a certain proposition cannot be the law simply by virtue of the fact that it is written in the Restatement. Rather, the Restatements are the product of a private organization, the American Law Institute ("ALI"), dedicated to working toward improvement of the law. To get a better idea of the ALI's work, look at their website (www.ali.org) especially the "About ALI" tab.

Uniform Commercial Code ("U.C.C")

We will also examine some subjects that are governed by statutes. In some cases, those will simply be statutes adopted by the legislatures of particular states. But there is one statute that we will examine from time to time that has a somewhat different background—the Uniform Commercial Code ("U.C.C"). Article 2 of the U.C.C. deals with the sale of goods. Excerpts from Article 2 also appear in the Selected Source Materials book that we use in this course. Please read—very carefully—the Editors' Introduction passage explaining the Uniform Commercial Code, and look at the table of contents of Article 2. The recommended text of the U.C.C. is produced by a non-governmental organization, the National Conference of Commissioners on Uniform State Law (now called the "Uniform Law Commission"). As with the Restatements, the fact that the sponsoring body has "adopted" something as part of the U.C.C. does not make it law. Rather, the U.C.C. or a part of it is law in a given jurisdiction only if it has been adopted as the law in that jurisdiction. Unlike the Restatements, however, the U.C.C. is a statute. That is, it has force of law not by virtue of action of the courts, but by virtue of enactment by the legislature of the state in question. The idea behind the U.C.C. is to get all of the states to adopt the same statute. That project has been pretty successful, but there is nothing that says that the legislature of a certain state has to adopt precisely the recommended text. Article 2 of the U.C.C. had been enacted by 49 states,

plus the District of Columbia and the Virgin Islands.[a] Most states have made some changes when they adopted the statute, so the actual law in a given state is not the U.C.C, but the particular statute based on the U.C.C. that was adopted in that state. In law school, it's convenient to look at the text of "the U.C.C," but in practice you must consult the particular statutory version of the jurisdiction in question.

Students are very frequently confused by the scope of Article 2 of the U.C.C. First, be clear on terminology. The U.C.C. is a very lengthy statute dealing with all kinds of commercial law subjects, such as checks, security interests, etc., etc. Article 2—dealing with the sale of goods—is the only part of the U.C.C. that we will examine in this course. Many of you will take other courses in Commercial Law later in law school and study other parts of the U.C.C.

Second, and perhaps most troublesome, there is a tendency to assume, based on nothing more than the title, that Article 2 of the U.C.C. applies only to transactions among businesses. *That is wrong*. Article 2 applies to any contract for the sale of goods. So if your friend sells you their used bicycle, that's a transaction governed by Article 2 of the U.C.C., even though neither of you is involved in any aspect of the bicycle business. There are some rules in Article 2 that apply only to "merchants," but aside from these rules, U.C.C. Article 2 applies to any sale of goods between anybody.

Third, U.C.C. Article 2 applies only to the *sale* of goods. That means that U.C.C. Article 2 has no application to subjects other than sales. For example, a contract between an advertising agency and a toothpaste company would involve services to design an ad campaign, not the sale of toothpaste. So, that arrangement would not be governed by U.C.C. Article 2. Even if we are dealing with a sale, Article 2 of the U.C.C. applies only to the sale of *goods*. In Anglo-American law there is a very deep divide between "real property"—like land and houses—and "personal property"—like cars and TVs. So a contract for sale of an office building would not be covered by U.C.C. Article 2, but a contract for sale of a photocopy machine would be governed by U.C.C. Article 2.

Later in the course, we will take a brief look at another body of law governing the sale of goods, but this time *international* sales: the United Nations Convention on the International Sale of Goods, or "CISG". We'll see that this body of law deals with import-export contracts, but actually excludes consumer contracts from its reach. Like the U.C.C., the CISG can displace inconsistent rules of state common law when certain conditions are met.

Finally, U.C.C. Article 2 does not attempt to be a complete statement of all of the rules of contract law concerning contracts for the sale of goods. For example, in the next Chapter we will spend a good deal of time

[a] Steven J. Burton & Melvin A. Eisenberg, Contract Law: Selected Source Materials (2014 ed), 2 (law as of May 1, 2012).

on questions of contract formation, some of which turn on the concepts of "offer" and "acceptance." As we will see, there are a few rules on these matters in Article 2, but if there doesn't happen to be a rule on the specific issue in U.C.C. Article 2, then a court would treat it in the same fashion as any other issue of contract law. The court would look to general contract law in the state in question, or might look to some secondary source, like a treatise on contract law or the RESTATEMENT (SECOND) OF CONTRACTS.

The following case and problems provide an opportunity to examine more carefully the relationship between U.C.C. Article 2 and other law. Before reading the case, refer to:

UCC §§ 2–102, 2–106(1), 2–725(1)

Custom Communications Engineering, Inc. v. E.F. Johnson Co.

Superior Court of New Jersey, Appellate Division, 1993.
269 N.J.Super. 531, 636 A.2d 80.

The central issue on appeal is whether the four-year statute of limitations under the Uniform Commercial Code (UCC), *N.J.S.A.* 12A:2–725(1), is applicable to the parties' dealership agreement.

Plaintiff Custom Communications Engineering, Inc. (Custom) appeals from an order for summary judgment dismissing its complaint against defendants E.F. Johnson Company (Johnson). . . . In its complaint, Custom seeks damages against Johnson for economic loss arising from Johnson's termination of its dealership agreement with Custom. . . . The Law Division judge determined that *N.J.S.A.* 12A:2–725(1) applied and therefore Custom's complaint was time-barred because it was filed four years after the accrual of its cause of action. We affirm the summary judgment order . . . .

Johnson is a manufacturer of radio equipment. On June 17, 1978, Custom entered into a Land Mobile Dealer Agreement with Johnson which granted Custom the right to sell and service Johnson's products within a designated "Dealer's Territory" in northern New Jersey. The agreement provides that Custom is required to use its best efforts to promote the sale of Johnson products in the designated area and to maintain an inventory of products, as well as a service facility for the benefit of Johnson customers.

The agreement also restricts Custom to the selling of Johnson products within its designated territory. Although the agreement does not expressly state that Custom's territory was exclusive, Custom claims that Johnson had made oral representations as to its exclusivity. Paragraph 3 of the agreement provides that Custom may sell Johnson products in the territory of other dealers only upon their approval and upon Custom paying them compensation for the sales. Paragraph 11

specifies that the relationship between the parties was "that of buyer and seller." Finally, paragraph 14 provides that either party may terminate the agreement, with or without cause, upon thirty days' written notice.

According to Custom, in 1978 Johnson began making sales in Custom's territory through other dealers without permission and without compensating Custom. Custom also claims that Johnson established other dealers in Custom's "exclusive" territory beginning some time in 1981–82. On March 18, 1985, Johnson terminated the agreement.

. . .

On April 19, 1988, Custom filed the present complaint . . . . [Johnson] moved for summary judgment, arguing that Custom's cause of action accrued no later than 1982, and thus was barred by the four-year statute of limitations under the UCC, *N.J.S.A.* 12A:2–725. Judge D'Ambrosio of the Law Division agreed, reasoning that since the parties were involved in a "sales" agreement, Custom's claim of breach of contract was governed by the UCC time-bar. . . .

N.J.S.A. 12A:2–725(1) provides that an action for breach of any contract for "sale" under the UCC must be commenced within four years after the accrual of the cause of action. *N.J.S.A.* 2A:14–1, the six-year statute of limitation generally governing breach of contract claims, expressly states that its time-bar does not apply to any action governed by *N.J.S.A.* 12A:2–725(1). Article 2 of the UCC applies to "transactions in goods." *N.J.S.A.* 12A:2–102. The term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid [.]" *N.J.S.A.* 12A:2–105(1). A "sale" involves "the passing of title from the seller to the buyer for a price." *N.J.S.A.* 12A:2–106(1).

Notwithstanding these narrowly-defined terms, whether *N.J.S.A.* 12A:2–725(1) applies depends on how the contract between the parties may be accurately characterized: as one involving a transaction of goods (*N.J.S.A.* 12A:2–102) plus incidental services, or as one for services plus the incidental sale of goods. * * * The legal analysis most frequently employed when courts are faced with such mixed contracts is that Article 2 of the UCC is applicable "if the sales aspect predominates and is inapplicable if the service aspect predominates." Sonja A. Soehnel, Annotation, Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services, 5 A.L.R. 4th 501, 505 (1981), and see cases annotated therein.

Custom argues that the six-year statute of limitations under *N.J.S.A.* 2A:14–1 applies because its agreement with Johnson was a dealership or distributorship, the predominate purpose of which was not the "sale" of goods, but for Custom to act as Johnson's agent in promoting its products, and to provide a service facility for customers who have purchased those products.

No doubt there are nonsale aspects to the parties' agreement. However, we view the nonsale components as intending to foster the dominant purpose of the agreement: to sell Johnson products through Custom to customers in Custom's distribution area. For example, under the agreement, Custom is required to buy from Johnson and maintain an inventory of Johnson products. Also, Custom's purchase orders are subject to the price, terms and conditions set by Johnson at the time the order was made, and Johnson reserves the right to "alter . . . the credit terms upon which [Custom] *buys* [Johnson's] Products and parts thereof." (Emphasis added). Finally, paragraph 11 of the agreement expressly states that the relationship between the parties shall be "buyer" and "seller." Thus, it is clear that a critical aspect of the agreement is the sale of goods from Johnson to Custom "for a price." *N.J.S.A.* 12A:2–106(1).

We accept Custom's argument that the agreement may be characterized as a dealership or distributorship contract: Custom is an intermediary in the consumer chain whose function is to promote and sell products manufactured by Johnson. Focusing strictly on the definitions under Article 2, one might assume that the UCC does not reach such a relationship because of the hybrid nature of the parties' respective roles.

However, the rule in most out-of-state jurisdictions is that dealerships or distributorships are to be treated as sales of goods contracts under the UCC. * * * [citing numerous cases] The common theme expressed in nearly all of the cases is that, although most dealership or distributorship agreements involve more than a mere sale of goods, the sales aspect of the relationship predominates. * * * Accordingly, courts have not hesitated to conclude that a direct dealership agreement, as here, is subject to the four-year statute of limitations under § 2–725(1) of the UCC. * * *

We adopt the majority rule as sound, since it is entirely consistent with the underlying purposes of the UCC: to foster consistency and predictability in the commercial marketplace. *See N.J.S.A.* 12A:1–102. Indeed, for that reason, our Supreme Court has observed that "the U.C.C. is the more appropriate vehicle for resolving commercial disputes arising out of business transactions between persons in a distributive chain." *Spring Motors Distribs., Inc. v. Ford Motor Company*, 98 N.J. 555, 571, 489 A.2d 660 (1985). This fundamental theme of the UCC is particularly pertinent in applying a statute of limitations to claims arising under Article 2. The purpose of § 2–725(1) is "[t]o introduce a uniform statute of limitations for sales contracts," thus eliminating jurisdictional variations. Comment to *N.J.S.A.* 12A:2–725(1). Application of the UCC time-bar to distributorship and dealership agreements accommodates the interests of both parties: it permits the nationwide merchant-seller to rely on the repose afforded by a uniform statute, and gives notice to the local merchant-dealer that all claims for economic loss under Article 2 must be filed within four years of the accrual of its cause of action.

The order for summary judgment in favor of Johnson is affirmed. . . .

PROBLEM

Here are excerpts from New Jersey's generally applicable statute of limitations:

> New Jersey Statutes § 2A:14–1. (6 years)
>
> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels . . . or for recovery upon a contractual claim or liability, express or implied, not under seal . . . shall be commenced within 6 years next after the cause of any such action shall have accrued. This section shall not apply to any action for breach of any contract for sale governed by section 12A:2–725 of the New Jersey Statutes.
>
> New Jersey Statutes § 2A:14–2 (2 years)
>
> Every action at law for an injury to the person caused by the wrongful act neglect or default of any person within this state shall be commenced within 2 years next after the cause of action shall have accrued.

Here is New Jersey's enactment of the statute of limitations suggested in Article 2 of the Uniform Commercial Code:

> New Jersey Statutes § 12A:2–725
>
> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

Note that the U.C.C. Article 2 statute of limitations (N.J. § 12A:2–725) applies only if the case is otherwise governed by U.C.C. Article 2. That depends on whether the case involves a sale "of goods." See U.C.C. §§ 2–102 & 2–106(1). So, if the case involves a sale "of goods," the statute of limitations is four years. If the case involves some other form of contract, the statute of limitations is six years.

Assume that all of the events below occur in New Jersey.

1. Safeway Stores, Inc. entered into a contract to sell a vacant store to Budget Department Stores, Inc. (For simplicity, please make the somewhat unrealistic assumption that there is no down payment). Safeway refused to perform the contract. Budget found a similar store and bought it, but it cost $350,000 more. Five years after the Safeway-Budget contract, Budget brings a lawsuit against Safeway. Safeway says that the suit is barred by the statute of limitations.

Is the case governed by the general statute of limitations in NJ Statutes § 2A:14–1 or the NJ U.C.C. Article 2 statute of limitations in NJ Statutes § 12A:2–725?

2. Sabeena Consumer entered into a contract to sell her big screen TV to Brie Neighbor for $1200. Sabeena refused to perform the contract. Brie found a similar TV elsewhere and bought it, but it cost $2000.

Five years after the Sabeena-Brie contract, Brie brings a lawsuit against Sabeena. Sabeena says that the suit is barred by the statute of limitations.

Is the case governed by the general statute of limitations in NJ Statutes § 2A:14–1 or the NJ U.C.C. Article 2 statute of limitations in NJ Statutes § 12A:2–725?

3. Brunswick Auto Parts Co. borrowed $75,000 from First National Bank to pay the price of an inventory of auto parts that Brunswick bought from Secaucus Equipment Inc. Brunswick signed a loan agreement promising to repay the $75,000 to First National Bank in one year. Brunswick failed to repay the loan when it came due.

Five years after Brunswick's default, First National Bank sues Brunswick for the $75,000.

Is the case governed by the general statute of limitations in NJ Statutes § 2A:14–1 or the NJ U.C.C. Article 2 statute of limitations in NJ Statutes § 12A:2–725?

4. Suppose that the events in *Hawkins v. McGee* occurred in New Jersey, and that Hawkins brought the suit against Dr. McGee three years after the operation.

Would the case be governed by the 6 year statute of limitations in New Jersey Statutes § 2A:14–1 or the 2 year statute of limitations in New Jersey Statutes § 2A:14–2?

C. OBJECTIVES OF CONTRACT REMEDIES

1. COMPENSATION OR PUNISHMENT?

Oliver Wendell Holmes, The Path of the Law (1897)

10 Harv. L. Rev. 457, at 459, 460–2

I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of

learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider—a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. . . .

. . . .

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Take again a notion which as popularly understood is the widest conception which the law contains—the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. . . .

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.

NOTES & QUESTIONS

1. Oliver Wendell Holmes, Jr (1841–1935), exercised a significant influence on the development of American private law. He served as justice and then chief justice of the Massachusetts Supreme Judicial Court for two decades, and then as justice of the U.S. Supreme Court for another three decades, applying a pragmatic jurisprudence that went on to be cited in many foundational cases of contract law. Do you agree that the moral pangs caused by breach of a promise are to be left out of the law of contract? For a skeptical view, see, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

2. Suppose that an out-of-work artist agrees to paint a house for $12,000. Before the time for performance, the artist gets an opportunity to paint a portrait for $20,000. The houseowner can get someone else to paint the house for $15,000. If the artist breaches, and pays the houseowner the $3,000 damages, the houseowner gets what she contracted for, but the artist's skills are devoted to a better use. This outcome is sometimes referred to as an "efficient breach", and one doesn't have to be an expert in the law and economics of contract to understand the gains that flow to the artist and, perhaps, to society in general, as a consequence of this breach. State, in your own words, how the breach might be understood to be efficient. How might it understood to be inefficient?

3. Efficient breach has offered an influential paradigm for explaining why some breaches are worthwhile. Do you think the artist-houseowner type of deal in the above question is representative of contracts in general, or is it better understood as a specific type? How might you describe the fact-specific characteristics of efficient breach?

White v. Benkowski

Supreme Court of Wisconsin, 1967.
37 Wis.2d 285, 155 N.W.2d 74.

This case involves a neighborhood squabble between two adjacent property owners.

Prior to November 28, 1962, Virgil and Gwynneth White, the plaintiffs, were desirous of purchasing a home in Oak Creek. Unfortunately, the particular home that the Whites were interested in was without a water supply. Despite this fact, the Whites purchased the home.

The adjacent home was owned and occupied by Paul and Ruth Benkowski, the defendants. The Benkowskis had a well in their yard which had piping that connected with the Whites' home.

On November 28, 1962, the Whites and Benkowskis entered into a written agreement wherein the Benkowskis promised to supply water to the White home for ten years or until an earlier date when either water was supplied by the municipality, the well became inadequate, or the Whites drilled their own well. The Whites promised to pay $3 a month

for the water and one-half the cost of any future repairs or maintenance that the Benkowski well might require. As part of the transaction, but not included in the written agreement, the Whites gave the Benkowskis $400 which was used to purchase and install a new pump and an additional tank that would increase the capacity of the well.

Initially, the relationship between the new neighbors was friendly. With the passing of time, however, their relationship deteriorated and the neighbors actually became hostile. In 1964, the water supply, which was controlled by the Benkowskis, was intermittently shut off. Mrs. White kept a record of the dates and durations that her water supply was not operative. Her record showed that the water was shut off on the following occasions:

(1) March 5, 1964, from 7:10 p.m. to 7:25 p.m.

(2) March 9, 1964, from 3:40 p.m. to 4:00 p.m.

(3) March 11, 1964, from 6:00 p.m. to 6:15 p.m.

(4) June 10, 1964, from 6:20 p.m. to 7:03 p.m.

The record also discloses that the water was shut off completely or partially for varying lengths of time on July 1, 6, 7, and 17, 1964, and on November 25, 1964.

Mr. Benkowski claimed that the water was shut off either to allow accumulated sand in the pipes to settle or to remind the Whites that their use of the water was excessive. Mr. White claimed that the Benkowskis breached their contract by shutting off the water.

Following the date when the water was last shut off (November 25, 1964), the Whites commenced an action to recover compensatory and punitive damages for an alleged violation of the agreement to supply water. A jury trial was held. Apparently it was agreed by counsel that for purposes of the trial 'plaintiffs' case was based upon an alleged deliberate violation of the contract consisting of turning off the water at the times specified in the plaintiffs' complaint.' Accordingly, in the special verdict the jury was asked:

'QUESTION 1: Did the defendants maliciously, vindictively or wantonly shut off the water supply of the plaintiffs for the purpose of harassing the plaintiffs?'

The jury was also asked:

'QUESTION 2: If you answered Question 1 'Yes', then answer this question:

'(a) What compensatory damages did the plaintiffs suffer?

'(b) What punitive damages should be assessed?'

Before the case was submitted to the jury, the defendants moved to strike the verdict's punitive-damage question. The court reserved its ruling on the motion. The jury returned a verdict which found that the Benkowskis maliciously shut off the Whites' water supply for harassment

purposes. Compensatory damages were set at $10 and punitive damages at $2,000. On motions after verdict, the court reduced the compensatory award to $1 and granted defendants' motion to strike the punitive damage question and answer.

Judgment for plaintiffs of $1 was entered and they appeal.

■ WILKIE, JUSTICE.

Two issues are raised on this appeal.

1. Was the trial court correct in reducing the award of compensatory damages from $10 to $1?

2. Are punitive damages available in actions for breach of contract?

Reduction of Jury Award.

The evidence of damage adduced during the trial here was that the water supply had been shut off during several short periods. Three incidents of inconvenience resulting from these shut-offs were detailed by the plaintiffs. Mrs. White testified that the lack of water in the bathroom on one occasion caused an odor and that on two other occasions she was forced to take her children to a neighbor's home to bathe them. Based on this evidence, the court instructed the jury that:

> '. . . in an action for a breach of contract the plaintiff is entitled to such damages as shall have been sustained by him which resulted naturally and directly from the breach if you find that the defendants did in fact breach the contract. Such damages include pecunitary loss and inconvenience suffered as a natural result of the breach and are called compensatory damages. In this case the plaintiffs have proved no pecuniary damages which you or the Court could compute. In a situation where there has been a breach of contract which you find to have damaged the plaintiff but for which the plaintiffs have proven no actual damages, the plaintiffs may recover nominal damages.
>
> 'By nominal damages is meant trivial—a trivial sum of money.'

Plaintiffs did not object to this instruction. In the trial court's decision on motions after verdict it states that the court so instructed the jury because, based on the fact that the plaintiffs paid for services they did not receive, their loss in proportion to the contract rate was approximately 25 cents. This rationale indicates that the court disregarded or overlooked Mrs. White's testimony of inconvenience. In viewing the evidence most favorable to the plaintiffs, there was some injury. The plaintiffs are not required to ascertain their damages with mathematical precision, but rather the trier of fact must set damages at a reasonable amount. Notwithstanding this instruction, the jury set the plaintiffs' damages at $10. The court was in error in reducing that amount to $1.

The jury finding of $10 in actual damages, though small, takes it out of the mere nominal status. The award is predicated on an actual injury. . . . Here there was credible evidence which showed inconvenience and thus actual injury, and the jury's finding as to compensatory damages should be reinstated.

Punitive Damages.

> 'If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep.' Exodus 22:1.

Over one hundred years ago this court held that, under proper circumstances, a plaintiff was entitled to recover exemplary or punitive damages. . . .

In Wisconsin compensatory damages are given to make whole the damage or injury suffered by the injured party. On the other hand, punitive damages are given

> 'on the basis of punishment to the injured party not because he has been injured, which injury has been compensated with compensatory damages, but to punish the wrongdoer for his malice and to deter others from like conduct.' [Malco, Inc. v. Midwest Alum. Sales, 109 N.W. 2d 516, 521 (Wis. 1961)]

Thus we reach the question of whether the plaintiffs are entitled to punitive damages for a breach of the water agreement.

The overwhelming weight of authority supports the proposition that punitive damages are not recoverable in actions for breach of contract. * * * In Chitty on Contracts, the author states that the right to receive punitive damages for breach of contract is now confined to the single case of damages for breach of a promise to marry. 1 Chitty, Contracts (22d ed. 1961), p. 1339.

Simpson states:

> 'Although damages in excess of compensation for loss are in some instances permitted in tort actions by way of punishment . . . in contract actions the damages recoverable are limited to compensation for pecunitary loss sustained by the breach.' Simpson, Contracts (2d ed. hornbook series), p. 394, sec. 195.

Corbin states that as a general rule punitive damages are not recoverable for breach of contract. 5 Corbin, Contracts, p. 438, sec. 1077.

In Wisconsin, the early case of *Gordon v. Brewster* (7 Wis 309 (1858)) involved the breach of an employment contract. The trial court instructed the jury that if the nonperformance of the contract was attributable to the defendant's wrongful act of discharging the plaintiff, then that would go to increase the damages sustained. On appeal, this court said that the instruction was unfortunate and might have led the jurors to suppose that they could give something more than actual compensation in a breach of contract case. We find no Wisconsin case in which breach of

contract (other than breach of promise to marry) has led to the award of punitive damages.

Persuasive authority from other jurisdictions supports the proposition (without exception) that punitive damages are not available in breach of contract actions. * * * This is true even if the breach, as in the instant case, is willful. * * *

. . . .

Reversed in part by reinstating the jury verdict relating to compensatory damages and otherwise affirmed. Costs to appellant.

NOTES

1. Did it make a difference here that the facts involved a deliberate, rather than inadvertent, violation of the contract? Should it?

2. We will consider the overlap between contract and tort law in Chapter 2.B. One possible tort claim might be the intentional infliction of emotional distress. It might be early days in your study of tort, but would you have brought such a claim, if you were the White's lawyer? What types of issues do you think might influence your answer?

2. DAMAGES OR SPECIFIC PERFORMANCE?

McCallister v. Patton

Supreme Court of Arkansas, 1948.
214 Ark. 293, 215 S.W. 2d 701.

■ MILLWEE, JUSTICE.

A. J. McCallister was plaintiff in the chancery court in a suit for specific performance of an alleged contract for the sale and purchase of a new Ford automobile from the defendant, R. H. Patton. The complaint alleges:

> 'That on or about the 15th day of September, 1945, the Plaintiff entered into a contract with the Defendant, whereby the Plaintiff contracted to purchase and the Defendant to sell, one Ford super deluxe tudor sedan and radio.
>
> 'That the Defendant is an automobile dealer and sells Ford automobiles and trucks within the city of Jonesboro, Craighead County, Arkansas and that at the time this Plaintiff entered into this contract the Defendant had no new Ford automobiles in stock of any kind and was engaged in taking orders by contract, numbering the contracts in the order that they were executed and delivered to him. As the cars were received the Defendant would fill the orders as he had previously received the contracts. The Plaintiff's number was number 37.
>
> 'As consideration and as part of the purchase price the Plaintiff paid to this Defendant the sum of $25.00 and at all

> times stood ready, able and willing to pay the balance upon the purchase price in accordance with the terms of the contract. . . .
>
> 'The Plaintiff is informed and verily believes and the Defendant has admitted to this Plaintiff that he has received more than 37 cars since the execution of this contract. The Defendant refuses to sell an automobile of the above make and description to this Plaintiff.
>
> 'Since the execution of this contract and to the present date, new Ford automobiles have been hard to obtain and this Plaintiff is unable to purchase an automobile at any other place or upon the open market of the description named in this contract and there is not an adequate remedy at law and the Court should direct specific performance of this contract.'

The prayer of the complaint was that the defendant be ordered to sell the automobile to plaintiff in compliance with the contract, and for all other proper relief. Under the terms of the 'New Car Order' attached to the complaint as Exhibit 'A,' delivery of the car was to be made 'as soon as possible out of current or future production' at defendant's regularly established price. Plaintiff was not required to trade in a used car but might do so, if the price of such car could be agreed upon and, if not, plaintiff was entitled to cancel the order and to the return of his deposit. The deposit of $25 was to be held in trust for the plaintiff and returned to him at his option on surrender of his rights under the agreement. There was no provision for forfeiture of the deposit in the event plaintiff refused to accept delivery of the car.

Defendant demurred to the complaint on the grounds that it did not state facts sufficient to entitle plaintiff to the relief of specific performance . . . . There were further allegations . . . to the effect that plaintiff was engaged in the sale of used cars and had contracted to resell whatever vehicle he obtained from the defendant; and that upon being so informed, defendant tendered and plaintiff refused to accept return of the $25 deposit. . . .

The chancellor sustained the demurrer to the complaint and overruled the motion to strike. . . . This appeal follows.

In testing the correctness of the trial court's ruling in sustaining the demurrer we first determine whether the allegations of the complaint are sufficient to bring plaintiff within the rule that equity will not grant specific performance of a contract for the sale of personal property if damages in an action at law afford a complete and adequate remedy. Our cases on the question are in harmony with the rule recognized generally that, while equity will not ordinarily decree specific performance of a contract for the sale of chattels, it will do so where special and peculiar reasons exist such as render it impossible for the injured party to obtain adequate relief by way of damages in an action at law. . . .

. . .

Among the various exceptions to the general rule are those cases involving contracts relating to personal property which has a peculiar, unique or sentimental value to the buyer not measurable in money damages. In *Chamber of Commerce v. Barton*, 195 Ark. 274, 112 S.W.2d 619, 625, this court held that the purchaser, Barton, was entitled to specific performance of a contract for the sale of Radio Station KTHS as an organized business. Justice Baker, speaking for the court, said:

> 'A judgment for a bit of lumber from which a picture frame might be made and also for a small lot of tube paint and a yard of canvas would not compensate one who had purchased a great painting.
>
> 'By the same token Barton would not be adequately compensated by a judgment for a bit of wire, a steel tower or two, more or less, as the mere instrumentalities of KTHS when he has purchased an organized business including these instrumentalities, worth perhaps not more than one-third of the purchase price. Moreover, he has also contracted for the good will of KTHS, which is so intangible as to be incapable of delivery or estimation of value. So the property is unique in character and, so far as the contract is capable of enforcement, the vendee is entitled to relief.'
>
> . . .

Plaintiff says we will take judicial knowledge of the scarcity of new automobiles as a result of the recent world war. If so, we would also take judicial notice of the fact that large numbers of cars of the type mentioned in the alleged contract have been produced since 1945, and sold through both new and used car dealers in the open market. Although the complaint alleges inadequacy of the remedy at law, it does not set forth facts sufficient to demonstrate such conclusion. It is neither alleged nor contended that the car ordered has any special or peculiar qualities not commonly possessed by others of the same make so as to make it practically impossible to replace it in the market. While it is alleged that new Ford automobiles have been hard to obtain, no harm or inconvenience of a kind which could not be fully compensated by an award of damages in a law action is set forth in the complaint.

We conclude that the allegations of the complaint are insufficient to entitle plaintiff to equitable relief and that his remedy at law is adequate. . . .

The decree is affirmed.

Morris v. Sparrow

Supreme Court of Arkansas, 1956.
225 Ark. 1019, 287 S.W.2d 583.

■ ROBINSON, JUSTICE.

Appellee Archie Sparrow filed this suit for specific performance, seeking to compel appellant Morris to deliver possession of a certain horse, which Sparrow claims Morris agreed to give him as part consideration for work done by Sparrow. The appeal is from a decree requiring the delivery of the horse.

Morris owns a cattle ranch near Mountain View, Arkansas, and he also participates in rodeos. Sparrow is a cowboy, and is experienced in training horses; occasionally he takes part in rodeos. He lives in Florida; while at a rodeo in that state, he and Morris made an agreement that they would go to Morris' ranch in Arkansas and, later, the two would go to Canada. After arriving at the Morris ranch, they changed their plans and decided that, while Morris went to Canada, Sparrow would stay at the ranch and do the necessary work. The parties are in accord that Sparrow was to work 16 weeks for a money consideration of $400. But, Sparrow says that as an additional consideration he was to receive a brown horse called Keno, owned by Morris. However, Morris states that Sparrow was to get the horse only on condition that his work at the ranch was satisfactory, and that Sparrow failed to do a good job. Morris paid Sparrow the amount of money they agreed was due, but did not deliver the horse.

At the time Sparrow went to Morris' ranch, the horse in question was practically unbroken; but during his spare time, Sparrow trained the horse and, with a little additional training, he will be a first class roping horse.

First there is the issue of whether Sparrow can maintain, in equity, a suit to enforce, by specific performance, a contract for the delivery of personal property. Although it has been held that equity will not ordinarily enforce, by specific performance, a contract for the sale of chattels, it will do so where special and peculiar reasons exist which render it impossible for the injured party to obtain relief by way of damages in an action at law. *McCallister v. Patton*, 214 Ark. 293, 215 S.W.2d 701. . . . Certainly when one has made a roping horse out of a green, unbroken pony, such a horse would have a peculiar and unique value; if Sparrow is entitled to prevail, he has a right to the horse instead of its market value in dollars and cents.

Morris claims that the part of the agreement whereby Sparrow was to receive the horse was conditional, depending on Sparrow doing a good job, and that he did not do such a job. Both parties were in Chancery Court and the Chancellor had a better opportunity than this court to evaluate the testimony of the witnesses; we cannot say the Chancellor's finding in favor of Sparrow is against the preponderance of the evidence.

. . .

Kitchen v. Herring

Supreme Court of North Carolina, 1851.
7 Ired.Eq. 190, 42 N.C. 190.

■ PEARSON, J.

In December 1846, the defendant, Herring, executed a contract in writing in these words, "Rec'd. of John L. Kitchen payment in full for a certain tract of land lying on the South west side of Black River, adjoining the lands of William Haffland and Martial, for which I am to give him a good deed &c." . . .

The prayer of the Bill is for a specific performance, . . .[b]

The defendant's Counsel insisted, that the contract was void, because of its vagueness and uncertainty. This position is untenable. The description is sufficiently certain to identify the land—"that is certain which can be made certain," and for this purpose an enquiry would be ordered if necessary. But the parties seem to have had no difficulty in this respect; for, it is admitted, that the tract of land which was the subject of the contract, has been conveyed by deed to Pridgen, and in that way its identity is established. . . .

It was further insisted, that, as it appears by the plaintiff's own showing, that "the land is chiefly valuable on account of the timber," this case does not come within the principle, on which a specific performance is decreed.

The position is new, and the Counsel admitted, that there was no authority to sustain it, but he contended with earnestness, that it was so fully sustained by "the reason of the thing," as to justify a departure from a well settled rule of this Court, under the maxim, *cessante ratione cessat lex*.[c]

The argument failed wholly to prove, that "the reason of the thing" called for an exception. The principle in regard to land was adopted, not because it was fertile or rich in minerals, or *valuable for timber,* but simply because it was *land*—a favorite and favored subject in England, and every country of Anglo Saxon origin. Our constitution gives to land pre-eminence over every other species of property; and our law, whether administered in Courts of law or of equity, gives to it the same preference. Land, whether rich or poor, cannot be taken to pay debts until the personal property is exhausted. Contracts concerning land must be in writing. Land must be sold at the Court House, must be conveyed by deeds duly registered, and other instances "too tedious to mention." The

[b] Eds. Because of the age of the case, the exact procedure is hard to follow. For our purposes we can treat this as if this were an opinion by the trial court.

[c] Eds. The Latin "cessante ratione legis cessat ipsa lex" can be translated as "when the reason for the law ceases, the law itself ceases".

principle is, that land is *assumed* to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity. . . . [I]n regard to other property, less favored, a specific performance will not be decreed, unless there be peculiar circumstances; for, if with the money, an article of the same description can be bought in market—corn, cotton, &c., the remedy at law is adequate.

Kalinowski v. Yeh

Intermediate Court of Appeals of Hawaii, 1993.
9 Haw.App. 473, 847 P.2d 673.

■ WATANABE, JUDGE.

Plaintiffs Harry and Adelaine Kalinowski (Kalinowskis) brought the instant action, seeking specific performance of a contract to purchase a condominium unit from Defendants Jim and Lisa Yeh (Yehs). The trial court held for the Kalinowskis, and we affirm.

[The Court concluded that the sellers, the Yehs, were bound by a contract to sell the condo unit, and that they had breached that contract.]

Specific Performance

The Yehs insist that specific performance is an extraordinary remedy that should not have been awarded the Kalinowskis by the trial court.

However, it is a well-accepted principle that "where the parties have fairly and understandingly entered into a valid contract for the sale of *real property*,[d] specific performance of the contract is a matter of right and equity will enforce it, absent circumstances of oppression and fraud." *Giannini v. First Nat'l Bank of Des Plaines,* 136 Ill.App.3d 971, 981, 91 Ill.Dec. 438, 447, 483 N.E.2d 924, 933 (1985). * * * The rationale for this principle is explained in the *Restatement (Second) of Contracts* as follows:

> Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative. Damages have therefore been regarded as inadequate to enforce a duty to transfer an interest in land[.]
>
> *Restatement (Second) of Contracts* § 360, comment e, at 174 (1981).

Whether this principle applies to a contract for the sale of a specific condominium unit has never previously been addressed by the Hawaii appellate courts. However, courts in other jurisdictions have generally concluded that the remedy of specific performance is available to a

[d] Eds. Note carefully that the opinion here refers to real property, that is, real estate, as distinguished from personal property (goods, securities, money, etc.)

purchaser of a specific condominium unit. In *Giannini, supra,* for example, the Illinois Appellate Court held that where there was no evidence that other condominium units were available for purchase by the buyer at the same price, terms, or conditions, the buyer of a specific condominium unit was entitled to the remedy of specific performance. 136 Ill.App.3d at 981, 91 Ill.Dec. at 447, 483 N.E.2d at 933. The New Jersey Superior Court more broadly held in *Pruitt v. Graziano,* 215 N.J.Super. 330, 521 A.2d 1313 (1987), that "a contract of sale of a designated condominium unit like any real property is specifically enforceable by the purchaser irrespective of any special proof of its uniqueness." 215 N.J.Super. at 332, 521 A.2d at 1314–15.

In the instant case, there is no evidence that the Kalinowskis would have been able to buy an identical unit in the same condominium project at no more than the same price, terms, and conditions. Instead, the evidence reveals that market prices for the Yehs' unit had rapidly escalated between the time of the Kalinowskis' offer and the termination of the agreement by the Yehs, rendering it unlikely that the Kalinowskis could obtain a condominium unit in the same project at no more than the price agreed upon in the Salt Lake DROA. Moreover, the Kalinowskis were entirely blameless in their own transactional conduct and expectations, and we see no reason to deprive them of the benefit of their bargain.

Accordingly, we affirm the judgment of the trial court granting the Kalinowskis specific performance of their agreement to purchase the Yehs' condominium unit.

QUESTIONS

1. Consider how the above four cases treat the issue of damages or specific performance. Do you think specific performance would be available for breach by the seller in a contract to purchase, in our contemporary setting, a (1) 1945 Ford motorcar, (2) 2001 Tesla electric car, and (3) standard 1 Bedroom apartment in a hi-rise development in downtown Las Vegas? What further issues of law or fact would you need to consider for each?

2. The order of specific performance is one which requires the party who has breached the contract to perform, on penalty of being held in contempt of court if she or he does not. If you had sympathy for the idea of "efficient breach", expressed in C.1 above, what misgivings do you have about the availability of this remedy? See further RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 130–132 (1992).

D. CONTRACT INTERESTS—IN GENERAL

Restatement (Second) of Contracts §§ 344, 347, 349, 371

One of the most influential modern law review articles on contracts is a work principally authored by a leading figure in jurisprudence, Lon Fuller. The article, which Fuller co-authored with one of his students, is L. Fuller & W. Perdue, *The Reliance Interest in Contract Damages I & II*, 46 YALE L.J. 52, 373 (1936, 1937).

When we studied *Hawkins v. McGee* at the beginning of the course, we saw that the classical concept of contract law is that the objective of contract law is to place the non-breaching party in the position she would have been in if the promised had been performed. Lon Fuller described that objective as the "expectation interest." The main theme of Fuller's article is that while protection of the expectation interest may be the usual approach of contract law, there are many situations in which it doesn't really seem right either to award the full expectation measure of recovery or to deny any relief altogether. Fuller coined the term "reliance interest" to describe another possible objective, that of returning the non-breaching party to the situation she was in before the agreement was made. A third interest described by Fuller was the "restitution interest," that is, the interest in restoring to the non-breaching party any benefit that she has conferred on the other party.

Fuller's article, and the description he worked out of the three contract interests, has been enormously influential in a variety of areas. We shall examine some of them later on. For the nonce, our goal is only to develop some familiarity with these three concepts, so that we can use them later on in working through various contract law problems.

To become familiar with these concepts, begin by studying the Restatement sections cited above, and working through the following problem.

PROBLEM—CONTRACT INTERESTS

Facts:

- Artist & Promoter agree as follows:
  - Artist will play piano recital
  - Promoter will pay Artist $10,000
    - $2000 up front
    - $8000 after performance
- Promoter pays Artist $2000.
- Promoter incurs $3000 non-recoverable costs in
  - hiring recital hall,
  - printing ads,

- etc.

- Artist cancels, without justification
- Promoter sues Artist for breach of contract

QUESTIONS

1. If the law of contract protected only the Restitution interest, what would you expect the measure of damages to be?

2. If the law of contract protected only the Reliance interest, what would you expect the measure of damages to be?

3. If the law of contract protected only the Expectation interest, what would you expect the measure of damages to be, assuming that Promoter can prove that if Artist had performed:

(a) Promoter's revenues from ticket sales would have been $20,000

(b) Promoter's additional costs of the performance would have been $1500

1. EXPECTATION INTEREST

Bolin Farms v. American Cotton Shippers Ass'n

United States District Court, Western District of Louisiana, 1974.
370 F.Supp. 1353.

■ EDWIN F. HUNTER, JR., CHIEF JUDGE.

This litigation arises out of the attempts by eleven (11) cotton farmers to test the contracts by which they concededly obligated themselves to sell and deliver their cotton. In essence, defendants agreed to purchase whatever was planted by these farmers on specific acreage at a price agreed upon between January and March of 1973, irrespective of what the price might be at harvest time. Meanwhile, the price of cotton unexpectedly skyrocketed to at least double the price agreed upon. The complaints seek a declaration that the contracts are null and void, so that plaintiffs may achieve a better price than they bargained for.[e] The fundamental question in each action involves the enforceability vel non of contracts for the advance or forward sale of cotton grown for the 1973 crop.

. . .

The record is a morass of pleadings which can best be unraveled by proceeding to the very core of the case—that is, the validity and enforceability of a contract for the purchase and sale of cotton, entered into between a willing buyer and a willing seller, both adult (experienced

[e] [Eds. The farmers brought an action for a "declaratory judgment" that the contracts were not enforceable. You'll study declaratory judgments in your civil procedure class. For present purposes, the case would be no different if the cotton buyers had sued the farmers seeking to enforce the contracts.]

cotton farmers on the one hand and experienced cotton buyers on the other hand) on an open and competitive market.

. . .

It is a matter of public record and public knowledge that as a result of the sudden and spectacular rise in the price of cotton in the latter part of 1973, literally scores of suits have been filed, either to enforce or rescind these advance or forward contracts. Defendants have cited thirteen (13) cases that arose between September 18 and November 9, 1973. In each, the validity of the contracts has been upheld by either summary judgment, declaratory judgment, preliminary injunction, and/or permanent injunction. These affirmations of the contracts have emanated from the United States District Courts for the Middle District of Georgia, the Northern District of Mississippi, the Western District of Tennessee, the Northern District of Alabama, The District of South Carolina, the Northern District of Georgia, and from the state courts of Arkansas, Georgia, Alabama and Mississippi. * * *

The contracts are in evidence. They speak for themselves. No useful purpose would be served by detailing each provision. They were entered into between January 9, 1973 and March 29, 1973. In each, plaintiffs obligated themselves to sell and deliver to the defendant cotton buyers all of the cotton raised and harvested on designated acreage. The price ranged from 29 cents to 41 cents per pound. The actual cotton produced was physically to be delivered to the buyers, to be by them physically received and paid for on delivery. These contracts were negotiated prior to planting. We call them "forward" sales contracts. Each plaintiff cotton farmer was experienced, having been a cotton producer for several years, and each was familiar with the forward sale contract procedure.

The depositions reveal that during the period of time from January 9th through March 29, 1973, the competitive open market range ran from 28 cents to 32 cents per pound. On the basis of the record it would be difficult to quarrel with the proposition that the sales were for a fair market price at the time they were made, and as a matter of law we conclude that the price and circumstances prevailing at the time are determinative.

From April through September, the cotton market rose spectacularly. The price of 29 cents or 30 cents a pound, which looked so good to the farmers in February, no longer looked so good against 80 cents in September.

These farmers certainly have every right to contest the validity of their contracts. Likewise, the buyer has every right to assert the validity of their bargain. To quote the Honorable Wilbur D. Owens, Jr., U. S. District Judge, Middle District of Georgia (see Mitchell-Huntley Cotton Co. v. Fulton Benson, Civil Action 2902): "Ladies and Gentlemen, this case illustrates about as well as any case that will ever be in a court room that life is a two way street, that when we make bargains that turn out

to be good for us that we keep them and then when we make bargains that turn out to be bad for us that we also keep them. That seems to be the essence of what this case is about. The defendants, naturally, don't want to sell cotton because the price has gone up and if I were one of those defendants I would feel the same way. I would be sick as an old hound dog who ate a rotten skunk, but unfortunately—well, not unfortunately—fortunately we all abide by contracts and that (is) the foundation of which all of the business that you have heard about here today is done."

What caused the upward price spiral of April to September? There were many causes. We are unable to pin down any one. Be that as it may, the cause has no relevance to the validity of the contracts. Some of the deponents point to such factors as large export shipments to China, high water and flood conditions in the cotton belt; late plantings forced by heavy rains, and the devaluation of the dollar. These elements and others are reasonable causes, but whatever causes the market to go up and down after the date of a contract has no relevancy to its validity. One facet of plaintiffs' attack is that the cotton buyers had inside information at the time they contracted with plaintiffs, and that these factors would coincide and drive the price of cotton to the level that it had never before reached. The record does not reveal this to be true. The record will reveal that Dallas Thomason sold his cotton at 30 cents; Frank Jones, Jr., Executive Vice-President of Cook Industries, Inc., sold his cotton at 30 cents; Conner Morscheimer, cotton buyer for W. K. Kennedy Co., Inc., sold his cotton at 29 ½ cents.

Plaintiffs emphasize that the cotton farmer has always been at the mercy of the weather and the boll weevil. This may be true, but by firm forward selling, the farmer shifts many of his risks to the buyer. The farmer guarantees neither quality nor quantity. He obligates himself to sell and the buyer obligates himself to buy all the cotton the farmer harvests from identifiable acreage. He sells it at a price at which he figures at the time of the contract he can make a profit in relation to his expectable costs. Against that firm contract he can arrange his crop financing. The depositions reveal the system used, and there can be no argument that it does give the grower a very real limitation of risk.

. . .

NOTES & QUESTIONS

1. We'll often have occasion to refer to this case—or, actually, this and similar cases—under the shorthand description the "Cotton Futures Cases." Be sure that you understand how one goes from the general concept of expectation damages—an award of money sufficient to place the non-breaching party in the position she would have been in if the promise had been performed—to a specific award in a situation such as that in the Cotton Futures Cases. If the farmers had performed, how much would the buyers pay to receive the cotton? If, as in the case itself, the farmers did not perform

their promises and the buyers had to buy the cotton in the open market, how much would the buyers have to pay?

2. Why should the farmers be obligated to sell their cotton for only about 30¢ per pound when the market price had—for reasons nobody expected—gone up to 80¢ per pound? Are the arguments for that result the same as in *Hawkins v. McGee*? To put the point in a slightly different way, assume that we conclude that the right result in the Cotton Futures Cases is that the farmers do have to sell their cotton for 30¢ per pound. Do the reasons for reaching that conclusion also lead us to the conclusion that the patient in *Hawkins* should be entitled to a sum of money that will place him in the position he would have been in if the promise had been performed?

2. RELIANCE INTEREST

Security Stove & Mfg. Co. v. American Ry. Express Co.

Kansas City Court of Appeals, Missouri, 1932.
227 Mo.App. 175, 51 S.W.2d 572.

■ BLAND, J.

This is an action for damages for the failure of defendant to transport, from Kansas City to Atlantic City, New Jersey, within a reasonable time, a furnace equipped with a combination oil and gas burner. The cause was tried before the court without the aid of a jury, resulting in a judgment in favor of plaintiff in the sum of $801.50 and interest, or in a total sum of $1,000.00. Defendant has appealed.

The facts show that plaintiff manufactured a furnace equipped with a special combination oil and gas burner it desired to exhibit at the American Gas Association Convention held in Atlantic City in October, 1926. The president of plaintiff testified that . . . "the thing wasn't sent there for sale but primarily to show"; that at the time the space was engaged it was too late to ship the furnace by freight so plaintiff decided to ship it by express, and, on September 18th, 1926, wrote the office of the defendant in Kansas City, stating that it had engaged a booth for exhibition purposes at Atlantic City, New Jersey, from the American Gas Association, for the week beginning October 11th; that its exhibit consisted of an oil burning furnace, together with two oil burners which weighed at least 1,500 pounds; that, "In order to get this exhibit in place on time it should be in Atlantic City not later than October the 8th. What we want you to do is to tell us how much time you will require to assure the delivery of the exhibit on time."

Mr. Bangs, chief clerk in charge of the local office of the defendant, upon receipt of the letter, sent Mr. Johnson, a commercial representative of the defendant, to see plaintiff. Johnson called upon plaintiff taking its letter with him. Johnson made a notation on the bottom of the letter

giving October 4th, as the day that defendant was required to have the exhibit in order for it to reach Atlantic City on October 8th.

On October 1st, plaintiff wrote the defendant at Kansas City, referring to its letter of September 18th, concerning the fact that the furnace must be in Atlantic City not later than October 8th, and stating what Johnson had told it, saying: "Now Mr. Bangs, we want to make doubly sure that this shipment is in Atlantic City not later than October 8th and the purpose of this letter is to tell you that you can *have your truck call for the shipment between 12 and 1 o'clock on Saturday, October 2nd for this*." (Italics plaintiff's.) On October 2d, plaintiff called the office of the express company in Kansas City and told it that the shipment was ready. Defendant came for the shipment on the last mentioned day, received it and delivered the express receipt to plaintiff. The shipment contained 21 packages. Each package was marked with stickers backed with glue and covered with silica of soda, to prevent the stickers being torn off in shipping. Each package was given a number. They ran from 1 to 21.

Plaintiff's president made arrangements to go to Atlantic City to attend the convention and install the exhibit, arriving there about October 11th. When he reached Atlantic City he found the shipment had been placed in the booth that had been assigned to plaintiff. The exhibit was set up, but it was found that one of the packages shipped was not there. This missing package contained the gas manifold, or that part of the oil and gas burner that controlled the flow of gas in the burner. This was the most important part of the exhibit and a like burner could not be obtained in Atlantic City.

Wires were sent and it was found that the stray package was at the "over and short bureau" of defendant in St. Louis. Defendant reported that the package would be forwarded to Atlantic City and would be there by Wednesday, the 13th. Plaintiff's president waited until Thursday, the day the convention closed, but the package had not arrived at the time, so he closed up the exhibit and left. About a week after he arrived in Kansas City, the package was returned by the defendant.

Bangs testified that the reasonable time for a shipment of this kind to reach Atlantic City from Kansas City would be four days; that if the shipment was received on October 4th, it would reach Atlantic City by October 8th; that plaintiff did not ask defendant for any special rate; that the rate charged was the regular one; that plaintiff asked no special advantage in the shipment; that all defendant, under its agreement with plaintiff was required to do was to deliver the shipment at Atlantic City in the ordinary course of events; that the shipment was found in St. Louis about Monday afternoon or Tuesday morning; that it was delivered at Atlantic City at the Ritz Carlton Hotel, on the 16th of the month. There was evidence on plaintiff's part that the reasonable time for a shipment of this character to reach Atlantic City from Kansas City was not more than three or four days. . . .

. . .

Defendant contends that . . . the only damages, if any, that can be recovered in cases of this kind, are for loss of profits and that plaintiff's evidence is not sufficient to base any recovery on this ground.

. . .

We think, under the circumstances in this case, that it was proper to allow plaintiff's expenses as its damages. Ordinarily the measure of damages where the carrier fails to deliver a shipment at destination within a reasonable time is the difference between the market value of the goods at the time of the delivery and the time when they should have been delivered. But where the carrier has notice of peculiar circumstances under which the shipment is made, which will result in an unusual loss by the shipper in case of delay in delivery, the carrier is responsible for the real damage sustained from such delay if the notice given is of such character, and goes to such extent, in informing the carrier of the shipper's situation, that the carrier will be presumed to have contracted with reference thereto. * * *

In the case at bar defendant was advised of the necessity of prompt delivery of the shipment. Plaintiff explained to Johnson the "importance of getting the exhibit there on time." . . .

. . .

Defendant contends that plaintiff "is endeavoring to achieve a return of the status quo in a suit based on a breach of contract. Instead of seeking to recover what he would have had, had the contract not been broken, plaintiff is trying to recover what he would have had, had there never been any contract of shipment"; that the expenses sued for would have been incurred in any event. It is no doubt, the general rule that where there is a breach of contract the party suffering the loss can recover only that which he would have had, had the contract not been broken . . . . But this is merely a general statement of the rule and is not inconsistent with the holdings that, in some instances, the injured party may recover expenses incurred in relying upon the contract, although such expenses would have been incurred had the contract not been breached. * * *

In *Sperry et al. v. O'Neill-Adams Co.* (C. C. A.) 185 F. 231, the court held that the advantages resulting from the use of trading stamps as a means of increasing trade are so contingent that they cannot form a basis on which to rest a recovery for a breach of contract to supply them. In lieu of compensation based thereon the court directed a recovery in the sum expended in preparation for carrying on business in connection with the use of the stamps. The court said, loc. cit. 239:

> "Plaintiff in its complaint had made a claim for lost profits, but, finding it impossible to marshal any evidence which would support a finding of exact figures, abandoned that claim. Any attempt to reach a precise sum would be mere blind guesswork.

> Nevertheless a contract, which both sides conceded would prove a valuable one, had been broken and the party who broke it was responsible for resultant damage. In order to carry out this contract, the plaintiff made expenditures which otherwise it would not have made. . . . The trial judge held, as we think rightly, that plaintiff was entitled at least to recover these expenses to which it had been put in order to secure the benefits of a contract of which defendant's conduct deprived it."
>
> . . .

The case at bar was to recover damages for loss of profits by reason of the failure of the defendant to transport the shipment within a reasonable time, so that it would arrive in Atlantic City for the exhibit. There were no profits contemplated. The furnace was to be shown and shipped back to Kansas City. There was no money loss, except the expenses, that was of such a nature as any court would allow as being sufficiently definite or lacking in pure speculation. Therefore, unless plaintiff is permitted to recover the expenses that it went to, which were a total loss to it by reason of its inability to exhibit the furnace and equipment, it will be deprived of any substantial compensation for its loss. The law does not contemplate any such injustice. It ought to allow plaintiff, as damages, the loss in the way of expenses that it sustained, and which it would not have been put to if it had not been for its reliance upon the defendant to perform its contract. There is no contention that the exhibit would have been entirely valueless and whatever it might have accomplished defendant knew of the circumstances and ought to respond for whatever damages plaintiff suffered. In cases of this kind the method of estimating the damages should be adopted which is the most definite and certain and which best achieves the fundamental purpose of compensation. * * * Had the exhibit been shipped in order to realize a profit on sales and such profits could have been realized, or to be entered in competition for a prize, and plaintiff failed to show loss of profits with sufficient definiteness, or that he would have won the prize, defendant's cases might be in point. But as before stated, no such situation exists here.

While, it is true that plaintiff already had incurred some of these expenses, in that it had rented space at the exhibit before entering into the contract with defendant for the shipment of the exhibit and this part of plaintiff's damages, in a sense, arose out of a circumstance which transpired before the contract was even entered into, yet, plaintiff arranged for the exhibit knowing that it could call upon defendant to perform its common law duty to accept and transport the shipment with reasonable dispatch. The whole damage, therefore, was suffered in contemplation of defendant performing its contract, which it failed to do, and would not have been sustained except for the reliance by plaintiff upon defendant to perform it. It can, therefore, be fairly said that the damages or loss suffered by plaintiff grew out of the breach of the

contract, for had the shipment arrived on time, plaintiff would have had the benefit of the contract, which was contemplated by all parties, defendant being advised of the purpose of the shipment.

The judgment is affirmed.

NOTES

1. The plaintiffs in *Security Stove* were awarded their reliance interest. Why did they not receive expectation? What about restitution? What would their restitution interest have been had it been awarded?

2. Freight transportation is a risky business, and risk allocation is a long-standing feature of contract in this area. Both statute and case law now reflect that fact, as carriers now routinely limit their liability (within certain parameters). We will encounter such limitations of liability in our focus on remedies in Chapter 7.

Sullivan v. O'Connor

Supreme Judicial Court of Massachusetts, Suffolk, 1973.
363 Mass. 579, 296 N.E.2d 183.

■ KAPLAN, JUSTICE.

The plaintiff patient secured a jury verdict of $13,500 against the defendant surgeon for breach of contract in respect to an operation upon the plaintiff's nose. The substituted consolidated bill of exceptions presents questions about the correctness of the judge's instructions on the issue of damages.

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense. The second count, based on the same transaction, was in the conventional form for malpractice, charging that the defendant had been guilty of negligence in performing the surgery. Answering, the defendant entered a general denial.

On the plaintiff's demand, the case was tried by jury. At the close of the evidence, the judge put to the jury, as special questions, the issues of liability under the two counts, and instructed them accordingly. The jury returned a verdict for the plaintiff on the contract count, and for the defendant on the negligence count. The judge then instructed the jury on the issue of damages.

As background to the instructions and the parties' exceptions, we mention certain facts as the jury could find them. The plaintiff was a professional entertainer, and this was known to the defendant. The

agreement was as alleged in the declaration. More particularly, judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery. The plaintiff did not demonstrate, however, that her change of appearance had resulted in loss of employment. Payments by the plaintiff covering the defendant's fee and hospital expenses were stipulated at $622.65.

. . .

It has been suggested on occasion that agreements between patients and physicians by which the physician undertakes to effect a cure or to bring about a given result should be declared unenforceable on grounds of public policy. See *Guilmet v. Campbell*, 385 Mich. 57, 76, 188 N.W.2d 601 (dissenting opinion). But there are many decisions recognizing and enforcing such contracts, see annotation, 43 A.L.R.3d 1221, 1225, 1229—1233, and the law of Massachusetts has treated them as valid, although we have had no decision meeting head on the contention that they should be denied legal sanction. * * * These causes of action are, however, considered a little suspect, and thus we find courts straining sometimes to read the pleadings as sounding only in tort for negligence, and not in contract for breach of promise, despite sedulous efforts by the pleaders to pursue the latter theory. * * *

It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries. If actions for breach of promise can be readily maintained, doctors, so it is said, will be frightened into practising 'defensive medicine.' On the other hand, if these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. See Miller, The Contractual Liability of Physicians and Surgeons, 1953 Wash.L.Q. 413, 416–423. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof.

Instructions to the jury may well stress this requirement and point to tests of truth, such as the complexity or difficulty of an operation as bearing on the probability that a given result was promised. See annotation, 43 A.L.R.3d 1225, 1225–1227.

If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract—'compensatory' ('expectancy') damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, 'restitution' damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See *Restatement: Contracts* § 329 and comment a, §§ 347, 384(1). Thus in *Hawkins v. McGee*, 84 N.H. 114 * * *, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not 'caused' by the breach. But where the plaintiff by reason of the operation was put to more pain that he would have had to endure, had the doctor performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery. It may be noted that on an alternative count for malpractice the plaintiff in the Hawkins case had been nonsuited; but on ordinary principles this could not affect the contract claim, for it is hardly a defence to a breach of contract that the promisor acted innocently and without negligence. . . .

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to effect a cure, attain a stated result, or employ a given medical method. This measure is expressed in somewhat variant ways, but the substance is that the plaintiff is to recover any expenditures made by him and for other detriment (usually not specifically described in the opinions) following proximately and foreseeably upon the defendant's failure to

carry out his promise. * * * This, be it noted, is not a 'restitution' measure, for it is not limited to restoration of the benefit conferred on the defendant (the fee paid) but includes other expenditures, for example, amounts paid for medicine and nurses; so also it would seem according to its logic to take in damages for any worsening of the plaintiff's condition due to the breach. Nor is it an 'expectancy' measure, for it does not appear to contemplate recovery of the whole difference in value between the condition as promised and the condition actually resulting from the treatment. Rather the tendency of the formulation is to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement. This kind of intermediate pattern of recovery for breach of contract is discussed in the suggestive article by Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 373, where the authors show that, although not attaining the currency of the standard measures, a 'reliance' measure has for special reasons been applied by the courts in a variety of settings, including noncommercial settings. See 46 Yale L.J. at 396–401.

For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly too meager, if the agreements are to be enforced at all. On the other hand, an expectancy recovery may well be excessive. The factors, already mentioned, which have made the cause of action somewhat suspect, also suggest moderation as to the breadth of the recovery that should be permitted. Where, as in the case at bar and in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh. We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder. As a general consideration, Fuller and Perdue argue that the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, when they have to do with the production or distribution of goods or the allocation of functions in the market place; they become weaker as the context shifts from a commercial to a noncommercial field. 46 Yale L.J. at 60–63.

There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unreceptive to the use of that formula in special situations. . . .

The question of recovery on a reliance basis for pain and suffering or mental distress requires further attention. We find expressions in the decisions that pain and suffering (or the like) are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for

the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed; he would be told, perhaps, that the asserted psychological injury was not fairly foreseeable by the defendant as a probable consequence of the breach of such a business contract. See *Restatement: Contracts,* § 341, and comment a. But there is no general rule barring such items of damage in actions for breach of contract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances. * * * Suffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach. Indeed it can be argued that the very suffering or distress 'contracted for'—that which would have been incurred if the treatment achieved the promised result—should also be compensable on the theory underlying the New York cases. For that suffering is 'wasted' if the treatment fails. Otherwise stated, compensation for this waste is arguably required in order to complete the restoration of the status quo ante.

In the light of the foregoing discussion, all the defendant's exceptions fail: the plaintiff was not confined to the recovery of her out-of-pocket expenditures; she was entitled to recover also for the worsening of her condition, and for the pain and suffering and mental distress involved in the third operation. These items were compensable on either an expectancy or a reliance view. We might have been required to elect between the two views if the pain and suffering connected with the first two operations contemplated by the agreement, or the whole difference in value between the present and the promised conditions, were being claimed as elements of damage. But the plaintiff waives her possible claim to the former element, and to so much of the latter as represents the difference in value between the promised condition and the condition before the operations. . . .

NOTES & QUESTIONS

1. The court in *Sullivan v. O'Connor* note that, while awarding the expectation interest might be more typical, there may be "special reasons . . . applied by courts in a variety of settings, including noncommercial settings" for awarding the reliance interest. Can you suggest a list of such "special reasons"? What might be the policy behind keeping such a list small?

2. In Restatement (Second), it is now § 353 that excludes recovery for emotional disturbance "unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result". These are limited. Consider whether you think such a contract is likely to be open to such recovery in: (a) a childcare

arrangement; (b) an arrangement with a funeral home on correct burial procedures of a relative; (c) the rental of an Airbnb room; (d) the purchase of a wedding ring.

3. RESTITUTION INTEREST

Yurchak v. Jack Boiman Construction Co.

Court of Appeals of Ohio, First District, 1981.
3 Ohio App.3d 15, 443 N.E.2d 526.

■ PER CURIAM.

This contract action arose out of a transaction between Michael Yurchak, plaintiff-appellee, and Jack Boiman Construction Company and Jack Boiman, defendants-appellants. On May 7, 1977, the parties entered into a written agreement whereby defendants undertook to waterproof plaintiff's basement. Central to the contract was defendants' guaranty that the basement would be waterproof for ten years. Plaintiff paid defendants $2,400, leaving a balance of $800 to be paid upon the job's completion. After defendants had finished their work, but before plaintiff could make final payment, it rained, and water leaked into plaintiff's basement much as it did before defendants attempted to waterproof it. Defendants endeavored several times to repair the leaks but were unable to do so. Plaintiff sued defendants on the breach of the guaranty and sought recovery of the $2,400 paid to defendants under the contract, and defendants counterclaimed for the outstanding $800. The evidence indicated that plaintiff received some minimal benefit from defendants' services. The jury found for plaintiff awarding him $2,000. Defendants appeal raising four assignments of error, none of which have merit.

In their first assignment of error defendants state that the trial court erred in overruling their motion for a directed verdict where the evidence showed that whereas the defendants had performed the contract, plaintiff had failed to perform his obligations thereunder (by withholding payment of the $800). We find this assignment unconvincing because it assumes that defendants had fully performed but the evidence showed that defendants' performance failed to achieve the ultimate object of the contract (the waterproofing of the basement). Final payment by plaintiff was clearly conditioned upon defendants' satisfactory completion of the task, and plaintiff was justified in withholding payment until the waterproofing of the basement was fully performed. Defendants' first assignment of error is overruled.

Defendants' second assignment of error is that the trial court erred in awarding a judgment to plaintiff in the absence of evidence indicating that the job was done in an unworkmanlike fashion or contrary to the contract specifications. This assignment is similar to the first in that it assumes that defendants fully complied with the contract specifications

when the evidence, as well as the jury's verdict, clearly indicate the contrary. Defendants' failure to waterproof the basement was a material breach of the contract and entitled plaintiff to sue for an appropriate remedy.

This brings us to the third assignment of error that it was improper for the court to award judgment to the plaintiff when there was no evidence as to the amount of damages. The controlling fact is that plaintiff bargained and paid for a watertight basement which he did not receive. Defendants failed to render the consideration due under the contract and the plaintiff was entitled to recover the money he had paid for that promise.

The right to restitution[1] from a party who has substantially failed to perform[2] his part of the bargain is firmly established. * * *. "Once it is determined that a substantial breach has occurred, the non-breaching party has several options about what measures of recovery to pursue." Dobbs, The Law of Remedies, Section 12.1. He may pursue his expectancy interest and sue for damages or, "[i]f it is easier for him to show his restitution measure, then so be it, for that measure will certainly not be an unfair one to the defendant in the usual case." Id. at 793. When a contract is breached, the innocent party may recover either his expectancy or the benefits he has conferred upon the breaching party by his performance under the contract. 3 Restatement of Contracts 2d 208, Section 373.

In a case strikingly similar to this one, *Economy Swimming Pool Co. v. Freeling* (1963), 236 Ark. 888, 370 S.W.2d 438, defendant contracted with plaintiff to build a watertight fallout shelter on plaintiff's property. The shelter leaked and defendant unsuccessfully attempted for three months to prevent the seepage. Plaintiff sued for restitution of his payments made under the contract to which the court, at page 891, 370 S.W.2d 438, stated: "It seems to be basic contract law—apparently so

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[1] The term "restitution," as it applies in breach of contract cases, refers only to the remedy of placing plaintiff in the position where he was before the contract was made; that is, to return him to the status quo ante (as opposed to damages, or his expectancy, which are to place him in the position he would be in if the contract were performed). It should not be confused with the equitable action, restitution, which is used in situations involving unjust enrichment where the existence of a contract is immaterial.

[2] In order to obtain restitution as a measure of damages, the breach must be substantial, not minor. Professor Corbin explains:

> "In the case of a breach by non-performance, however, assuming that there has been no repudiation, the injured party's alternative remedy by way of restitution depends upon the extent of the non-performance by the defendant. The defendant's breach may be nothing but a failure to perform some minor part of his contractual duty. Such a minor non-performance is a breach of contract and an action for damages can be maintained. The injured party, however, can not maintain an action for restitution of what he has given the defendant unless the defendant's non-performance is so material that it is held to go to the 'essence'; it must be such a breach as would discharge the injured party from any further contractual duty on his own part. Such a vital breach by the defendant operates, with respect to the right of restitution, in the same way that a repudiation of the contractual obligation would operate." 5 Corbin on Contracts 561–564, Section 1104.

basic that there is little case law on the point—that where there is a material breach of contract, substantial nonperformance and entire or substantial failure of consideration, the injured party is entitled to rescission of the contract and restitution and recovery back of money paid." See, also, *Bause v. Anthony Pools, Inc.* (1962), 205 Cal.App.2d 606, 23 Cal.Rptr. 265.[3]

Defendants' fourth assignment of error is that plaintiff prevented defendants from performing their part of the contract. We find no evidence in the record that plaintiff refused to permit defendants to complete the job. The jury properly weighed the evidence and found for the plaintiff.

We affirm.

NOTES & QUESTIONS

1. What might Mr. Yurchak's expectation interest have been in this case? Why might he have favoured the recovery of the restitution interest?

2. Think through the different rationales for expectation, reliance, and the restitution interest. Expectation is the more usual remedy, and we will explore it further in Chapter 7. It has been said that "Reliance is often difficult to prove . . . and when proved it may be difficult to measure": Sharp, *Promissory Liability*, 7 U. Chi. L. Rev. 1, 20–21 (1939). As against restitution:

> [I]t is sometimes said that a credit economy depends, to a peculiar extent, on the keeping of promises, or at least of contracts, and so the equivalent of performance should be given in a case of breach. It is to be noted that if one understands credit in a limited sense, the force of this observation is likely to be lost. Credit in the sense of relations analogous to those of lender and borrower, could be taken care of by restitution. A more exact statement of the relations between our economy and expectation damages, seem to depend on the observation that it is not only an industrial and credit economy, but also a risk taking, profit making, more or less gambling economy. *Id.*

[3] The restitution sought by plaintiff in this case was the payment he made on the contract ($2,400). However if defendants' services resulted in any benefit to the plaintiff, the plaintiff's restitution must be offset by the value of that benefit. 5 Corbin on Contracts 573, Section 1107. The jury apparently gave credit to testimony that defendants' work had stopped some of the mud that had previously oozed into plaintiff's basement and offset plaintiff's award by $400. We do not rule on the propriety of this aspect of the verdict because plaintiff, apparently satisfied with the verdict, chose not to cross-appeal and raise this issue.