Contracts classnotes, Spring 2004. Professor Colson.

Table of Contents

Tuesday, April 20

Assignment and delegation

Assignment and delegation

A.C. Associates

- Walsh defaults and presumably is insolvent.
- Note that even though Metro. Stell is not in privity with Presb. Hosp., it would usually have a mechanic's lien on the property—such a lien is probably not involved here because Presb. Hosp. is probably public property (against which there can be no mechanic's liens).
- Walsh assigns to Presb. Hosp.
    - Metro. Steel argues:
        1. Assignment itc. was a delegation also, of the duty to pay.
        2. Assignment itc. gives rise to an implied promise by Presb. Hosp. to pay Metro. Steel, making Metro. a 3PB.
    - Old rule: general words of assignemtn do not result in delegation or assumption of duties.
    - New rule (UCC): absent indications otherwise, delegation is preferred.
- What if Presb. Hosp. asked Metro. to do additional work (after the assignment)? Colson thinks the court almost certainly would infer a duty to pay in Presb. Hosp.

Sally Beauty

- Exclusive agency contract itc.
    - N.b., the "best efforts" obligation—it's not clear here whether it was express or implied. Either way, it's in there.
    - Nexxus argues the "best efforts" duty is not delegable. So, the question is: what are the limits of delegation? The court says the "best efforts" agency duty is not delegable to a competitor without the obligee's consent. This preserves the obligee's bargain, the court argues.
        - Thus, courts must determine if the contract is a personal services contract first—if it is, the contract duties are prima facie not delegable.
        - Posner's dissent: the market will make this a good contract for Nexxus. I.e., Best's and Sally are interchangeable in the context of the market.

***Septembertide* redux**

- Sept. held to be a 3PB.

- Note this argument by Sept. not included in the casebook:
    - The failure to pay the last payment is a material breach; as a result, the contract can be rescinded (i.e., rather than terminated or avoided). Here, Sept. has fully performed, so recession is its only option for recovery.
        - But recall *Kiefer* (the infant jeep purchase): after recission, that party must return what it received under the contract. So, wouldn't Sept. have to return the payments it received?? And so would recission really get it anywhere??
- Bookcrafters: a $1.1m lender, for security interest in New Lib.'s promise.
    - Bookcrafters doesn't like that its security interest is secondary to Sept.'s 3PB interest (as the court holds itc.; S&D never had Sept.'s interests, so it couldn't have given Bookcrafters anything wrt. them in security). Bookcrafters argues: how could it have found out about Sept.'s 3PB interest?? Does it have to investigate the facts of the contract (as the court did to determine 3PB intent) and predict whether there will be any 3PB interests??

Friday, April 16

Assignment and delegation

Assignment and delegation

The standard written bilateral contract:

A:promisee ← B:promisor
A:promisor → B:promisee

B:promisor → C
B delegates his duty to perform to C. B is delegator, C is delegatee.
B:promisee → C
B assigns his right to performance to C. B is assignor, C is assignee.

How do you assign?

- Sale (see Form A, p895).
- Security interest (see Form B, p895—this form is unusual in that it

makes it the assignor's duty to collect from the promisor, rather than the assignee's).

- If the value of the promise is less than the value of the debt secured, then the assignor retains a cause of action against the promisee for the difference.

Herzog

- N.b., the monies here go into the client's trust account, which is managed by the firm.
- ¶2p898: the doctor "request[s] that payment be made directly" and then calls the firm and asks if that's good enough for a valid assignment. So, when the firm later pays someone other than the doctor, they make their critical error—if you pay someone other than the assignee, you have to pay twice (because you also have to pay the assignee) (see p899).
  - The firm argues that the assignment attempt wasn't effective. See p896: an agreement to pay out of a particular fund is not an assignment (Restatement § 324).
  - The court ignores "request" as not being enough for an assignment.
  - The firm also argues that its ethical obligation is to pay the client. The court rejects this, saying the firm's ethical obligation is wrt. only to the client's money.
- Is the assignment here a sale or a security? Probably a security; but it doesn't matter to the outcome itc. (which is why the court doesn't address it).

Bel-Ray

- A clause in the contract says there can be no assignment without Bel-Ray's consent.
  - The law favors assignability, so courts will read such clauses narrowly.
- The question itc. is whether the duty to arbitrate is delegated when an assignment is made.
  - The rule (p904): distinguish the power to assign and the right to assign. An approval clause does not prevent the assignment—it just means that Bel-Ray has an action against the assignor. What the clause did not say was that any assignment would be void—thus, the clause was just a promise not to assign.
  - Power vs. right:
    - If the clause says "void," then there's no power to assign.
    - If not, then the promisee has the power to assign, but not the right to.

Thursday, April 15

Third party beneficiaries

Third party beneficiaries

Septembertide

- Sept. wants to get money from New Lib. because S&D (its promisee) is in financial trouble.
  - Note the assignment issue here too (see *supra* on assignments): S&D got a loan from Bookcrafters using New Lib.'s promise as security.
- The intended beneficiaries rule:
  - *Grigerik*: "intent" here is the intent of both parties.
  - Itc.:
    - ¶2p880: the timing, language, and financial obligations created shed "much light" on S&D's intent.
      - The author and the book were mentioned in the contract, the court notes. Colson notes that this mention was probably only in S&D's licensing promise to New Lib., and probably not in New Lib.'s promise to pay S&D—so maybe itc. doesn't require intent to be the intent of both parties (as in *Grigerik*).
    - ¶3p880: the "proceeds" clause—but that's in the S&D/Sept. contract (!!), where of course Sept. is a beneficiary; it's not in the S&D/New Lib. contract.

    So, is this simply a "forseeability" test for 3PBs? Maybe, but that's not contract law, traditionally (see notes following itc. in casebook). Colson notes that this is the slippery slope again (n.b. that *Grigerik* rejects a forseeability test for 3PBs (p874)).
  - Colson says that the PMR and PER are not going to be applicable to 3PB analysis (and notes that the court itc. sees there is no obstacle in PMR to looking at timing, obligations, etc., for intent (¶2p880).

Olson v. Etheridge

- The old Illinois rule: you can't change the underlying contract if there are 3PBs.
- The new Illinois rule: 3PBs interests vest iff:
  - Reliance by 3PB

- Suit by 3PB on the contract
- Assent by 3PB at request of parties

That is, as Colson says, 3PBs have to give some pain for their rights.

But, note that if a 3PB gets too excited about delegation to a new promisor and assents to it, he might discharge the original obligor (i.e., a novation).

Attorney-client contracts with 3PBs

- p875: you just have to be average, if you're an attorney.
- *Lucas*: doesn't this standard seem just like negligence (see nap875).
- Colson asks: where's the intent, though??

Public contracts

- *H.R. Moch*: the public is not usually an intended beneficiary of a public contract (this is practically the same analysis as in *Hadley*).
- *Chevron*: maybe not exactly like *Moch*, but the result turns out the same because of *Hadley*—a heartattack is simply too unforseeable.

Tuesday, April 13

Third party beneficiaries

Third party beneficiaries

Related concepts:

- Trust
  - Express trusts (see n2p859)
  - Constructive trusts

  In either case, their must be some actual property involved.
- Agency
  - Express agency: one party promises to act on behalf of another.

Lawrence v. Fox

- Trust theory: no. See ¶2p860, *Farley* allowed a constructive trust. Lawrence's problem itc. is that the Holly-Fox transaction was a loan; there is no property involved on which to base a constructive trust. I.e., no *res*.
- Agency theory: no. Lawrence would argue that Holly was his agent—

his problem is that there is no express agreement. See concurrence itc.
- Contract: yes.
    - The dissent is troubled because there's no privity here.
    - The majority is not troubled:
        - See ¶1p861: the trust cases (e.g. *Farley*) are just applications of a more general principle in favor of 3P's having actions.
        - But what about the fact that Holly and Fox could modify their contract? The majority says this isn't a problem itc., and thus that it doesn't have to worry about that today.
            - The dissent has a big problem with this. It argues: how can we have a beneficiary to a contract whose rights can be eliminated without his consent!? The majority repsonds to the dissent by saying that the result itc. is the just result (¶3p861); this is where we start down the slippery slope, Colson says.

Seaver

- Distinguish this from *Fox* because there is no preexisting debtor-creditor relationship between Mrs. B (promisee) and her niece (3PB); i.e., itc. is a classic example of a donee 3PB.
- Trust theory? No—the judge (promisor) only had a life estate. I.e., there's no *res*.
- Contract?
    - First, the court outlines the 3PB pattern contracts since *Fox*, and analogizes itc. to the "close relationship" contracts.
    - Then, the court notes that *Fox* is progressive, and that the general doctrine it represents is that "any third person, for whose direct benefit a contract was intended, could sue on it." So, the door opens wider to 3PBs, Colson remarks.

Restatement First: creditor and donee 3PBs can sue. "Incidental" 3PBs can not.

Grigerik

- Why didn't the buyer sue the owner here—the owner is primarily liabile (see n1p865)? Colson doesn't know.
- The modern 3PB rule (¶1p874): if the parties intended a 3PB, then that 3PB can sue on the contract.
    - So, itc., was the problem that Lang didn't explicity specify "Grigerik" as the 3PB??

Tuesday, April 6

Remedies

Remedies

Emotional damages

Emotional damages fall in the OL category (which is where the big money is).

Brown v. Fritz (p534) (real estate—buyer's damages)

- The seller misrepresented:
  - The acreage.
  - That the sewer actually worked.
- The buyer bought for $105K, sold for $175K, and spent $10K to fix the sewer.
  - Buyer seeks emotional damages for distress and hospitalization.
- Buyer's recovery:
  - $10K for fixing the sewer.
  - No emotional damages—these are too much like punitives, the court says, which aren't recoverable in contract. This is not the general rule.
    - Colson wonders <u>how</u> emotional damages are like punitive damages—punitive damages don't have anything to do with injuries, they're just for punishment.

The general rule (n1p535): emotional damages are usually not forseeable under a *Hadley* test, but they are sometimes—when they, you can recover them.

Certainty

Another limitation on damages. There must be certainty of:

1. Some harm, and
2. How much harm.

Usually, if you can prove (1), courts will be lenient wrt. (2).

Fera

- Here, Π is trying to get to the jury—it does.

- Colson notes that itc. is an example of a very permissive certainty test.

Liquidated damages

When parties include a liquidated damages clause, they are trying to displace ordinary contract law (like they are with a force majeure clause, or where they try to displace trade custom).

Wasserman's

- Liquidated damages clause:
  - Cost of improvments
  - 25% of gross receipts
- Note that the property value in 1969 was $48K, and in 1989 (time of suit) was $610K.
- Courts for a long time didn't like liquidated damages clauses, mainly because of the danger of oppression. The modern trend, though, has been towards approving and enforcing them as long as they are a reasonable estimate of actual damages. Also, the more difficult the actual damages would be to measure, the more reasonable a LD clause will seem to a court.
  - Itc. says that you analyze the liquidated damages measure from the time of breach. So, under this approach, you've got to prove actual damages (approximately) at trial anyhow.

Friday, April 2

Remedies

Remedies

Redux: *Jacobs & Young*, *Grvoes*, *Peevyhouse*

- All were treated as construction contracts.
- All involve contractor's breach.
- Exceptions to the basic remedies formula applied to construction contracts:

  LIV = cost of completion
  unless economic waste
  - tearing down
  - $x to increase FMV < $x

- *Groves* says no economic waste because no tearning down, so CoC is the damage measure.
- *Peevyhouse* does not award CoC because of economic waste—because restoration was only "incidental" to the contract.

Hadley v. Baxendale

- N.b., the facts in the actual opinion are different from the facts used in the rationale of that same opinion!!
- What does *Hadley* do?

  (LIV+ OL) – CA = dmgs.

  In the services context for buyer:

  LIV = contract price paid
  CA = amount not paid
  OL = lost wages and profit

  Hadley greatly reduces the availability of OL.

- *Hadley* and *Palsgraf*: the general/special damages distinction in *Hadley* is like the proximate cause idea from *Palsgraf*—but much narrower even. In both cases, the court is reining in the jury, by taking questions from them.
  - Also note that the Δs in both cases are railroads (!!).

- *Delchi*: a forseeability test version of *Hadley*.
- *Kenford*: a contemplation test version of *Hadley*.
  - Contemplation of:
    - the loss.
    - risk allocation.
  - Kenford promised to give city land; the city promised to build a stadium.
    - But, n.b., Kenford had no agreement with <u>both</u> city and DSI.
    - Still, increased tax revenue was contemplated, and so land appreciation must have been contemplated!
    - Thus, *Kenford* requires that the <u>risk itself</u> actually be allocated in contemplation for recovery of OL.

Thursday, April 1

Remedies

Remedies

The basic remedies formula:

damages = (LIV + OL) – (CA + LA)

Parker (The Shirley MacLaine case) (services—provider's damages)

- Δ anticipatorily repudiates (or possibly actually breaches).
- The general rule for services contracts (¶2p502):

  LIV = the agreed salary
  LA = the amount Π has earned or might have earned

  The problem itc. is calculating LA.
  - Δ offered Π the same salary for another project—if that's the LA, then dmgs. = 0. The court rejects this—the substitute employment must be comparable or substantially similar, and the court says the two movies itc. were <u>not</u> (pp502-503). It says that the second offer was inferior to the first and should <u>not</u> be included in LA.
    - The dissent argues that the two <u>are</u> substantially similar—the kind of work was acting, in both. Any further questions about their similarity, it argues, should go to the jury.

- Note the English and American rules wrt. service contracts remedies:
  - English rule: constructive service.
  - American rule: no constructive service—that would encourage idleness!
- Π probably couldn't succeed on a lost volume seller argument because this is a services contract.

Jacobs & Young (construction)

- Substantial performance is what entitles the builder itc. to recovery. The remedies question is what to subtract for builder's recovery the the contract wasn't performed as bargained for.
  - The basic remedies formula applied to construction contracts would have:

LIV = cost of completion

An exception applies in situations like itc., though, where cost of completion is "grossly and unfairly" out of proportion with the good to be obtained by the contract. I.e.:

LIV = cost of completion
unless, that would lead to economic waste.

Economic waste:
- The waste of tearing something down.
- The waste of spending $x to increase FMV < $x.

Groves

- First of all, Colson argues, didn't Δ only have the right, not the duty, to remove the gravel?
- The court effectively makes Δ an insurer against the depression, to Π's benefit. It does this by not recognizing the second type of economic waste (spending $x to increase FMV < $x), and only recognizing the first type (tearing something down).

Peevyhouse

- This decision, like *Groves*, is wrong, Colson argues, because the court says the restoration was only incidental to the contract. Colson thinks it clearly was important to the contract, since the owners insisted on it.

Tuesday, March 30

Remedies

Remedies

The remedies chart:

- Policies
  - Redress: we want to redresss the injured party (but we are not going to punish, retributively, the injurer). Note that this is essentially a moral view.
  - Expectation: we want to protect the expectation interest of the injured party.

        - We may also want to protect the reliance and/or restitution interests of the injured party.
    - Substitution: we prefer substitutional relief over specific relief.
- Rules
    - Goods contracts
        - Sellers
        - Buyers

          LIV = cost of cover
          CA = contract price (not paid)

    - Services contracts
    - Construction contracts
        - Generals
        - Subs
    - Real property contracts

R.E. Davis Chemical (goods—seller's damages)

- Generally, we'd calculate damages as:

  (contract price not received) – (resale price) = damages

  But here, that is zero. So Π wants lost profit, under a "lost volume seller" theory (see ¶0p484). The court considers, under this theory, the law of increased marginal costs (Colson doesn't like this—it's to arcane a situation where it would actually make a difference beyond actual capacity).

Algernon Blair (construction—sub's damages)

- Here, LIV – CA < 0. This is an anomaly that occurred because the breaching party had an extraordinarily advantageous contract because Π botched its bid (and it's real rare that a party with an advantage would breach).
- So, Π abandons contract theory and seeks recovery in restitution, which we calculate as:

  FMV – (amount already paid) = damages

  Δ argues that this is punitive—it takes away the advantage it had. The court rejects this, seeking to "maintain the equilibrium" between the parties (Colson doesn't like this—he argues that the point of contract is to <u>change</u> the equilibrium).

Limitations on damages

This is another policy on the chart—mitigation.

Avoidability

Rockingham City (construction)

- Π repudiated after Δ had spent $1900; but Δ kept working and spent $18K.
- The court says Δ had no right to "pile on" damages. So:

  dmgs = LIV – CA – (costs you <u>should</u> have avoided)

Tongish (goods—buyer's damages)

- Remember the general formula for goods contracts remedies:

  (cost of cover (LIV)) – (contract price (CA)) = dmgs

  But here, buyer is getting a fixed profit per unit (the handling charge). So, the buyer never assumed the risk of the market—and so the cost of cover formular isn't appropriate, right? The court holds otherwise! It says that it doesn't want to reward the seller for a bad faith breach. (Colson doesn't like this—he wonders why we're moralizing in contracts. The morality here is, supposedly, that "a deal's a deal." Should this be part of the remedies chart??)
- N.b., the buyer Coop was probably excused from performance by Bambino.

<u>Friday, March 26</u>

Remedies

Remedies

Specific performance

Walgreen v. Sara Creek

- N.b., Sara Creek's notice of intent to lease to Phar-Mor is an anticipatory repudiation.
- Colson is irked because Posner has substituted law and

economics for precedent in contract law:
    - Efficient allocation of resources concerns.
    - Costs-benefits analysis.
    - Free market preferences.
- Adequate remedy at law? No.
    - Too hard to calculate lost profits on such a long-term lease.
    - Real estate—specific performance is usuallly given in the context.

    But Posner says that injunctions aren't ordinarily granted because they usually don't lead to efficient allocation of resources. Thus, to make its decision, the court considers the costs and benefits of an injunction itc.

- The policy ideal for contract remedies is to put the promisee in the position he would have been in had the promise been performed.
- Loss in value (LIV)

    (what Π would have got) – (what Δ paid Π) = LIV

- But, subtract from LIV the cost that Π avoided (CA)

    LIV – CA = damages

Vitex Mfg.

- Itc., Δ wants Π's overhead to be included in Π's CA. The court rejects this—it says that Π's allocation of overhead costs to specific jobs is just an analytical construct; i.e., in contract, we're not concerned with "gross" or "net" anything, we're just concerend with <u>loss</u>. So, overhead is not part of CA.

Laredo Hides

- N.b., the constructive condition analysis at ¶3p476—was timely payment of the essence, such that failure to pay on time is a material breach?
- Lost profit would be calculated this way itc.:

    LIV – CA = damages

    CA = the contract price not paid
    LIV = cost of the nondelivered hides
        hides cost = ??
            - In terms of FMV (UCC § 2-713)?
            - In terms of actual cover (UCC § 2-712)?

- Also, Π can get special damages for increased shipping and handling charges. This we will call "other loss" (OL).

  (LIV+ OL) – CA = damages

Thursday, March 25

Remedies: specific performance

Remedies

Specific performance

- The distinction between law and equity (see pp451-452)
  - Keep in mind the different conractual settings:
    - Goods
    - Services
    - Construction
    - Land

    The general remedies rules are "flavored" in each setting by each setting.
  - Why is equity limited (see ¶3p452)?
    - Farnsworth says maybe because of the severity of equitable remedies (on the parties and on the court).
    - Colson says because of precedent, of course!

Klein v. PepsiCo

- Note that Klein can sue even though he's a stranger to the contract (see notes on third-party beneficiaries, *supra*).
- Note the conditions involved in this contract (see ¶3p454):
  - Express condition on factory inspection satisfactory to the buyer. PepsiCo argues that this condition never occurred. The court rejects this, saying that PepsiCo agreed to fix the jet, so the condition was satisfied.
- Specific performance:
  - Is the jet unique? The general rule grants damages only for goods.
  - Are there special circumstances? Π argues he could <u>not</u> cover. The court rejects this—there were other jets on the market that were comparable.
    - The problem here is that money damages are

calculated as:

FMV – K price = damages

Here, FMV has gone up since the time of breach—Π can't get money damages for that appreciation under that formula. I.e., to recover the appreciation, he'd have to get specific performance.

The court rejects this argument, saying that a price increase alone is not a special circumstance that warrants specific performance.

Laclede Gas

- Reasons not to grant specific performance:
  - Difficulty of administration (see *Northern Delaware*, p464).
    - If specific performance is to difficult to administer, courts will dney it <u>even if</u> there is no adequate remedy at law (<u>unless</u> the public interest is involved).
  - Adequate remedy available at law.
    - Itc., the contract is for the long-term, and, most importantly, cover is not available. A remedy at law is not adequate if you can't cover.

<u>Wednesday, March 10</u>

Review

Review

<u>Waiver</u>: waiver is most often found by courts against unfavored parties (e.g., insurance companies).

<u>PER</u>: two PERs in *Gianni*?

1. Is the document an entire embodiment of the parties' agreement?
2. If so, would the prospective term <u>naturally</u> be in that document? If so, it will not be included.

Example of a not-natural term: two sales agreed in two contracts; terms re: K2 would not naturally be included in K1.

On an exam, in a PER issue, talk about the outcome per both *Gianni* and *Masterson*.

- The *Masterson* PER:
    1. Did the parties intend the document to be completely integrated—based on all evidence?
    2. (If so, would the prospective term naturally be in the document?)

Conditions

- Condition precedent: contract duty doesn't arise until the condition occurs.
- Condition subsequent: contract duty arises and continues unless the condition arises.

But note that precedent/subsequent distinction doesn't make a difference in our analyses.

A condition is an event which must occur before a contract duty becomes enforceable. What counts as a condition depends on what the parties want.

An express condition is one that is written out. These must be strictly complied with. Express conditions leave less room for construction (but courts still have some room, e.g. for a duty of good faith).

Constructive conditions need only be substantially complied with. See *Jacobson*, p509. Consider:

- Purpose to be accomplished
- Excuse for deviation
- Severity of forfeiture

See also *Walker*, p724; Restatment 2d § 542.

Substantial performance and material breach same question, seem from different sides:

- Π will say he substantially performed.
- Δ will say Π materially breached.

I.e., substantial performance = immaterial breach.

Partial breach: what are the rights of the parties?

- See *K&G*, p727: partial breach is when one party materially fails to perform a certain segment or phase of performance. The other party is

then entitled to suspend one of its segments or phases.

Anticipatory repudiation

- Bilateral: unequivocal statement of intention not to perform, before performance is due. Repudiatee has two options:
    1. Suspend performance
    2. Sue for damages

    I.e., you can treat an AR as a breach.
- Unilateral, or has become unilateral through complete performance by one party (e.g., a contract to pay money and money has been paid): AR doctrine doesn't apply. I.e., you can't immediately bring suit if you receive an AR.
    - Why? AR is kind of a maverick doctrine, since no breach has yet occurred. So, the courts are not inclined to apply it. With unilateral contracts, the victim party has no performance to be excused, so treating AR as a breach doesn't make complete sense.

I/CI/FoP

1. Unexpected event?
2. Risk allocated?
    - This requirement contains the main differences between the three doctrines:
        - Impossibility: risk that a party could not perform.
        - Commerical impracticability: risk that performance would be possible but unexpectedly more expensive.
        - Frustration of purpose: risk that performance would be possible and not more expensive, but that the purpose would disappear.

Tuesday, March 9

Frustration of purpose
Half measures

Frustration of purpose and half measures

pb1p833: "The Lost Weekend"

- First, look to the rule(s), p838: "when an event neither anticipated nor caused by either party, the risk of which was not allocated by the contract, destroys the object or purpose of the contract, thus destroying

the value of performance, the parties are excused from further performance."

- The deposit: when do you get it back, under a general understanding? Often you don't, no matter what.
    - So, is the deposit a risk allocation? (If so, Π doesn't have to pay the rest of the room charge (i.e., Π is excused).
        - Colson says the deposit may be kind of a general force majuere clause. See *NIPSCO*. Posner takes a very literal meaning of "prevent" in the FM clause there. Then he analyzes the FM clause in a free market context—but, says Colson, our experience with public utilities proves that the free market doesn't work with them! They are inherently monopolistic. So, here, doesn't the supplier know that NIPSCO is subject to regulation?? If so, then maybe "prevent" shouldn't be read so literally.
        - Posner, in *NIPSCO*, says it is a case of a stranded buyer, and there is no excuse for a stranded buyer under the UCC. Posner says that by having an FM clause you displace all common law arguments (including FoP). So, by grabbing for more (with an FM clause) and doing it poorly, NIPSCO comes out worse than it would have without the FM clause (i.e., under the common law).
    - But, even if the deposit is seen as an allocation, Π is only excused from paying the rest of the room charge. To get back the deposits (which Π wants to do), Π would have to use restitution theory.

Young v. Chicopee: the court measures the restitution interest by the amount of work done under the contract. It gives nothing for the lumber alongside. That is, the court never gets to restitution theory—it stays in contract theory and measures some restitution there only (cf. *Renner*).

See also the restitution analysis in *Transatlantic* (pp810-811).

Friday, March 5

Review

Review

pb2p834

- Defenses:

- Express condition: none.
- Construction condition: substantial peformance? "All but ready." If not, was the phone call an anticipatory repudiation by the buyer (if it comes before the deadline)??
- Mutual mistake: no—no state of facts that both parties were mistaken about at the time the contract was made.
- Impossibility: no—performance isn't impossible.
- Commercial impracticability: no—performance isn't any harder.
- Frustration of purpose: is the world available to the buyer (as in *Swift Canadian*)??

Thursday, March 4

Stranded sellers

Stranded sellers

- *Selland and Dunbar*: sellers stranded because supply source has failed and are looking to be excused from performance.
    - Commerical impracticability:
        - *Transatlantic*, the common law rule (¶0p807):
            - Unexpected
            - Unallocated
            - Commercially impracticable
                - Since *Mineral Park*, the question has been "How excessive must the loss be?"

          Note that these three often work together (i.e., if one, then the others).
    - Impossibility is an excuse, too, but is separate from CI (*Taylor*).

Selland: failure of supplier will be an excuse if the supplier is expressed in the agreement.

Dunbar: if *Selland* and *Dunbar* are consistent, the difference must be in element three—commercial impracticability. I.e., the magnitude of it.

- Colson argues: isn't is obvious that Dunbar already had an agreement with the refinery for supply? (The court complains that Dunbar didn't seek a contract with a refinery. Why??)
    - A contract with the refinery goes to elements one and two (unexpected and unallocated).
- The meaning of "approximately" is a PMR, interpretation and

construction, issue.

Element one: unexpected. See pp 812-813. Forseeability does not require allocation. Colson says, too, that forseeability does not require the event be expected; see *Eastern* (¶1p827): "if element three, still no element one." I.e., everyone knew what was going on (with the oil crisis).

Force majuere clauses: these are attempts at displacing the common law and creating more possible excuses from performance. These will end up in interpretation and construction issues, and the courts will limit them.

np830-831: what's the relationship between mutual mistake and impossibility/CI?

- Mutual mistake focuses on things that existed at the time the contract was made.
- Impossibility/CI deals with cases where something happened after the contract was formed.

Mutual mistake, p790: "mutual mistake of material fact . . ." In *Mineral Park*, Howard probably couldn't prove both parties assumed there was enough gravel—i.e., he couldn't show the actual mutual mistake itself.

What if *Watkins & Son* was analyzed under CI? The court would probably say the risk of hitting rock was allocated (this is the problem with using CI here). But if it wasn't, was it even commercially impracticable to continue?

Tuesday, March 2

Mutual mistake
Impracticability

Mutual mistake

- The basic rule (¶2p790): "a contract may be rescinded when there is a mutual mistake of material fact which constitutes 'an essential part and condition of the contract.'"
    1. Mutual
    2. mistake
    3. of material fact
    4. constituting an essential part
    5. and condition

of the contract.

Renner v. Kehl

- Why wouldn't parties have either:
  - Investigated the water supply, or
  - Conditioned the contract on adequate water supply?
- fn2p790: a reference to interpretation—unallocated risk—and also to construction—"assumption on which contract was made".
  - Was the risk allocated (via either express or implied terms)?
    - Yes: then there is little room for construction.
    - No: then there is more room for construction.
- Once entitled to MM theory, contract is unenforceable. So, contract theory recovery is gone, and restitution theory must (can) be used for recovery.
  - Under restitution theory, you are only entitled to the amount you have actually enriched the other party. Itc., determine the value of the wells (n.b., what Π really wants here (the $209K) is reliance damages).

Impracticability

n1p811: What's the rule? See ¶0p807:

- Contingency (unexpected occurrence) must occur
- Risk of the contingency must have been unallocated
- Contingency must have rendered performance impracticable

Transatlantic: a failure to prove the requirements.

- Unallocated risk: the court says the risk was assumed ("we may safely assume . . ." See *Frigaliment* re: surrounding market conditions.
- Impracticability also (performance wasn't commercially impracticable).

Thursday, February 26

Review
Anticipatory repudiation
Assurance

Review

Note that the performance, breach, and excuse analysis is a step-by-step process, no unlike the formation analysis.

Anticipatory repudiation and assurance

pb3p771: "Jarbeau's Case"

- An anticipatory repudiation here? Yes.
  - See definition of AR at ¶1p740: statement of intention not to perform except on conditions beyond the contract. Here, the troupe refused to perform for less than a 60% cut, whereas contract called for 50/50 split.
    - But is this strong enough for AR?? Perhaps that language is precatory. Or an offer to renogotiate.
- What legal significance of the academy returning the draft contract unsigned?
  - Academy can choose to either
    - Suspend performance, or
    - Seek damages

    But here they choose neither, therefore reaffirming the contract.
- What legal significance of the troupe sending advance materials to the academy?
  - A retraction of the troupe's AR? Yes, since it sent the materials before any reliance by the academy.

So, note that there are two reasons why the academy can't rely on the original AR:

1. Election not to sue, but instead to reaffirm (the academy lost the power to change its mind).
2. Retraction of the AR by the troupe before any reliance by the academy.

Norcon Power Partners

- Reasonable grounds for insecurity?
  - Note that under the assurance doctrine, the question is not whether a party has insecurity, but whether insecurity has arisen.
  - See *Pittsburgh–Des Moines Steel Co.*: as here, nothing has arisen; the contract is just playing out as it was planned.

Tuesday, February 24

Anticipatory repudiation

Anticipatory repudiation

n2p746: "The Rose Bowl Affair"

- Π gives money for:
  - A season ticket
  - An option to buy Rose Bowl tickets
- What is the doctrine of anticipatory repudiation?
  - If option performance is due, repudiation is a breach. (N.b., "anticipatory breach" is an oxymoron.)
  - If option performance is not due, repudiation is an anticipatory repudiation.
  - Consequences of anticipatory repudiation (from *Hochster*):
    - Repudiatee can sue for damages.
    - Repudiatee can suspend his own performance.

    N.b., this is the same as material breach, except in material breach, breachee can only sue.
  - Anticipatory breach exceptions (p745; see also Restatement 2d §§ 243(3), 253):
    - Unilateral contract
    - Effectively unilateral contract because performance has been completed by one of the parties

    "The Rose Bowl" problem is outside the letter of the p745 rule:
      - No installment payments
      - Π seeks to recover in equity (for specific performance of the option), no for money damages
      - Plus, is Π done performing, really? He would still have to pay for the Rose Bowl tickets. But this doesn't matter—Π bought that option, which is a second contract.

Problem, p757: *McCloskey & Co. v. Minweld Steel Co.*

- General contractor McCloskey contracts with sub Minweld; general's payment is conditioned on sub's work.
- General wnats to threaten to terminate the contract and get assurance from sub.
  - Generally, there is no right to assurances (¶1p740 WHERE???)
  - See ¶3p754 ("All labor, materials . . .") So what if general requests from sub a P.O. for steel?
  - Also consider prevention, hindrance, cooperation—must general cooperate??

np759: *C.L. Madox, Inc. v. Coalfield Services, Inc.*

- Sub suspends performance after two weeks. Was sub's suspension excused?
    1. Failure to pay? No—general hadn't been invoiced before the sub suspended.
    2. General's insistence on liquidated damages? No—demand not made until after sub's suspension.
    3. General's lack of response? Yes—but why?
        - Duty to sign??
        - Duty to answer your phone??
        - Good faith?? Cooperation?? Prevention??

        We don't know. One thing's for sure, though: this is not an anticipatory repudiation. It might be a repudiation, by conduct, but it is not anticipatory.

Thursday, February 19

Material breach

Material breach

Walker & Co.

N.b., contract's ¶ (d): "revert." How can it revert if the lessee doesn't own it to start with? "Transfer" might be a better word here.

Π threatens to enforce contract's ¶ (g), saying he will "enforce conditions in ¶ (g)." Did Π use "conditions" correctly?

- See ¶ (g): "lessee hereby agrees to pay such balance upon any contingencies." This is a promise, not a condition. However, note that there are some real conditions in ¶ (g); but this isn't one of them.

Material breach doctrine

- How is it related to substantial performance doctrine?
    - Substantial performance (see ¶0p509):
        - Purpose to be served.
        - Excuse for deviation.
        - Cruelty of enforce adherence.
    - Material breach (¶3p724, (a) – (f)):
        - (a) extent to which injured party will obtain

substantial benefit he could have reasonably anticipated.
- (b) extent to which injured party can be adequately compensated for damages.
- (c) extent to which failing party has partly performed or prepared to perform.
- (d) greater or less hardship on the failing party.
- (e) wilful, negligent, or innocent behavior of the failing party.
- (f) greater of less uncertainty that failing party will perform the remainder.

- (c), (d) matches with "cruelty of enforced adherence."
- (e) matches with "excuse for deviation."
- (a), (b), (f) matches with "purpose to be served."

- Materiality of breach in *Walker & Co.*:
  - Π wins a little on the purpose to be served.
  - Δ wins a little on the excuse for deviation.
  - Π wins a <u>lot</u> on the cruelty of enforced adherence—if the court finds material breaach, then Π gets $0 for the sign it made.

- Note that, in determining material breach:
  - Express conditions must be met. Period.
  - Constructive conditions are subject to material breach analysis.

<u>Problem 1, p726</u>: one improvement would be if Δ could bargain for inclusion of a term requiring "prompt cleaning."

N.b., *K & G*, on pp728-729, contains a great review of this chapter, Colson says.

<u>Tuesday, February 17</u>

Divisibility

Divisibility

Gill: is there a constructive condition itc.? Δ argues that there is—Δ's duty to pay

is conditioned on Π's entire delivery.

- Divisibility: itc., there may be as many parts to the K as per 1000 ft. Plus, the K is divisible into the different types of logs. On each part, there is a constructive condition—the duty to pay is conditioned on Π's complete delivery of that part (see n1p709).

Problem, p716:

- Π would argue that it was an hourly K (not a flat-rate K).
- Did Π breach? See ¶1p607—you can't do anything to destroy the fruits of the K for the other party.
- Here, there seems to be a double constructive condition:
    1. Δ's duty to pay back monies is conditioned on Π not interfering with the K (e.g., by killing himself).
    2. Π's duty not to interfere with the K is conditioned on Δ's paying back the monies.
- Both parties have an argument based on restitution theory, too:
    - Π would argue along the lines of *Britton*.
    - Δ would argue that restitution theory is not available for a willful breacher.

n3p709: divisibility in *Internatio*—Π argues the K is entire, whereas Δ argues the K is divisible.

n1p716: statutory law has displace the common law here—employees must be paid at least monthly. Also, the trend is towards restituion (but not reliance).

Friday, February 13

"Contract as Cupid"

How does contract law view:

- Cupidity (an inordinate desire for wealth)??
- Greed (intense desire—cupidity plus meanness)??
- Avarice (cupidity plus miserliness)??
- Repacity (cupidity plus actual seizure)??

Colson suggests these may in fact be in the premises of contract law. Candidate parties from our cases include:

- Alcoa (N.J. distributorship case).
- Market St. Associates (repurchase case; Posner opinion).

LeGalley prenuptial (handout)

- Why did the LeGalleys file the K in court? See IC § 32-918 (handout). But that's not why the LeGalleys filed it—they wanted to "make it official."
- A prenuptial serves as an addendum to basic terms of the marriage contract, which are provided by statute and common law.
- Prenuptial advice:
  - First, there is a conflict of interest issue in representing both parties to a prenuptial. This can be handled by giving an explanation of the problem and then getting a waiver from both parties (of, in part, confidentiality w/r/t future actions on the agreement).
  - Note that the LeGalley K doesn't have well-written conditions. You might say to Rex: condition what's most important to Theresa on her performance of what's most important to you.
    - As they are written, the terms in the LeGalley K would be constructive conditions, which need only be substantially performed to be fulfilled.

Thursday, February 12

Conditions
Mitigation

Conditions

n1p698: *Stewart v. Newbury*.

- "Pay in the usual manner," in a phone conversation. If that's in the K, can the contractor abandon the K when the owner doesn't pay in installments?
  - The contractor argues that his duty to perform is constructively conditioned on installment payments by the owner. N.b., he must argue for a constructive condition because there is nothing express about installment payments in the K.
  - The owner argues that his duty to pay is conditioned on the contractor's completing performance.
- Does it matter if the phone conversation occurred before or after the contract was formed?
  - Before: PER issue—is the written document complete on its face? Not really, itc.
  - After: PED issue—was there consideration for the new duty? (But see *Watkins & Sons*).

Mitigation

That is, mitigation by the courts of the harshness of constructive conditions.

Jacob & Youngs

Substantial performance: factors:

1. Purpose to be served (desire to be gratified).
2. Excuse for deviation from the letter of the K.
3. Cruelty of enforced adherence.

Itc., the purpose to be served by specifying Reading pipe was to indicate a standard (see fnap507). The cruelty of enforcing adherence is high, since the builder would stand to lose a substantial amount in rebuilding the home.

Measuring damages: what is the measure when the contractor breaches?

- The general rule is to award the cost of completion. But if that would create economic waster, then (itc.) diminution of value may be used:

FMV as promised
(FMV as built)
damages

N.b., the dissent itc. claims that the K provides that the owner doesn't have to pay if Reading pipe isn't used—but it doesn't point out where in the K it says that (it doesn't say it).

Tuesday, February 10

Conditions

Conditions

Last chapter we studied interpretation and construction of promises. This chapter we will study interpretation and construction of conditions.

Internatio: the condition here is expressed in the term "with two weeks call from buyer." Note that itc. the seller wants out of the K because the rice price has gone up.

- The court decides time is of the essence in this K (¶1p670). Since Π was late, Δ's duty is excused.

Peacock Construction: there are three possible conditions in this K:

1. "Within 30 days."
2. "Written acceptance by architect."
3. "Full payment by owner."

The court says that the condition (3) ("full payment by owner") is not a condition (although Colson says it seems to be pretty clearly written as one). The court is concerned with fairness—if such a term was enforced as a condition on the duty to pay, a sub would bear the risk of the owner not paying, since the sub is not in privity with the owner. But bearing that risk is what the general is supposed to do, not the sub.

Gibson: this K involves a condition of satisfaction (so, note that the first concern would be re: formation—was there a K at all?).

- n1p678: if the buyer needn't even look at the painting, then there would be no consideration and so no K. N.b., sometimes there is a right to cure performance.

Doubleday & Co.: nobody argues itc. that the condition did occur. Δ argues that Π had a duty to provide an editor, and it's because they didn't that Δ couldn't provide a satisfactory manuscript. That is, Δ argues that he was prevented from satisfying Π.

- The court says there is nothing in the about any such duty. Δ asks the court to look at course of performance—in the previous volume Π provided a good editor. The court rejects that and says there is no such duty.
- Note that Δ never promised a satisfactory manuscript—that is just a condition on Δ getting paid.

N.b., waiver, estoppel, and election (p686). Also, amendment.

- Waiver: intentional relinquishment of a known right. Reliance is not required. See *McKenna*.
- Election: choice binding on the elector, even without reliance by the other party.
- Estoppel: the essential element of reliance. See *McKenna*.

Hicks: this is a case where a condition outside the K conditions the entire agreement.

- Note that the modern PER is being applied (¶3p690).
- The court says that the outside condition doesn't contradict the K's written terms.
- n1p692: is itc. consistent with *WWW Associates*? *WWW Associates* defends the sanctity of the written document, whereas itc. seems to go against that sanctity.

- However, note that at the law level, *WWW* is about the PMR and itc. is about the PER. Two are related only on the policy level.

Friday, February 6

Conditions

Conditions

Luttinger: there are two promises conditioned itc.:

1. Buyer's promise to buy.
2. Seller's promise to refund if buyer can't secure financing.

In both conditions, the buyer is protecting itself.

Does "diligence" mean reasonable efforts or good faith??

Tuesday, February 3

Balla
Nanakuli
Columbia Nitrogen

Balla

(In-house counsel objects to employer's practice of selling bad dialysis machines.)

n4p650: tort vs. K.

- Remedies: in tort, you are usu. limited to recover compensation for your actual damages, but punitive damages are available. In K, you get your expectations – but how substantial can your expectations be if you're an at-will employee?
- Tort of retaliatory discharge: the point of TRD is that an employer has a duty not to use its at-will powers to terminate an employee out of spite. This provides for a remedy where none would be available in K.

Interpretation or construction in at-will Ks?: see Wood's Rule, p641 – the at-will term must be constructive considering that rule.

Holding: there is no tort of retaliatory discharge available to in-house counsel.

The court can find no public good that could come from having such a tort. normally, TRD is available to encourage people to whistleblow; but a laywer must whistleblow anyhow, per the code of professional conduct, so we don't need TRD to encourage lawyers to do that.

Nanakuli

n1p659: does the court "explain," "supplement," or "qualify"? It both adds and detracts from the express "Posted Price" term in the K – Colson believes "qualify" is, therefore, the most apt description of what the court did.

Interpretation or construction? Both, and the court is delighted to find that either route leads to the same result.

Admissibility of evidence under the UCC

- C/o/p, c/o/d, and usage evidence is always admissible to give meaning to a K; but if that evidence can't be reconciled with express terms then the meaning the evidence adds is not binding on the parties (¶2p657).

Note that itc., the "qualification" of price protection doesn't totally swallow up the "Posted Price" express term – it only swallows it partly up, i.e., under certain circumstances.

Columbia Nitrogen

N.b., Colson sees both *Nanakuli* and *Columbia Nitrogen* as not adhering to the PMR. Over time K has moved from formalistic interp./constr. (e.g., *Gianni*) to more realist interp./constr.

np663: *Columbia* says that trade custom is always admissible, unless it is carefully excluded by the parties. To exclude it, you probably would have to refer to each specific custom you wanted to exclude – a blanket exclusion of "trade custom" generally would probably not be enforced.

Friday, January 30

Prentice-Hall
Bak-A-Lum
Teddy's Frosted Foods

Prentice-Hall

The contract terms (p627)

- ¶12, which is the publisher's favorite.
- ¶4, which is the bedrock of Π's argument; "it will be published." N.b., that the court must figure out what "publish" means.

So, realize that this case is about interpretation, in that the court must blance the meanings of ¶4 and ¶12. The court finds that ¶4 requires that the publisher only satisfy a baseline: "privishing."

np634: If there had been no ¶12, then the court might have to construe, by looking at ¶4 and implying a duty of good faith. This would cause the court to look at trade usage. Still, though, Π would probably lose.

Is the publisher's advance to Π like the minimum rent in *Dickey*? Yes.

Note that the joint-maximization criteria (n2p625) wouldn't be that helpful in this case, since the publisher came to the table looking to maximize only its own profits, not Π's as well.

Bak-A-Lum

n1p637: How is this case different from *Shell* (p414)?

- *Bak-A-Lum*: the contract is an oral agreement; also, Π is to be the exclusive distributor, but no term re: duration was set.
  - The trial court itc. finds that 7 mos. notice, plus $5K/mo. is fair. The appellate court, though, says 20 mos. notice plus $10K/mo. is more fair.
  - Here, the Δ had no duty not to terminate but did have a duty to give reasonable notice – a duty that the court construes (since the parties said nothing about duration).
- *Shell*: the contract includes an explicit term re: notice of termination; also, the applicable legal principle is unconscionability.

So, could the *Bak-A-Lum* Δ protect itself with a "30 days notice" term? Yes it could, so long as the notice period is not unconscionable, as in *Shell*. Note that this result is suggested by *Prentice-Hall*.

Could Δ protect itself with a "termination at will" term? The answer to this is to note that *Bak-A-Lum* isn't about notice, but rather about Δ's acts under the circumstances.

Teddy's Frosted Foods

Employment at will is terminable at any time, for any reason. And if parties say

nothing about it, employment at will is the constructive default. However, an employer probably can't fire an at-will employee for a bad reason.

The legal action in *Teddy's* is for the tort of retaliatory termination. The court says that Π's argument won't do enough, since Π wasn't really advancing the relevant public policy – he could have notified the appropriate regulatory agency, instead of just trying to sway his employer towards doing the Right Thing.

Thursday, January 29

Good faith and fair dealing
Market St. Associates
Dickey
Bloor

The implied covenant of good faith and fair dealing

What is good faith (review)?

- "Honesty"; in trade, consistency with trade practices (¶2p611).
- You may not destroy or injure the fruits of the contract (but, n.b., this just tells you what you can't do, not what you have to do) (¶1p607). See also *Hilton Hotels Corp.*, at n2p609 (the case of the "Dynamic Duo").

Market St. Associates

Π seeks specific performance of a leaseback clause; Δ claims Π breached its duty of good faith.

Posner: "good faith" is not a moralistic concept when it comes to contracts. You are not obligated to be an altruist. In fact, our system wouldn't work unless you could take advantage of your contract "partner." So, we must distinguish between "taking advantage" (fair and good) and "sharp dealing" (bad and a breach of the duty of good faith).

This means that we must remand to "take a tour through Π's mind" -- that is, we have to figure out if Π was being honest or not.

Dickey

Π claims that Δ is not fulfilling its obligation (rooted in good faith) to grow Δ's business (and so keep its percentage rent to Π up).

How does the minimum rent term affect Δ's duty of good faith? There is, apparently, an inverse relationship – i.e., if the minimum rent was sufficiently high, Δ would have no duty of good faith to grow its business.

So, is *Dickey* really a gap filling, or "omitted," case, since Δ's duty of good faith is tied to the express minimum rent term? No, it is not really a gap filling case. N.b., of course if there was no minimum rent term, then Δ's duty of good faith would be very important (see *Prins*, ¶3p616).

What about the "washing cars only" term – can Π find a breach here? No, because the court says this term only prohibited non-conforming uses, and did not require Δ to wash cars in the everyday sense.

Bloor: this case seems to be about interpretation rather than construction. The court is looking at the words and actions of the parties to determine what the contract really was for.

Tuesday, January 27

Good faith and fair dealing
Dalton
Burger King
Eastern Air Lines

The implied covenant of good faith and fair dealing

Filling the gap: some definitions.

Corbin: "Interpretation is found by looking at the parties words or conduct. Construction is the process of determining the meaning of the contract without looking at the words and conduct."

"Interpretation" and "implied-in-fact" will be synonyms in this class, as will "construction" and "implied-at-law."

N.b. In this class, we will approach problems like those today as litigators – we will start with a complaint about what was done under the contract and seek to resolve the dispute using law.

Dalton

Π's complaint: Δ didn't consider the material he submitted (to prove he took both of the SATs with his name on them).

n1p608: What standard would a court use if Π claims Δ has not complied with the court order?

- The court will not review unless Δ's performance if either arbitrary or irrational (¶4p607).
- The court would look only at Δ's process: did Δ receive Π's documentation? Did Δ distribute Π's evidence to readers? Did Δ's reader read Π's evidence? In this way, *Dalton* is like *Miranda*: it rests on the idea that if we have a fair procedure, we will get a just result.

N.b., *Dalton* reminds of us satisfaction clauses, Colson says.

Burger King: a contrast to *Dalton*. Why wouldn't the franchisee itc. bargain for exlusivity? Because it has no bargaining power.

Eastern Air Lines: Π complains that Δ is freighting fuel. So, itc., course of performance evidence is incredibly probative.

Friday, January 23

Plain-meaning rule
WWW Associates
PG&E

The plain-meaning rule

WWW Associates

Parties use a form contract but include their own addendum: a cancellation clause. The clause seems clear on its own, but Π wants to submit an affidavit to the effect that the clause was added "for Π's sole benefit" (¶1p588).

The plain-meaning rule: if the written document is clear, look only at the writing (¶1p589). The PMR is often considered to be a corollary of the PER.

Distinguishing the PER and PMR

- PER deals with prior and negotiated terms only.
- PMR deals with all extrinsic evidence, i.e., anything not within the four corners of the document. N.b., that the set of all extrinsic evidence contains as a proper subset

the set of all evidence of prior and negotiated terms.

Note that, under the PMR, extrinsic evidence is <u>not</u> admissible for the purposes of creating an ambiguity where there was none before (¶5p589). Itc., the affidavit Π wants to admit would seem to do nothing but contradict the plain meaning (n1p590).

PG&E

<u>Issue</u>: Can Π introduce evidence about the extent of the indemnification?

What is the extrinsic evidence, really? The court says it's really just the judge's <u>personal linguistic experience</u> (¶4p592); compare this to *WWW Associates* and its PMR.

<u>The *PG&E* PMR (Traynor's rule)</u>: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible" (¶1p593).

Hurst: "the language of dictionaries is not the only language spoken in America" (¶4p601).

N.b. <u>Course of performance</u> is evidence from the performance of the contract being sued on; <u>course of dealing</u> is evidence from prior contracts and agreements.

<u>Problem, p598</u>

The calculation of value clause: "equivalent to the market value of the permises according to the assessment rolls as maintained by the County." Does this clause have a plain meaning or does it rely on standard usage? Is extrinsic evidence as to its meaning admissible? What is ambiguous? "Market value" and "assessment" are not synonyms.

N.b., the right of first refusal in this agreement is very strange – usu. refuser has to meet the offered price, not a market or assessed price.

<u>Thursday, January 22</u>

Frigaliment

Frigaliment

N.b. This is a trial court opinion, so it deals primarily with law-application.

Issue: Has Π proved that a "2 1/2 to 3 lbs. chicken" is a "broiler"? (This is a procedural issue re: the burden of persuasion).

Probative evidence
(Colson contrasts Humpty-Dumpty's subjectiveness with Holmes's realist objectivism.)

- Π: evidence re: the negotiations. Not probative, the court says. See ¶2p576: "any kind of chickens."
- Δ: evidence re: market prices. Objective evidence, and at least somewhat probative.
- Δ: evidence re: government regulations. Objective evidence. Probative, since the contract specifies "Grade A, Government Inspected" (¶2p575).
- Π: evidence re: trade usage. Note that Π's expert doesn't follow what he says himself is trade usage! Δ brings in its own expert and wins on this point.
- Δ: evidence re: course of performance. "If buyer really thought the K was for broilers only, it would have told Δ to stop shipping." Not probative because Π was complaining all along.
- Π: "chicken 1 to 1 1/2" meant broilers, so "chicken 2 1/2 to 3" must have meant broilers, too." Not probative – see the court's apples analogy at ¶1p576: "a contract for 'apples' of two different sizes could be filled with different kinds of apples even though only one species came in both sizes.

Note that the court looks at dictionaries, but finds nothing probative since both meanings of "chicken" are given.

Is the PER relevant here?

Statement of the PER rule: "All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract, . . . and 'unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted by parol evidence'" (¶5p557 (*Gianni*)).

So, yes? No. PER only applies when the written agreement is "couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement" (¶1p558 (*Gianni*)).

Ambiguities: a patent ambiguity is on the face of things. A latent ambiguity is found underneath things, usu. later in the process.

N.b. *Raffles* (p582) and *Oswald* (p584) make the same point as *Frigaliment*, Colson says.

Tuesday, January 20

Parol evidence rule
Gianni
Masterson
Bollinger

The parol evidence rule
"Few things are darker than this, or fuller of subtle difficulties." Thayer.

The rule is not well titled

- It doesn't concern just parol evidence – not only parol evidence is barred by it, and some parol evidence is not barred by bit.
- It is not an evidentiary rule – if it applies, it bars you from proving something, period; whereas evidentiary rules bar certain evidence only.

Gianni* and *Masterson

Gianni: the written document provides that lessee can sell only certain items and not tobacco. A term granting lessee the exclusive right to sell soda on the property is not in the written agreement.
Masterson: the written document includes a reservation by the grantor of a repurchase option. There is no term in the written document indicating that the option is personal to the grantor and so nonassignable.

Putting *Gianni* and *Masterson* in context

Restatement 2d §§ 209, 210, 215: "integration" can be "partial" or "complete." See n2p559:

1. Has a writing been adopted by the parties as "a final expression of one or more terms of an agreement"? Restatement 2d § 209(1). If so, the agreement is "integrated" and and the PER applies; "evidence of prior agreements or negotiations is not admissible to contradict a term of the writing." Restatement 2d § 215.
2. If the agreement is integrated, has the writing been "adopted by the parties as a complete and exclusive statement of the terms of the agreement"? Restatement 2d § 210. If so, the agreement is "completely integrated"

and no evidence of additional terms, even consistent ones, is admissible. If not, the agreement is "partially integrated" and only evidence of contradictory terms in prior agreements is inadmissible (evidence of consistent additional terms is admissible). Restatement 2d § 216.

In *Masterson*, the court finds a partially integrated agreement. The *Gianni* court finds a completely integrated agreement.

Gianni rule: look only to the four corneres of the document to determine partial or complete integration (¶1p558).

The *Masterson* court finds it impossible to apply the *Gianni* rule (citing Wigmore), and so it looks at all the facts (¶4p561). Does a personal option contradict anything in the written document (n.b., this depends on the language of the CA statute re: these types of options)? The majority is concerned with contradiction of the parties' intent.

Collateral agreements

Does a written contract preclude evidence of separate oral agreements? No – not unless there is some kind of relation between the oral agreement and the written document. To determine this, ask: would a related collateral agreement naturally be included in the written document? I.e., is it "in the field" of the written agreement?

In *Gianni*, Π argues that an exclusivity clause would naturally be in the other lease(s), not in his. The court says such a clause should have been in both (all) leases.

N.b. Do we have a sense of who's credible in *Gianni*? Well, a 3d, independent party offers testimony on Π's behalf (whereas, in *Masterson*, it's the bankrupt optionee himself testifying on his own behalf).

Bollinger: the remarkable fact here is the ease with which Π can show the mutual mistake – Δ had already been sandwiching the topsoil, which they probably wouldn't have gone to the trouble to do if there hadn't been an agreement about it (¶5p568). Note that the *Gianni* Π could make the same argument (i.e., that he had been the exclusive soda-seller, so there must have been an agreement about it); but in *Gianni*, there are no supportive facts like there are in *Bollinger*.

Index of Cases and Terms