Law School Survival Guide

Contracts and Sales

Outlines and Case Summaries

2010
Edition

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CONTRACTS AND SALES
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Law School Survival Guide

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)
AGI	Adjusted gross income
AP	Adverse possession
A/R	Assumption of the risk
B	Buyer
BFP	Bona fide purchaser or bona fide purchase
C	Constitution
CIF	Cause-in-fact
Cl.	Clause
CLEO	State Chief Law Enforcement Officer
Court (cap.)	United States Supreme Court
CP	Court of Pleas (UK)
CR	Contingent remainder
CSD	Common Scheme of Development
CSI	Compelling state interest
Ct.	Court
Ct. App.	Court of Appeals
Ct. Chan.	Court of Chancery (England)
ED	Emotional distress
EI	Executory interest
Eng.	England
ES	Equitable Servitude
FI	false imprisonment
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FQJ	Federal question jurisdiction
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
FS	Fee simple absolute (fee simple)
FSCS	Fee simple on condition subsequent
FSD	Fee simple determinable
FS EL	Fee simple on executory limitation
FT	Fee tail
H.L.	House of Lords (England)
IIED	Intentional infliction of emotional distress
IT	Intentional tort
JMOL	Judgment as a matter of law
JNOV	Judgment non obstante veredicto
J/SL	Joint and several liability, or jointly and severally liable
JT	Joint tenant/tenancy
K	Knowledge (criminal law) or Contract (all other law)
K.B.	King's Bench (UK)
KSC	Knowledge to a substantial certainty
L	Loss in value
L1	First landlord
Lat.	Latin
LE	Life estate
LED	Life estate determinable
LLC	Limited liability company
LLP	Limited liability partnership
LRM	Least restrictive means
MPC	Model Penal Code
MSAJ	Motion to set aside the judgment
N	Negligence
N.B.	Nota bene
NIED	Negligent infliction of emotional distress
O	Original owner, or grantor (in present estates and future interests)
OLQ	Owner of the *locus in quo*
OO	Original owner
P	Purpose or purchaser
PE	Privity of Estate
PJ	Personal jurisdiction
PJI	Pattern Criminal Jury Instruction
PK	Privity of Contract
Q.B.	Queen's Bench (UK)
R	Recklessness
RAP	Rule against perpetuities
RC	Real Covenant
Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
RFRA	Religious Freedom Restoration Act of 1993
RIL	Res ipsa loquitur
RPP	Reasonable prudent person
Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
§	Section
S	Sublessee or seller
S.Ct.	Supreme Court or US Supreme Court Reporter
SF	Statute of Frauds
SJ	Summary judgment
SL	Strict liability, or statute of limitations

SMJ	Subject matter jurisdiction
SP	Specific performance
T1	First tenant
TE	Tenant/tenancy by the entireties
TO	True owner
UCC	Uniform Commercial Code
US	United States of America or United States Reports (compilation of US Supreme Court opinions)
USC	United States Code
VR	Vested remainder
VR SD	Vested remainder subject to divestment

I. INTRODUCTION

A. DEFINING CONTRACTS

1. The Restatement (Second) of Contracts § 2 establishes the following definitions:
    a. *Promise*: a manifestation of intention to act or refrain from acting so made as to justify a *promisee* in understanding that a commitment has been made.
    b. *Promisor*: the party making the promise.
    c. *Promisee*: the party receiving the promise.
    d. *Beneficiary*: the party that will benefit from a performance, when this person is not the promisee.
2. "A contract is a promise or set of promises, for breach of which the law gives remedy, the fulfillment of which is a legal duty" (§ 1 Restatement).
3. "An agreement is a manifestation of mutual assent by two or more persons. A bargain is an agreement to exchange promises or exchange a promise for a performance or to exchange performances" (§ 3 Restatement).
4. A contract can be made orally or in writing, or inferred from conduct (§ 4 Restatement).

B. SOURCES OF THE LAW ON CONTRACTS

1. The case law, which can vary from state to state.
2. In the sales of goods, the Uniform Commercial Code (UCC).
    a. This is a uniform law that that all of the states have adopted.
    b. However, Louisiana has not adopted the UCC in all of the ways suggested its drafters.
    c. The UCC applies to contracts for the sale of goods (art. 2) and for leases (art. 2A).
    d. The UCC also deals with negotiable instruments (art. 3), bank deposits (art. 4), letters of credit (art. 5), investment securities (art. 8).
    e. The present text will limit itself to discussing sales of goods and will make some mention of the UCC provisions with respecto to leases.
3. Furthermore, secondary sources such as the Restatement (Second) of Contracts, legal treatises, and scholarly articles may apply.

C. CLASSES OF CONTRACTS

1. Bilateral contracts are accepted by return promise.

a. Example: a contract in which A promises to sell B land at a particular price if B promises to purchase the land at that price.

2. Unilateral contracts are accepted by performance.

a. Example: A promises to pay $10 to whoever finds and brings him his lost dog.

b. The person who finds and brings the dog, without notifying A of his acceptance or promising to bring A the lost dog, is entitled to the $5 at the time he brings the lost dog.

II. MUTUAL ASSENT

A. THE OBJECTIVE THEORY OF ASSENT

1. An Objective Meeting of the Minds: the Reasonable Person Standard

a. For there to be a valid contract, there must be a "meeting of the minds."

b. *Actual mutual assent* is not required; it is the *expression* of assent through behavior that matters.

c. What is important in the objective theory of assent is not the inner motives of the parties, but rather, their outward expressions.

d. Determining the "secrets of the mind" is thus not necessary in determining mutual assent.

i. *See Embry v. Hargadine, McKittrick Dry Goods* Co. (Mo. Ct. App. 1907), where the defendant acted as though the plaintiff had his job contract back, but then fired him after two months. The court ruled in favor of the plaintiff, since the defendant expressed his assent through behavior and whether he intended to renew the contract was irrelevant.

e. One must determine whether a *reasonable person* in the offeree's position would come to conclude that an offer or assent to an offer is being made.

f. Even if the offeror is joking or intoxicated, if his outer conduct would lead a reasonable person to conclude that there was an agreement, then the promise is enforceable.

i. *See Lucy v. Zehmer* (Va. 1954), where a court held that if the defendant were sober enough to spend forty minutes discussing the terms of an agreement, then regardless of whether he was intoxicated, that promise was enforceable because of the manifestation of assent.

2. A Written Contract

a. The commitment does not need to be memorialized as a written contract.

b. A contract is enforceable as soon as there is a meeting of the minds.

i. *See Sanders v. Pottlitzer Fruit Co.* (N.Y. I894), where after much negotiation, the plaintiff sends a letter offering apples, the defendant says it will take apples only if conditions are met, and the plaintiff accepts. The defendant then asks for the written contract to be sent, which it tries to change. The plaintiff refuses to change it and sues to enforce the original contract. The court held that an agreement in the prior correspondences; a formally written contract is not required. Judgment for the plaintiff.

B. THE OFFER

1. Definition

   a. An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his *assent* to that bargain is invited and will conclude it (§ 24 Restatement).

2. The Four Elements of an Offer

   a. A Commitment

      i. There must be a promise to enter into a contract, not an invitation to negotiate.

      ii. Language such as "I offer" or "I promise" tends to indicate commitment; language such as "I consider" or "I quote" tends to indicate an invitation for offers.

      iii. If offeror did not intend to make the offer, the objective test will be used: "would a reasonable person in the offeree's position know or should he have known that there was an offer?"

      iv. To answer this question, the following will be considered:

         1) Industry practices and prior practices between the parties.

         2) Circumstances: was the offer made in jest? If so, would a reasonable person have construed it to be an offer?

            a) *See Zehmer*, where the defendant said he was joking about selling his land, but the court held there was a commitment because a reasonable person would not have understood that he was joking.

   b. Communicated

      i. The offeree must have knowledge of the offer before being able to accept it.

      ii. Example: A offers to buy B's car for $5,000. B, before he finds out about the offer, says that he will give A his car for the same price. Since A's offer was not communicated to B, B's communication is merely another offer; it does not constitution acceptance.

   c. To an Identified Offeree

      i. An offer is always personal; it cannot be transferred to a third party.

ii. The broader the medium for communicating the offer, the more likely the courts will construe the communication to be an advertisement.

iii. Advertisements are not offers, but rather, invitations to negotiate or make offers.

1) *See Nebraska Seed Co. v. Harsh* (Neb. 1915)152 N.W. 310 (Neb. 1915), where a farmer invited a company to buy about 1,800 bushels of seeds for $2.25 each, and the company accepted. When the farmer did not deliver, the company sued for breach of contract. The court held that there was never an offer, since the communication was not made to an identified offeree, but rather, to several. Furthermore, the delivery time and subject matter ("about" 1800 bushels) was indefinite.

2) *See also Leonard v. Pepsico* (S.D.N.Y. 1999), where an advertisement was held not to be an offer, and furthermore, tested by the reasonable person standard, the content of the advertisement was an obvious joke, not a real offer.

iv. However, the Restatement (Second) of Contracts allows offers to be made to more than one person (§ 29 Restatement). The communication would be a valid offer if it can only be construed as being open to a single offeree.

1) For example, if a subject offers a reward to whoever finds and returns his lost dog, a court would treat the communication as an offer, since it is implicitly being communicated to an identified offeree: the first and only person to return the dog.

d. With Definite Terms

i. For an offer to be enforced, it must contain definite terms.

ii. Each category of contracts calls for different terms to be specified.

1) For contracts of *realty*, the ***price*** and the ***land to be sold*** (the amount and location) must be specified.[1]

a) The land must be identified as to both the amount and the location to be sold.

2) For employment contracts, the ***duration*** must be determined.

a) The duration may be manifested as a period of time (*e.g.*, a one year employment contract) or as a task (*e.g.*, a contract to repair a computer).

b) If the duration is not specified, the offeree is considered hired at will and can quit or be fired at

[1] With respect to the description of the land, the test turns on whether a court can identify the land to be sold in order to enforce the contract.

anytime without being able to enforce any time provision.

3) For contracts for the sale of goods under the UCC, only the ***quantity*** must described (UCC Official Comment 1, § 2-201).

a) The indicated quantity need not be accurate, but the contract cannot be enforced beyond this quantity.

b) Other terms, such as the price, place of delivery, or time of delivery, can be determined by the UCC gapfillers.[2]

c) There are two exceptions to this rule:

i) Requirements contracts (*e.g.*, "I will buy as many units as I need"); and

ii) Output contracts (*e.g.*, "I will buy as many units as you produce").

d) If terms, such as place of delivery and time of delivery, are left unspecified, the court can fill these in with what is reasonable.

e) If the price is unspecified, the court can fill it in when: (i) there is no mention of price in the negotiation; (ii) the price was left to the parties to agree upon but they did not; or (iii) the price was left to be determined by the market.

i) For example, if A offers to sell B ten widgets "for the price we agree to," the price can be determined by the court, since the price was left to the parties to agree upon.

ii) However, if A offers to sell B ten widgets "for a reasonable price," a court cannot fill in the price because the offer does not fit into one of the three circumstances defined above.

iii) Since price is not determined, it is not a valid offer and the agreement is unenforceable; the court is not going to try to determine what a reasonable price is.

3. Terminating an Offer

a. The offeree's power of acceptance is terminated in the following circumstances (§ 36 Restatement):

i. The offeree ***rejects*** the offer or makes a ***counteroffer***;

ii. There is a ***lapse of time*** (must be reasonable);

[2] In the case of an open price term, see § 2-305 UCC; for the absence of a specified place of delivery, see § 2-308 UCC; for the absence of specific time provisions, see §2-309 UCC.

iii. The offeror directly or indirectly ***revokes*** the offer:

1) The offer is considered to be indirectly revoked if the offeree receives reliable information that would lead a reasonable person to conclude that it has been revoked (*e.g.*, when the offeree learns that the offeror is searching for other purchasers).

2) *See Dickinson v. Dodds* (Ct. App. U.K. 1876), where Dodds, the defendant, gave the plaintiff an option not bearing consideration that would remain open for two days to buy his house for 700 pounds. The plaintiff heard of Dodd's intent to sell the land to another purchaser, even though he never communicated a formal, direct revocation. The plaintiff then accepted the offer and sued for specific performance when the land was not delivered. Held: although Dodd's revocation was not directly communicated to the plaintiff, the offer was terminated the moment that the plaintiff heard about it indirectly.

a) *N.B.*: if there had been any consideration on the option, real or recited, the offer would have been irrevocable until the agreed-to termination.

iv. The offeror or offeree ***dies*** or is ***incapacitated***.

1) If the offeror dies before the offeree accepts the offer, the offeree's power of acceptance is terminated and no contract is formed.

2) However, if the offerree accepts just prior to the offeror's death, an enforceable contract is formed. Once there is a meeting of the minds, the death of either party does not invalidate the contract.

b. Exception: Options Contracts

i. If an options contract is supported by consideration (or, in many courts, by recital thereof), the offeree's power of acceptance is not terminated through his rejection of the offer, counteroffer, death or incapacity, or through the direct or indirect revocation by offeror.

ii. However, if there is no consideration, an options contract can be terminated in the same way that a regular offer can be terminated (rejection, lapse of time, revocation or death or incapacity).

c. Revocation of Unilateral Contracts

i. In the case of unilateral contracts, where the offer is accepted by performance, the offeror may revoke the offer at any time before the offeree completes performance.

ii. However, where there is a ***tender*** (unconditioned willingness to perform immediately coupled with a manifest ability to perform) or a ***beginning of performance*** (more than just preparation to begin performance), a binding option contract is formed that the offeror is unable to revoke.

a) *See Parker v. Twentieth Century-Fox Film Corp.* (Cal. 1970), where the defendant hired the plaintiff Parker to play lead role in a musical for $750,000. The defendant breached the contract and instead offered the plaintiff the chance to play a lead role in a Western style movie to be filmed in Australia under similar terms. The plaintiff refused the new contract and sued for damages. The defendant argued that accepting the new job was required mitigation. Held: the plaintiff is not required to accept the new job as mitigation because the new job is substantially different from the old and cannot substitute it. The plaintiff is entitled to the $750,000.

b) *N.B.*: the court never discussed the plaintiff's duty to make reasonable efforts to find work. It may have been because these kinds of jobs come around so rarely that it may not have been practical to have required her to make such efforts.

d. Mitigation in the Sale of Goods under the UCC

i. General rule when the buyer breaches:

1) If the seller resells the good, he is entitled to the difference between the purchase price and the contract price.

2) If the seller does not resell, he is entitled to the difference between market price and contract price plus incidental and consequential damages minus costs avoided.

ii. If the seller withholds delivery because of the buyer's breach, he must refund the defendant all the money that the defendant gave him less either $500 or 20% of contract price, whichever is less. UCC § 2-718(2).

iii. However, this rule is subject to another damage-measuring formula under UCC § 2-708:

1) Damages for the seller are the difference between the market price and the contract price at the time and place of tender, plus incidental and consequential costs, minus costs saved.

2) If § 2-708(1) does not offer a reasonable result, then the seller may collect the profit (including reasonable overhead) that he would have made, plus incidentals, due allowance for costs, and due credit for payments.

C. LIQUIDATED DAMAGES V. PENALTY CLAUSES

1. Introduction

a. Generally, damages for breach of contract are equal to expectation damages, reliance damages or restitution damages.

b. However, when calculating damages would be too difficult, the parties may elect to include liquidated (stipulated) damages clauses in the contract itself, to be applied in case of breach.

c. However, courts are hesitant in enforcing stipulated damages clauses that appear to be penalties.

i. Rationale: contracts must be seen in terms of economic realities. When damages could be calculated, the non-breaching party should be able to recover only monetary damages. When exorbitant damages are claimed, they are seen by the courts as penalties, which the contract law does not recognize.

2. Stipulated damages clauses will generally not be enforced when:

a. Actual damages can be calculated; and

b. The stipulated damages are significantly greater than the actual damages (this indicates that the stipulated damages are really a penalty).

i. Courts are especially reluctant to enforce stipulated damages clauses when they apply to even immaterial breaches.

ii. *See Kemble v. Farren* (C.P. 1829), where the defendant Farren had a contract to be a comedian at the Royal theatre with a 1,000 £ liquidated damages clause. When the defendant breached after the second season, the plaintiff sued to recover the full 1,000 £. Held: because this contract allows the plaintiff to collect 1,000 £ in damages for even slight breach, it functions as a penalty clause and will not be enforced.

3. On the other hand, courts will enforce liquidated damage clauses when they are ***reasonable***, as determined by three factors:

a. There is *no intent to create a penalty clause*.

b. The damages *would be difficult for a court to ascertain* at the time the contract was made.

i. *N.B.*: under the minority approach, courts look to see if the damages would be difficult to ascertain *at the time the suit is brought*.

c. The damages *accurately predict* the damages at the time they arise.

i. *See Wassenaar v. Towne Hotel* (Wis. 1983)., where the plaintiff employee Wassenaar entered into an employment contract with the defendant. Under a stipulated damages clause, the defendant was responsible for its entire three year financial obligation to pay the plaintiff in the event that the defendant terminated the contract prematurely. While twenty one months remaining, the defendant terminated the contract. On the issue of whether the penalty clause was valid, the court held that the damages for breaching the employment contract comprised more than just the amount of money owed; it also included harm to reputation and other

incalculable factors. The liquidated damages clause was therefore applied.

ii. *N.B.*: this court ***did not require the plaintiff to mitigate damages*** because when a stipulated damages clause is found to be reasonable, the non-breaching party is not required to mitigate. However, although courts do not formally require mitigation, in practice mitigation is factored into courts' decision through courts' analysis of ***reasonableness*** *of liquidated damages clauses*. If in *Wassenaar*, the defendant was able to get information into record that the plaintiff had in fact gotten a job just after leaving the defendant's employment, the court, in evaluating the accuracy of the stipulated damages clause in predicting actual damages, would have held that this factor was not met. It would have therefore probably found the clause to be unreasonable, and would not have honored it. Instead, it would have required the plaintiff to prove expectation damages. Thus, mitigation may be indirectly factored into the analysis.

D. OTHER REMEDIES AND CAUSES OF ACTION

1. Specific Performance and Injunctions

a. General Rule

i. Specific performance (SP) and injunctions will not be ordered by a court unless there is *no adequate remedy at law* (*i.e.*, money damages).

ii. It is an exceptional remedy that tends to be applied in only real estate transactions.

b. Contracts for Land

i. For real estate transactions, SP is granted as a matter of course.

1) *See Loveless v. Diehl* (Ark. 1963), where the defendant leased his farm to the plaintiff Diehl for three years with an option to purchase it for $21,000. The plaintiff found a buyer who would buy the land, allowing the plaintiff to make a $1,000 profit, but when the defendant found out about this, he repudiated the options contract. The plaintiff sued for SP. The defendant counterclaimed for a $1,440 promissory note. The courts originally held that the plaintiff was entitled to $1,000 and the defendant was entitled to the payment of the promissory note. On rehearing, it was held that there was no reason to deny SP. The general rule is that for realty, SP is granted as a matter of course. The plaintiffs spent much more on improving the property than the meager $1,000 awarded as damages. To refuse SP would be to unjustly enrich the sellers for breaching their own options contract.

ii. But if it can be shown that there really is no difference between two pieces of real estate, then only damages will be rewarded (this would be exceptional).

c. Contracts for Goods

i. Under the common law, courts only order SP when the goods are scarce, rare, irreplaceable, or of sentimental value.

1) *See Cumbest v. Harris* (Miss. 1978), where the defendant Harris loaned the plaintiff money and the plaintiff gave the defendant hi-fi equipment as collateral, with an option to purchase the equipment at any time before 5 pm on a specified date. When the day arrived, the plaintiff did everything he could to purchase the goods, but the defendant avoided him. The plaintiff sued for SP. The court held that the test for determining whether SP should be rewarded requires the court to consider whether damages are adequate. Here, some parts of the equipment were irreplaceable and other parts were replaceable only with much effort and time. Because the equipment was rare, unique, and difficult to acquire, SP was rewarded.

ii. UCC § 2-716 similarly awards SP when the good is unique or in other proper circumstances (*e.g.*, it is not commercially feasible for the plaintiff to obtain the good).

1) *See Sedmak v. Charlie's Chevrolet* (Mo. App. 1981), where the plaintiff ordered a limited edition Corvette from the defendant for $15,000. When the time came to tender purchase, the value rose and the defendant reneged on its promise and required the plaintiff to bid on the car. The plaintiff sued for SP. Held: although this Corvette is not unique, it is so rare and finding the equivalent would be so difficult that under UCC § 2-716(1), judgment for SP is affirmed.

d. Contracts for Personal Services

i. Originally, SP was offered for contracts for personal services.

ii. However, courts later became unwilling to order SP, finding such orders impractical and unjust.

1) *See The Case of Mary Clark, A Woman of Colour* (Ind. 1821), where Mary Clark sued to be freed from Johnston, to whom she voluntarily indentured herself. Johnston called for SP, arguing that Clark should be bound by a contract she voluntarily signed. Held: to enforce this contract and require SP would be to put Clark in a state of ***involuntary servitude***. She should be discharged.

iii. Just as courts were reluctant to enforce SP, they also were reluctant to enforce *negative injunctions*, which prohibit the breaching party from taking on similar work. Many courts consider negative injunctions to be an indirect form of SP.

1) *See Ford v. Jermon* (Pa. 1865), where the defendant Jermon breached her contract to act in a theatre. The plaintiff sued for a negative injunction. Held: forbidding

the defendant from acting in any other play would have the effect of enforcing SP through the "backdoor," which the court refused to do. SP within the context of employment contracts is a mitigated form of slavery. Judgment for the defendant was affirmed.

iv. Later, courts began allowing negative injunctions, even when they were not expressly provided for in the contract.

1) *See Duff v. Russell* (N.Y. 1891), where the plaintiff Duff sued the defendant performer for breaching her acting contract. The court awarded a negative injunction against her, since the contract implied that she would not work for competitors.

v. Today, negative injunctions are permitted in personal service contracts for employment of unique individuals, where *the breaching party is unique* or *when finding a replacement is unusually burdensome*.

1) Rationale: there is an implied warranty by employees offering rare or unique services not to work for competitors during the employment period.

2) Furthermore, courts are more willing to enforce negative injunctions than SP because negative injunctions are easier to enforce.

3) *See Dallas Cowboys Football Club v. Harris* (Tex. Civ. App.1961), where the court held that the plaintiff Dallas Cowboys Football Club was entitled to a negative injunction against the defendant's working for competing football teams because the defendant's skills were sufficiently unique and exceptional, regardless of the fact that it was never shown that he was the best.

vi. Although today, SP is not enforced in personal service contracts, this rule is limited to *personal service contracts*, not *corporate service contracts*. When there is no adequate remedy at law, corporate service contracts may be enforced through SP.

1) Rationale: the policy of not wanting to force a defendant to work does not apply when the defendant is a large corporation with many employees working at an hourly rate.

2) In personal services contract, then, the only SP that a party can obtain is a negative injunction in certain circumstances (the defendant has rare or unique services).

2. Restitution – Damage Interest and Cause of Action

a. Restitution for Breach of Contract

i. One of the alternative damage interests that a party may seek for breach of contract is restitution.

ii. Generally, restitution is sought by non-breaching parties to collect damages for breach of contract when expectation damages cannot be calculated.

iii. It is available when the contract between the parties has been rescinded; however, some ***courts allow restitution even when a contract has not been rescinded***.

1) *See Bush v. Canfield* (Conn. 1818), where the defendant Canfield breached his contract after the plaintiff paid the first $5,000 of the $14,000 owed for a shipment of 2,000 barrels of flour. Because the price of the flour dropped between the time the contract was made and the time of the breach, the plaintiff did not seek expectation damages, which would have been negative. The court allowed the plaintiff to collect $5,000 of restitution damages without first rescinding the contract.

a) *Dissent*: for the plaintiff to collect restitution damages, it must first rescind the contract. Here, the plaintiff did not first rescind.

b) *Concurring opinion responding to the dissent*: the dissent is simply dwelling on a technicality. Whether the plaintiff was to start the case all over again after rescinding the contract or pursue restitution by skipping that step, the same result will transpire.

b. Restitution to the Party in Breach

i. Under the old common law, restitution was not available to the breaching party.

ii. Under the modern law, the breaching party is still unable to collect damages under the contract, since he breached it.

iii. However, in support of the ***public policy discouraging forfeiture***, the breaching party may collect restitution when the non-breaching party receives a benefit from the breaching party.

1) *See Britton v. Turner* (N.H. 1834), where the defendant Turner agreed to pay the plaintiff $120 upon the plaintiff's completing a one year labor contract. The plaintiff quit work after nine months and sued to recover the nine months of labor. Held: the plaintiff may recover *quantum meruit* ("as much as he deserves") the market value of the benefit he conferred on the defendant.

2) *N.B.*: it may seem unusually harsh that a person be held liable for restitution damages by a party that breaches a contract. It would seem that such a rule would discourage parties from keeping contracts and fully performing. However, most cases do not work out like *Britton*; usually, the non-breaching party's injury will be mitigated:

a) He can repudiate whatever benefit the breaching party has given to him, and thus not be liable for restitution damages (because he will have nothing to disgorge); and

b) Even if he keeps the benefit, he may be able to sue the breaching party for damages if he can prove them.

3) *N.B.*: breaching parties, as in this case, are not required to rescind the contract before collecting restitution, since their breach is in a sense already a rescission.

iv. The restitution collected is to equal ***the market value*** of the benefit that the breaching party transferred to the non-breaching party.

v. Thus, if the plaintiff breaches contract and then sues the defendant for restitution, and if the contract price was higher than market price, a court will only reward market price.

vi. However, the plaintiff is entitled only to contract price when the market value would afford him greater recovery than the contract price.

1) The rationale is not to encourage the plaintiffs to breach their contracts when they realize they made a bad deal.

c. A valid liquidated damages clause may prevent a breaching party from collecting restitution damages. However, if the breaching party shows that the damages clause is invalid (*i.e.*, the other party would be unjustly enriched), he may be able to collect restitution.

i. *See Vines v. Orchard Hills* (Conn. 1980), where the plaintiff Vines entered into a contract with the defendant to buy a condominium. The contract had a stipulated damages clause that established the 10% down payment ($7,880) as damages in the event of the plaintiff's breach. The plaintiff informed the defendant that he would not go through with the deal, since he would be moving to NJ, and demanded the deposit. When the defendant refused, the plaintiff sued for restitution, arguing that as a result of the appreciation of the condo, the defendant benefited from the breach, since he could sell the condo for more. Held: stipulated damages clauses will not be upheld when they lead to the unjust enrichment of the non-breaching party, who ***suffers no damages***. If the breaching party seeks restitution, the burden of proof is on him to show that the liquidated damages clause leads to unjust enrichment. The case is remanded with a new opportunity given to the plaintiff to bring forward evidence showing that the damages clause is unreasonable and its enforcement would lead to unjust enrichment.

d. Restitution and "Quasi Contract"

i. ***Quasi contracts*** are implied contracts that are created by the courts to avoid unjust enrichment when the elements of a contract are not met.

ii. There are two kinds:

1) Implied in Fact Contracts

a) Contracts may be implied by the conduct of the parties.

b) Example: if a party finds a man mowing his lawn, goes outside, and greets him, there will be an implied-in-fact contract, even if he never contracted the man to mow his lawn.

2) Implied in Law Contracts

a) Implied in law contracts, also known as constructive contracts, have no basis in the facts of a case.

b) These are created by the courts in order to avoid injustice when there is neither an express nor an implied in fact contract.

c) Courts, in creating implied in law contracts, may order that a party that is enriched by the service of another restitute the benefit received, in order to avoid unjust enrichment.

i) *See Cotnam v. Wisdom* (Ark. 1907), where the defendant Cotnam was knocked unconscious from his street car and the plaintiff performed medical services upon him. The plaintiff sued to recover for the medical procedures performed on the defendant. Held: although no express contract was entered into, the law will construct a contract for the medical services delivered. This will encourage doctors to help those who are in need and will avoid the unjust enrichment of those receiving the benefits. The plaintiff is thus entitled to restitution equal to the value of his services.

3. Reformation

a. When a written contract fails to reflect the meeting of the minds of the parties when they come to an agreement, the equitable remedy of reformation is used to change the document in order to reflect the agreement reached.

b. Situations in which reformation may arise include: (i) when both parties are mistaken; and (ii) when one party is mistaken and the other acted fraudulently.

Summary Chart for Determining
When the Duty to Perform Has Become Absolute

1. Are there any conditions precedent to a party's performance?	Yes	Go to question 2
	No	The duty to perform has become absolute. Go to question 4.
2. Have the conditions been met?	Yes	The duty to perform has become absolute. Go to question 4.
	No	Go to question 3.
3. Has the condition been excused (treated as though it occurred, in order to avoid forfeiture)?	Yes	The condition to perform has become absolute.
	No	The duty to perform has become absolute. Go to question 4.
4. Has the contractual obligation been discharged through (i) substantial/perfect performance; (ii) material breach; or (iii) agreement of the parties (rescission; accord and satisfaction; novation; substitute agreement)?	Yes	There is no absolute duty to perform.
	No	Go to question 5.
5. Are there any defenses to contractual obligation (*e.g.*, legal incapacity, the improper obtainment of consent, mistake, changed future circumstances)?	Yes	The duty to perform may be voided.
	No	The party is contractually obligated to perform.

APPENDICES

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GLOSSARY

***Ad coelum* doctrine** Under this doctrine, for the purpose of immovable minerals, "to whomever the soil belongs, he also owns to the sky and to the depths." It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An uconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the "but-for" test (*i.e.*, "but for A, B would not have occurred"). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion *See RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow *See* CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff's claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

***Ex post facto* law** (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malic aforethought *and* premediation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does no apply. Compare PRELIMINARY HEARING.

Infant A person who has not yet reached the legal age of majority (generally, eighteen years of age); a minor.

Intent (torts) The *mens rea* element for intentional torts, which is formed when the defendant possesses either: (i) purpose (a wanting or desiring) that a certain result come about; or (ii) knowledge to a substantial certainty that a result is substantially certain to come about as a result of his act (based on belief or knowledge).

Intervening cause An act that intervenes in the series of events after an act, such that it alters the resulting consequence. When intervening causes are strong enough to relieve wrongdoer of liability, they become SUPERSEDING CAUSES.

Involuntary manslaughter An *unintentional* killing lacking malice aforethought committed either with criminal negligence or during the commission of an unlawful act.

Issue preclusion *See* COLLATERAL ESTOPPEL.

Joinder The uniting of distinct claims or parties in an action.

Knowledge to a substantial certainty (torts) Knowledge of an extremely high risk that a particular consequence will materialize as a result of one's act. It may be based on knowledge or belief and, like purpose, satisfies the *mens rea* required in intentional torts.

Larceny A specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.

Leasehold estate An estate where the possessor is not the owner of the property (*e.g.*, in the case of a rental property). Possession will spring back to the owner after the current possessor's lease or rental comes to a close.

License (property law) A right to use another's property that is terminable at the will of the possessor of the land.

Malum in se (Lat., "a wrong in itself"). An inherently evil or immoral act, regardless of whether it is prohibited.

Malum prohibitum (Lat., "a prohibited wrong"). An act or offense which is prohibited but is not inherently wrong (*e.g.*, failing to stop at a stop sign).

Merchantable title Title not subject to such reasonable doubt that it would create a just apprehension of its validity in the mind of a reasonable prudent person. Merchantable title is not necessarily good title; it may have *slight defects*.

Mortgage Security for a debt given by a mortgagor (a debtor) to a mortgagee (a creditor) to secure a loan given to the mortgagor, usually for the purpose of purchasing land or some other real estate.

Mortgagee In a mortgage, the creditor, loan company, or bank that lends to the debtor, or mortgagor.

Mortgagor In a mortgage, the party that borrows from a creditor, loan company, or bank; a debtor.

Negligence *per se* Negligence established as a matter of law such that the plaintiff need not establish duty and breach. The violation of civil and criminal statutes gives rise to negligence *per se* in most states, such that the jury is instructed that the violation of a statute constitutes the breach of duty for the purposes of negligence.

Nonjusticiable political question A question that involves the exercise of *discretionary*