

RESTATEMENT (SECOND) OF CONTRACTS

CHAPTER 1

MEANING OF TERMS

§ 1. Contract Defined

§ 2. Promise; Promisor; Promisee; Beneficiary

§ 4. How a Promise May Be Made

CHAPTER 2

FORMATION OF CONTRACTS—PARTIES AND CAPACITY

§ 12. Capacity to Contract

§ 13. Persons Affected by Guardianship

§ 14. Infants

§ 15. Mental Illness or Defect

§ 16. Intoxicated Persons

CHAPTER 3

FORMATION OF CONTRACTS—MUTUAL ASSENT

§ 17. Requirement of a Bargain

§ 18. Manifestation of Mutual Assent

§ 20. Requirement of Manifestation of Mutual Assent. (Restatement First)

§ 20. Effect of Misunderstanding

§ 22. Mode of Assent: Offer and Acceptance

§ 24. Offer Defined

§ 25. Option Contracts

§ 26. Preliminary Negotiations

§ 25. When a Manifestation of Intention is Not an Offer

§ 27. Existence of Contract Where Written Memorial is Contemplated

§ 30. Form of Acceptance Invited

§ 32. Invitation of Promise or Performance

§ 33. Certainty

§ 34. Certainty and Choice of Terms; Effect of Performance or Reliance

§ 35. The Offeree's Power of Acceptance

§ 36. Methods of Termination of the Power of Acceptance

§ 38. Rejection

§ 39. Counter-offers

[§ 38. Rejection of Offer by Counter-Offer \(Restatement First\)](#)

[§ 40. Time When Rejection or Counter-offer Terminates the Power of Acceptance](#)

[§ 41. Lapse of Time](#)

[§ 42. Revocation by Communication from Offeror Received by Offeree](#)

[§ 43. Indirect Communication of Revocation](#)

[§ 45. Option Contract Created by Part Performance or Tender](#)

[§ 46. Revocation of General Offer](#)

[§ 48. Death or Incapacity of Offeror or Offeree](#)

[§ 50. Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise](#)

[§ 51. Effect of Part Performance Without Knowledge of Offer](#)

[§ 52. Who May Accept an Offer](#)

[§ 53. Acceptance by Performance; Manifestation of Intention Not to Accept](#)

[§ 54. Acceptance by Performance; Necessity of Notification to Offeror](#)

[§ 55. Acceptance of Non-Promissory Offers](#)

[§ 56. Acceptance by Promise; Necessity of Notification to Offeror](#)

[§ 58. Necessity of Acceptance Complying with Terms of Offer](#)

[§ 59. Purported Acceptance Which Adds Qualifications](#)

[§ 60. Acceptance of Offer Which States Place, Time or Manner of Acceptance](#)

[§ 61. Acceptance Which Requests Change of Terms](#)

[§ 62. Effect of Performance by Offeree Where Offer Invites Either Performance or Promise](#)

[§ 63. Time When Acceptance Takes Effect](#)

[§ 66. Acceptance Must be Properly Dispatched](#)

[§ 69. Acceptance by Silence or Exercise of Dominion](#)

[CHAPTER 4](#)

[FORMATION OF CONTRACTS—CONSIDERATION](#)

[§ 71. Requirement of Exchange; Types of Exchange](#)

[§ 73. Performance of Legal Duty](#)

[§ 74. Settlement of Claims](#)

[§ 77. Illusory and Alternative Promises](#)

[§ 79. Adequacy of Consideration; Mutuality of Obligation](#)

[§ 81. Consideration as Motive or Inducing Cause](#)

[§ 82. Promise to Pay Indebtedness; Effect on the Statute of Limitations](#)

[§ 83. Promise to Pay Indebtedness Discharged in Bankruptcy](#)

[§ 84. Promise to Perform a Duty in Spite of Non-occurrence of a Condition](#)

[§ 86. Promise for Benefit Received](#)

[§ 87. Option Contract](#)

[§ 89. Modification of Executory Contract](#)

[§ 90. Promise Reasonably Inducing Action or Forbearance](#)

[§ 90. Promise Reasonably Inducing Definite and Substantial Action](#) (Restatement First)

[§ 95. Requirements for Sealed Contract or Written Contract or Instrument](#)

[CHAPTER 5](#)

[THE STATUTE OF FRAUDS](#)

[§ 131. General Requisites of a Memorandum](#)

[§ 132. Several Writings](#)

[§ 139. Enforcement by Virtue of Action in Reliance](#)

[CHAPTER 6](#)

[MISTAKE](#)

[§ 151. Mistake Defined](#)

[§ 152. When Mistake of Both Parties Makes a Contract Voidable](#)

[§ 153. When Mistake of One Party Makes a Contract Voidable](#)

[§ 154. When a Party Bears the Risk of a Mistake](#)

[§ 155. When Mistake of Both Parties as to Written Expression justifies Reformation](#)

[§ 157. Effect of Fault of Party Seeking Relief](#)

[§ 158. Relief Including Restitution](#)

[CHAPTER 7](#)

[MISREPRESENTATION, DURESS AND UNDUE INFLUENCE](#)

[§ 161. When Non-Disclosure Is Equivalent to an Assertion](#)

[§ 162. When a Misrepresentation Is Fraudulent or Material](#)

[§ 164. When a Misrepresentation Makes a Contract Voidable](#)

[§ 167. When a Misrepresentation Is an Inducing Cause](#)

[§ 169. When Reliance on an Assertion of Opinion Is Not justified](#)

[§ 174. When Duress by Physical Compulsion Prevents Formation of a Contract](#)

[§ 175. When Duress by Threat Makes a Contract Voidable](#)

[§ 176. When a Threat Is Improper](#)

[§ 177. When Undue Influence Makes a Contract Voidable](#)

[CHAPTER 8](#)

[UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY](#)

[§ 178. When a Term Is Unenforceable on Grounds of Public Policy](#)

[§ 181. Effect of Failure to Comply with Licensing or Similar Requirement](#)

[§ 182. Effect of Performance if Intended Use Is Improper](#)

[§ 187. Non-Ancillary Restraints on Competition](#)

[§ 188. Ancillary Restraints on Competition](#)

[§ 194. Promise Interfering with Contract with Another](#)

[§ 195. Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently](#)

[§ 198. Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong](#)

[CHAPTER 9](#)

[THE SCOPE OF CONTRACTUAL OBLIGATIONS](#)

[§ 201. Whose Meaning Prevails](#)

[§ 202. Rules in Aid of Interpretation](#)

[§ 203. Standards of Preference in Interpretation](#)

[§ 204. Supplying an Omitted Essential Term](#)

[§ 205. Duty of Good Faith and Fair Dealing](#)

[§ 206. Interpretation Against the Draftsman](#)

[§ 208. Unconscionable Contract or Term](#)

[§ 209. Integrated Agreements](#)

[§ 210. Completely and Partially Integrated Agreements](#)

[§ 211. Standardized Agreements](#)

[§ 213. Effect of Integrated Agreement on Prior Agreements \(Parol Evidence Rule\)](#)

[§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations](#)

[§ 215. Contradiction of Integrated Terms](#)

[§ 216. Consistent Additional Terms](#)

[§ 217. Integrated Agreement Subject to Oral Requirement of a Condition](#)

[§ 220. Usage Relevant to Interpretation](#)

[§ 221. Usage Supplementing an Agreement](#)

[§ 222. Usage of Trade](#)

[§ 223. Course of Dealing](#)

[§ 224. Condition Defined](#)

[§ 225. Effects of the Non-Occurrence of a Condition](#)

[§ 226. How an Event May Be Made a Condition](#)

[§ 227. Standards of Preference with Regard to Conditions](#)

[§ 228. Satisfaction of the Obligor as a Condition](#)

[§ 229. Excuse of a Condition to Avoid Forfeiture](#)

[CHAPTER 10](#)

[PERFORMANCE AND NON-PERFORMANCE](#)

[§ 234. Order of Performances](#)

[§ 235. Effect of Performance as Discharge and of Non-Performance as Breach](#)

[§ 236. Claims for Damages for Total and for Partial Breach](#)

[§ 237. Effect on Other Party's Duties of a Failure to Render Performance](#)

[§ 238. Effect on Other Party's Duties of a Failure to Offer Performance](#)

[§ 240. Part Performances as Agreed Equivalents](#)

[§ 241. Circumstances Significant in Determining Whether a Failure Is Material](#)

[§ 242. Circumstances Significant in Determining When Remaining Duties are Discharged](#)

[§ 243. Effect of a Breach by Non-Performance as Giving Rise to a Claim for Damages for Total Breach](#)

[§ 250. When a Statement or an Act Is a Repudiation](#)

[§ 251. When a Failure to Give Assurance May Be Treated as a Repudiation](#)

[§ 252. Effect of Insolvency](#)

[§ 253. Effect of a Repudiation as a Breach and on Other Party's Duties](#)

[§ 256. Nullification of Repudiation or Basis for Repudiation](#)

[§ 257. Effect of Urging Performance in Spite of Repudiation](#)

[CHAPTER 11](#)

[IMPRACTICABILITY OF PERFORMANCE AND FRUSTRATION OF PURPOSE](#)

[§ 261. Discharge by Supervening Impracticability](#)

[§ 262. Death or Incapacity of Person Necessary for Performance](#)

[§ 263. Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance](#)

[§ 265. Discharge by Supervening Frustration](#)

[§ 266. Existing Impracticability or Frustration](#)

[§ 272. Relief Including Restitution](#)

[CHAPTER 12](#)

[DISCHARGE BY ASSENT OR ALTERATION](#)

[§ 281. Accord and Satisfaction](#)

[§ 285. Contract Not to Sue](#)

[§ 286. Alteration of Writing](#)

[CHAPTER 13](#)

JOINT AND SEVERAL PROMISORS AND PROMISEES

§ 288. Promises of the Same Performance

§ 293. Effect of Performance or Satisfaction on Co-promisors

§ 294. Effect of Discharge on Co-promisors

CHAPTER 14

CONTRACT BENEFICIARIES

§ 302. Intended and Incidental Beneficiaries

§ 309. Defenses Against the Beneficiary

§ 311. Variation of a Duty to a Beneficiary

§ 313. Government Contracts

CHAPTER 15

ASSIGNMENT AND DELEGATION

§ 317. Assignment of a Right

§ 318. Delegation of Performance of Duty

§ 319. Delegation of Performance of Condition

§ 321. Assignment of Future Rights

§ 322. Contractual Prohibition of Assignment

§ 328. Interpretation of Words of Assignment; Effect of Acceptance of Assignment

§ 331. Partially Effective Assignments

§ 332. Revocability of Gratuitous Assignments

§ 336. Defenses Against an Assignee

CHAPTER 16

REMEDIES

§ 344. Purposes of Remedies

§ 346. Availability of Damages

§ 347. Measure of Damages in General

§ 348. Alternatives to Loss in Value of Performance

§ 349. Damages Based on Reliance Interest

§ 350. Avoidability as a Limitation on Damages

§ 351. Unforeseeability and Related Limitations on Damages

§ 352. Uncertainty as a Limitation on Damages

§ 353. Loss Due to Emotional Disturbance

§ 354. Interest as Damages

§ 355. Punitive Damages

§ 356. Liquidated Damages and Penalties

[§ 359. Effect of Adequacy of Damages](#)

[§ 360. Factors Affecting Adequacy of Damages](#)

[§ 370. Requirement That Benefit Be Conferred](#)

[§ 371. Measure of Restitution Interest](#)

[§ 373. Restitution When Other Party Is in Breach](#)

[§ 374. Restitution in Favor of Party in Breach](#)

[§ 375. Restitution When Contract Is Within Statute of Frauds](#)

[§ 376. Restitution When Contract Is Voidable](#)

[§ 377. Restitution in Cases of Impracticability, Frustration, Non-Occurrence of Condition or Disclaimer by Beneficiary](#)

RESTATEMENT (SECOND) OF CONTRACTS

CHAPTER 1

MEANING OF TERMS

§ 1. Contract Defined

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

§ 2. Promise; Promisor; Promisee; Beneficiary

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee.

(4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

§ 4. How a Promise May Be Made

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

CHAPTER 2

FORMATION OF CONTRACTS—PARTIES AND CAPACITY

§ 12. Capacity to Contract

(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.

(2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is

- (a) under guardianship, or
- (b) an infant, or
- (c) mentally ill or defective, or
- (d) intoxicated.

§ 13. Persons Affected by Guardianship

A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.

§ 14. Infants

Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.

§ 15. Mental Illness or Defect

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

- (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
- (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

§ 16. Intoxicated Persons

A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication

- (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
- (b) he is unable to act in a reasonable manner in relation to the transaction.

CHAPTER 3

FORMATION OF CONTRACTS—MUTUAL ASSENT

§ 17. Requirement of a Bargain

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.

(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

§ 18. Manifestation of Mutual Assent

Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

[The predecessor of § 18 is § 20 of the First Restatement. It read as follows:

§ 20. Requirement of Manifestation of Mutual Assent.

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by §§ 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.]

§ 20. Effect of Misunderstanding

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or

(b) each party knows or each party has reason to know the meaning attached by the other.

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

§ 22. Mode of Assent: Offer and Acceptance

(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

§ 24. Offer Defined

An offer is the 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.

§ 25. Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

§ 26. Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

[The predecessor of § 26 is § 25 of the First Restatement. It reads as follows:

§ 25. When a Manifestation of Intention is Not an Offer.

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.]

§ 27. Existence of Contract Where Written Memorial is Contemplated

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof, but the circumstances may show that the agreements are preliminary negotiations.

§ 30. Form of Acceptance Invited

(1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.

(2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

§ 32. Invitation of Promise or Performance

In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

§ 33. Certainty

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

§ 34. Certainty and Choice of Terms; Effect of Performance or Reliance

(1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.

(2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.

(3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.

§ 35. The Offeree's Power of Acceptance

(1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.

(2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.

§ 36. Methods of Termination of the Power of Acceptance

(1) An offeree's power of acceptance may be terminated by

- (a) rejection or counter-offer by the offeree, or
- (b) lapse of time, or
- (c) revocation by the offeror, or
- (d) death or incapacity of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer.

§ 38. Rejection

(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.

(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

§ 39. Counter-offers

(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

(2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

[The predecessor of § 39 is § 38 of the First Restatement. It read as follows:

§ 38. Rejection of Offer by Counter-Offer.

A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeror in his offer, or the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated.]

§ 40. Time When Rejection or Counter-offer Terminates the Power of Acceptance

Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.

§ 41. Lapse of Time

(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.

§ 42. Revocation by Communication from Offeror Received by Offeree

An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.

§ 43. Indirect Communication of Revocation

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

§ 45. Option Contract Created by Part Performance or Tender

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

§ 46. Revocation of General Offer

Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.

§ 48. Death or Incapacity of Offeror or Offeree

An offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

§ 50. Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

§ 51. Effect of Part Performance Without Knowledge of Offer

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

§ 52. Who May Accept an Offer

An offer can be accepted only by a person whom it invites to furnish the consideration.

§ 53. Acceptance by Performance; Manifestation of Intention Not to Accept

(1) An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.

(2) Except as stated in § 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance.

(3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

§ 54. Acceptance by Performance; Necessity of Notification to Offeror

(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.

(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless

- (a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or
- (b) the offeror learns of the performance within a reasonable time, or
- (c) the offer indicates that notification of acceptance is not required.

§ 55. Acceptance of Non-Promissory Offers

Acceptance by promise may create a contract in which the offeror's performance is completed when the offeree's promise is made.

§ 56. Acceptance by Promise; Necessity of Notification to Offeror

Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.

§ 58. Necessity of Acceptance Complying with Terms of Offer

An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered.

§ 59. Purported Acceptance Which Adds Qualifications

A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.

§ 60. Acceptance of Offer Which States Place, Time or Manner of Acceptance

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

§ 61. Acceptance Which Requests Change of Terms

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

§ 62. Effect of Performance by Offeree Where Offer Invites Either Performance or Promise

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to render complete performance.

§ 63. Time When Acceptance Takes Effect

Unless the offer provides otherwise,

(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

§ 66. Acceptance Must be Properly Dispatched

An acceptance sent by mail or otherwise from a distance is not operative when dispatched, unless it is properly addressed and such other precautions taken as are ordinarily observed to insure safe transmission of similar messages.

§ 69. Acceptance by Silence or Exercise of Dominion

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

CHAPTER 4

FORMATION OF CONTRACTS—CONSIDERATION

§ 71. Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

§ 73. Performance of Legal Duty

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

§ 74. Settlement of Claims

(1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless

(a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or

(b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.

(2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

§ 77. Illusory and Alternative Promises

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for; or

(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

§ 79. Adequacy of Consideration; Mutuality of Obligation

If the requirement of consideration is met, there is no additional requirement of

(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or

(b) equivalence in the values exchanged; or

(c) "mutuality of obligation."

§ 81. Consideration as Motive or Inducing Cause

(1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.

(2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

§ 82. Promise to Pay Indebtedness; Effect on the Statute of Limitations

(1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.

(2) The following facts operate as such a promise unless other facts indicate a different intention:

(a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or

(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or

(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

§ 83. Promise to Pay Indebtedness Discharged in Bankruptcy

An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.

§ 84. Promise to Perform a Duty in Spite of Non-occurrence of a Condition

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

§ 86. Promise for Benefit Received

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value is disproportionate to the benefit.

§ 87. Option Contract

(1) An offer is binding as an option contract if it

(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

§ 89. Modification of Executory Contract

A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or

(b) to the extent provided by statute; or

(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

§ 90. Promise Reasonably Inducing Action or Forbearance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

[The predecessor of § 90, in the First Restatement, read as follows:

§ 90. Promise Reasonably Inducing Definite and Substantial Action.

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.]

§ 95. Requirements for Sealed Contract or Written Contract or Instrument

[The Introduction to this topic notes that the effect of a seal is governed by statute in most states.]

(1) In the absence of statute a promise is binding without consideration if

(a) it is in writing and sealed; and

(b) the document containing the promise is delivered; and

(c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.

(2) When a statute provides in effect that a written contract or instrument is binding without consideration or that lack of consideration is an affirmative defense to an action on a written contract or instrument, in order to be subject to the statute a promise must either

(a) be expressed in a document signed or otherwise assented to by the promisor and delivered; or

(b) be expressed in a writing or writings to which both promisor and promisee manifest assent.

CHAPTER 5

THE STATUTE OF FRAUDS

§ 131. General Requisites of a Memorandum

Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which

(a) reasonably identifies the subject matter of the contract,

(b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and

(c) states with reasonable certainty the essential terms of the unperformed promises in the contract.

§ 132. Several Writings

The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction.

§ 139. Enforcement by Virtue of Action in Reliance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) The extent to which the action of forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

- (d) the reasonableness of the action or forbearance;
- (e) the extent to which the action of forbearance was foreseeable by the promisor.

CHAPTER 6

MISTAKE

§ 151. Mistake Defined

A mistake is a belief that is not in accord with the facts.

§ 152. When Mistake of Both Parties Makes a Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

§ 153. When Mistake of One Party Makes a Contract Voidable

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
- (b) the other party had reason to know of the mistake or his fault caused the mistake.

§ 154. When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

§ 155. When Mistake of Both Parties as to Written Expression justifies Reformation

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

§ 157. Effect of Fault of Party Seeking Relief

A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

§ 158. Relief Including Restitution

(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 376.

(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

CHAPTER 7

MISREPRESENTATION, DURESS AND UNDUE INFLUENCE

§ 161. When Non-Disclosure Is Equivalent to an Assertion

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

- (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
- (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
- (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
- (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

§ 162. When a Misrepresentation Is Fraudulent or Material

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker

- (a) knows or believes that the assertion is not in accord with the facts, or
- (b) does not have the confidence that he states or implies in the truth of the assertion, or
- (c) knows that he does not have the basis that he states or implies for the assertion.

(2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

§ 164. When a Misrepresentation Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

(2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

§ 167. When a Misrepresentation Is an Inducing Cause

A misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent.

§ 168. Reliance on Assertions of Opinion

(1) An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters.

(2) If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion

- (a) that the facts known to that person are not incompatible with his opinion, or
- (b) that he knows facts sufficient to justify him in forming it.

§ 169. When Reliance on an Assertion of Opinion Is Not justified

To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient

- (a) stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient is reasonable in relying on it, or

(b) reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter, or

(c) is for some other special reason particularly susceptible to a misrepresentation of the type involved

§ 174. When Duress by Physical Compulsion Prevents Formation of a Contract

If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

§ 175. When Duress by Threat Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

§ 176. When a Threat Is Improper

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.

§ 177. When Undue Influence Makes a Contract Voidable

(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

(3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

CHAPTER 8

UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY

§ 178. When a Term Is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and
- (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy is manifested by legislation or judicial decisions
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.

§ 181. Effect of Failure to Comply with Licensing or Similar Requirement

If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if

- (a) the requirement has a regulatory purpose, and
- (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.

§ 182. Effect of Performance if Intended Use Is Improper

If the promisee has substantially performed, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee

- (a) acted for the purpose of furthering the improper use, or
- (b) knew of the use and the use involves grave social harm.

§ 187. Non-Ancillary Restraints on Competition

A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade.

§ 188. Ancillary Restraints on Competition

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

- (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
- (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

- (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
- (b) a promise by an employee or other agent not to compete with his employer or other principal;
- (c) a promise by a partner not to compete with the partnership.

§ 194. Promise Interfering with Contract with Another

A promise that tortiously interferes with performance of a contract with a third person or a tortiously induced promise to commit a breach of contract is unenforceable on grounds of public policy.

§ 195. Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently

(1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

(2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if

- (a) the term exempts an employer from liability to an employee for injury in the course of his employment;
- (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or

(c) the other party is similarly a member of a class protected against the class to which the first party belongs.

(3) A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.

§ 198. Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong

A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if

(a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or

(b) he was not equally in the wrong with the promisor.

CHAPTER 9

THE SCOPE OF CONTRACTUAL OBLIGATIONS

§ 201. Whose Meaning Prevails

(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

§ 202. Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

(a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

§ 203. Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

(a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;

(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;

(c) specific terms and exact terms are given greater weight than general language;

(d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

§ 204. Supplying an Omitted Essential Term

When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

§ 205. Duty of Good Faith and Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

§ 206. Interpretation Against the Draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

§ 208. Unconscionable Contract or Term

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

§ 209. Integrated Agreements

(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

§ 210. Completely and Partially Integrated Agreements

(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.

(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.

(3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

§ 211. Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

§ 213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

- (a) that the writing is or is not an integrated agreement;
- (b) that the integrated agreement, if any, is completely or partially integrated;
- (c) the meaning of the writing, whether or not integrated;
- (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
- (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

§ 215. Contradiction of Integrated Terms

Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

§ 216. Consistent Additional Terms

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

- (a) agreed to for separate consideration, or
- (b) such a term as in the circumstances might naturally be omitted from the writing.

§ 217. Integrated Agreement Subject to Oral Requirement of a Condition

Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition.

§ 220. Usage Relevant to Interpretation

(1) An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage.

(2) When the meaning attached by one party accorded with a relevant usage and the other knew or had reason to know of the usage, the other is treated as having known or had reason to know the meaning attached by the first party.

§ 221. Usage Supplementing an Agreement

An agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage.

§ 222. Usage of Trade

(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.

(2) The existence and scope of a usage of trade are to be determined as questions of fact. If a usage is embodied in a written trade code or similar writing the interpretation of the writing is to be determined by the court as a question of law.

(3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.

§ 223. Course of Dealing

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

§ 224. Condition Defined

A condition is an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due.

§ 225. Effects of the Non-Occurrence of a Condition

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

§ 226. How an Event May Be Made a Condition

An event may be made a condition either by the agreement of the parties or by a term supplied by the court.

§ 227. Standards of Preference with Regard to Conditions

(1) In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.

(2) Unless the contract is of a type under which only one party generally undertakes duties, when it is doubtful whether

(a) a duty is imposed on an obligee that an event occur, or

(b) the event is made a condition of the obligor's duty, or

(c) the event is made a condition of the obligor's duty and a duty is imposed on the obligee that the event occur, the first interpretation is preferred if the event is within the obligee's control.

(3) In case of doubt, an interpretation under which an event is a condition of an obligor's duty is preferred over an interpretation under which the non-occurrence of the event is a ground for discharge of that duty after it has become a duty to perform.

§ 228. Satisfaction of the Obligor as a Condition

When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.

§ 229. Excuse of a Condition to Avoid Forfeiture

To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

CHAPTER 10

PERFORMANCE AND NON-PERFORMANCE

§ 234. Order of Performances

(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

(2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

§ 235. Effect of Performance as Discharge and of Non-Performance as Breach

- (1) Full performance of a duty under a contract discharges the duty.
- (2) When performance of a duty under a contract is due any non-performance is a breach.

§ 236. Claims for Damages for Total and for Partial Breach

- (1) A claim for damages for total breach is one for damages based on all of the injured party's remaining rights to performance.
- (2) A claim for damages for partial breach is one for damages based on only part of the injured party's remaining rights to performance.

§ 237. Effect on Other Party's Duties of a Failure to Render Performance

Except as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

§ 238. Effect on Other Party's Duties of a Failure to Offer Performance

Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

§ 240. Part Performances as Agreed Equivalents

If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

§ 241. Circumstances Significant in Determining Whether a Failure Is Material

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

§ 242. Circumstances Significant in Determining When Remaining Duties are Discharged

In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance under the rules stated in §§ 237 and 238, the following circumstances are significant:

(a) those stated in § 241;

(b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;

(c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

§ 243. Effect of a Breach by Non-Performance as Giving Rise to a Claim for Damages for Total Breach

(1) With respect to performances to be exchanged under an exchange of promises, a breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance, other than a duty to render an agreed equivalent under § 240.

(2) Except as stated in Subsection (3), a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach.

(3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

(4) In any case other than those stated in the preceding subsections, a breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.

§ 250. When a Statement or an Act Is a Repudiation

A repudiation is

(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or

(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

§ 251. When a Failure to Give Assurance May Be Treated as a Repudiation

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

§ 252. Effect of Insolvency

(1) Where the obligor's insolvency gives the obligee reasonable grounds to believe that the obligor will commit a breach under the rule stated in § 251, the obligee may suspend any performance for which he has not already received the agreed exchange until he receives assurance in the form of performance itself, an offer of performance, or adequate security.

(2) A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

§ 253. Effect of a Repudiation as a Breach and on Other Party's Duties

(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.

(2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

§ 256. Nullification of Repudiation or Basis for Repudiation

(1) The effect of a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified by a retraction of the statement if notification of the retraction comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final.

(2) The effect of events other than a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified if, to the knowledge of the injured party, those events have ceased to exist before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final.

§ 257. Effect of Urging Performance in Spite of Repudiation

The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation.

CHAPTER 11

IMPRACTICABILITY OF PERFORMANCE AND FRUSTRATION OF PURPOSE

§ 261. Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 262. Death or Incapacity of Person Necessary for Performance

If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

§ 263. Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance

If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

§ 265. Discharge by Supervening Frustration

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

§ 266. Existing Impracticability or Frustration

(1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

(2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

§ 272. Relief Including Restitution

(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 377.

(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

CHAPTER 12

DISCHARGE BY ASSENT OR ALTERATION

§ 281. Accord and Satisfaction

(1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.

(2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.

(3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach.

§ 285. Contract Not to Sue

(1) A contract not to sue is a contract under which the obligee of a duty promises never to sue the obligor or a third person to enforce the duty or not to do so for a limited time.

(2) Except as stated in Subsection (3), a contract never to sue discharges the duty and a contract not to sue for a limited time bars an action to enforce the duty during that time.

(3) A contract not to sue one co-obligor bars levy of execution on the property of the promisee during the agreed time but does not bar an action or the recovery of judgment against any co-obligor.

§ 286. Alteration of Writing

(1) If one to whom a duty is owed under a contract alters a writing that is an integrated agreement or that satisfies the Statute of Frauds with respect to that contract, the duty is discharged if the alteration is fraudulent and material.

(2) An alteration is material if it would, if effective, vary any party's legal relations with the maker of the alteration or adversely affect that party's legal relations with a third person. The unauthorized insertion in a blank space in a writing is an alteration.

CHAPTER 13

JOINT AND SEVERAL PROMISORS AND PROMISEES

§ 288. Promises of the Same Performance

(1) Where two or more parties to a contract make a promise or promises to the same promisee, the manifested intention of the parties determines whether they promise that the same performance or separate performances shall be given.

(2) Unless a contrary intention is manifested, a promise by two or more promisors is a promise that the same performance shall be given.

§ 293. Effect of Performance or Satisfaction on Co-promisors

Full or partial performance or other satisfaction of the contractual duty of a promisor discharges the duty to the obligee of each other promisor of the same performance to the extent of the amount or value applied to the discharge of the duty of the promisor who renders it.

§ 294. Effect of Discharge on Co-promisors

(1) Except as stated in § 295, where the obligee of promises of the same performance discharges one promisor by release, rescission or accord and satisfaction,

(a) co-promisors who are bound only by a joint duty are discharged unless the discharged promisor is a surety for the co-promisor;

(b) co-promisors who are bound by joint and several duties or by several duties are not discharged except to the extent required by the law of suretyship.

(2) By statute in many states a discharge of one promisor does not discharge other promisors of the same performance except to the extent required by the law of suretyship.

(3) Any consideration received by the obligee for discharge of one promisor discharges the duty of each other promisor of the same performance to the extent of the amount or value received. An agreement to the contrary is not effective unless it is made with a surety and expressly preserves the duty of his principal.

CHAPTER 14

CONTRACT BENEFICIARIES

§ 302. Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

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

§ 309. Defenses Against the Beneficiary

(1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.

(2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

(3) Except as stated in Subsections (1) and (2) and in § 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.

(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

§ 311. Variation of a Duty to a Beneficiary

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

(4) If the promisee receives consideration for an attempted discharge or modification of the promisor's duty which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration so received. The promisor's duty is discharged to the extent of the amount received by the beneficiary.

§ 313. Government Contracts

(1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.

(2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless

(a) the terms of the promise provide for such liability; or

(b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

CHAPTER 15

ASSIGNMENT AND DELEGATION

§ 317. Assignment of a Right

(1) An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

(2) A contractual right can be assigned unless

(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or

(b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or

(c) assignment is validly precluded by contract.

§ 318. Delegation of Performance of Duty

(1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.

(2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.

(3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

§ 319. Delegation of Performance of Condition

(1) Where a performance by a person is made a condition of a duty, performance by a person delegated by him satisfies that requirement unless the delegation is contrary to public policy or the terms of the agreement.

(2) Unless otherwise agreed, an agreement requires performance of a condition by a particular person only to the extent that the obligor has a substantial interest in having that person perform or control the acts required.

§ 321. Assignment of Future Rights

(1) Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right.

(2) Except as otherwise provided by statute and as stated in Subsection (1), a purported assignment of a right expected to arise under a contract not in existence operates only as a promise to assign the right when it arises and as a power to enforce it.

§ 322. Contractual Prohibition of Assignment

(1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition.

(2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,

(a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation;

(b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;

(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

§ 328. Interpretation of Words of Assignment; Effect of Acceptance of Assignment

(1) Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.

(2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise.

Caveat: The Institute expresses no opinion as to whether the rule stated in Subsection (2) applies to an assignment by a purchaser of his rights under a contract for the sale of land.

§ 331. Partially Effective Assignments

An assignment may be conditional, revocable, or voidable by the assignor, or unenforceable by virtue of a Statute of Frauds.

§ 332. Revocability of Gratuitous Assignments

(1) Unless a contrary intention is manifested, a gratuitous assignment is irrevocable if

(a) the assignment is in a writing either signed or under seal that is delivered by the assignor; or

(b) the assignment is accompanied by delivery of a writing of a type customarily accepted as a symbol or as evidence of the right assigned.

(2) Except as stated in this Section, a gratuitous assignment is revocable and the right of the assignee is terminated by the assignor's death or incapacity, by a subsequent assignment by the assignor, or by notification from the assignor received by the assignee or by the obligor.

(3) A gratuitous assignment ceases to be revocable to the extent that before the assignee's right is terminated he obtains

(a) payment or satisfaction of the obligation, or

(b) judgment against the obligor, or

(c) a new contract of the obligor by novation.

(4) A gratuitous assignment is irrevocable to the extent necessary to avoid injustice where the assignor should reasonably expect the assignment to induce action or forbearance by the assignee or a subassignee and the assignment does induce such action or forbearance.

(5) An assignment is gratuitous unless it is given or taken

(a) in exchange for a performance or return promise that would be consideration for a promise; or

(b) as security for or in total or partial satisfaction of a pre-existing debt or other obligation.

§ 336. Defenses Against an Assignee

(1) By an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor or unenforceable against him if no assignment had been made, the right of the assignee is subject to the infirmity.

(2) The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but not to defenses or claims which accrue thereafter except as stated in this Section or as provided by statute.

(3) Where the right of an assignor is subject to discharge or modification in whole or in part by impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance by an obligee, the right of the assignee is to that extent subject to discharge or modification even after the obligor receives notification of the assignment.

(4) An assignee's right against the obligor is subject to any defense or claim arising from his conduct or to which he was subject as a party or a prior assignee because he had notice.

CHAPTER 16

REMEDIES

§ 344. Purposes of Remedies

Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

(a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,

(b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

§ 346. Availability of Damages

(1) The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.

(2) If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages.

§ 347. Measure of Damages in General

Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

- (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- (b) any other loss, including incidental or consequential loss, caused by the breach, less
- (c) any cost or other loss that he has avoided by not having to perform.

§ 348. Alternatives to Loss in Value of Performance

(1) If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(a) the diminution in the market price of the property caused by the breach,
or

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

(3) If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

§ 349. Damages Based on Reliance Interest

As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

§ 350. Avoidability as a Limitation on Damages

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

§ 351. Unforeseeability and Related Limitations on Damages

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

§ 352. Uncertainty as a Limitation on Damages

Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

§ 353. Loss Due to Emotional Disturbance

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

§ 354. Interest as Damages

(1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.

(2) In any other case, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

§ 355. Punitive Damages

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

§ 356. Liquidated Damages and Penalties

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

(2) A term in a bond providing for an amount of money as a penalty for nonoccurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.

§ 359. Effect of Adequacy of Damages

(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

(2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.

(3) Specific performance or an injunction will not be refused merely because there, is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in § 357.

§ 360. Factors Affecting Adequacy of Damages

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

- (a) the difficulty of proving damages with reasonable certainty,
- (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and
- (c) the likelihood that an award of damages could not be collected.

§ 370. Requirement That Benefit Be Conferred

A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.

§ 371. Measure of Restitution Interest

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

- (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
- (b) the extent to which the other party's property has been increased in value or his other interests advanced.

§ 373. Restitution When Other Party Is in Breach

(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

§ 374. Restitution in Favor of Party in Breach

(1) Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.

(2) To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

§ 375. Restitution When Contract Is Within Statute of Frauds

A party who would otherwise have a claim in restitution under a contract is not barred from restitution for the reason that the contract is unenforceable by him because of the Statute of Frauds unless the Statute provides otherwise or its purpose would be frustrated by allowing restitution.

§ 376. Restitution When Contract Is Voidable

A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

§ 377. Restitution in Cases of Impracticability, Frustration, Non-Occurrence of Condition or Disclaimer by Beneficiary

A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.