THE CONTRACTS RESTATEMENT

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The *Contracts Restatement* of the American Law Institute, in six hundred and nine black letter sections, with accompanying explanatory comment and illustrations sets forth comprehensively the law of contracts. It is for the most part intended to be inclusive in its provisions, with no "unprovided case". In scope it includes Remedies, including Damages, Restitution and Specific Performance, generally regarded as parts of the subjects of Damages, Quasi Contracts and Equity; Interpretation and the Parol Evidence Rule, regarded as parts of the law of Evidence. Many sections deal with topics treated in Sales, Equity and other recognized divisions of the law. It is a demonstration of the unity of the law, and the overlapping and interrelation of conventional subjects and topics.

In form it is like a uniform state law with clarifying comment and illustrations.[1] On the face of any particular section there is nothing to indicate whether it states well settled law, or embodies a choice between one or more conflicting rules, or is an extension into fields where authority is lacking. It differs from a treatise or encyclopedia in not indicating conflicts of authority and reasons for the solutions adopted. To determine wherein they are supported by existing authority one is compelled to rely on the various state annotations now in the course of preparation, or on other means of finding local decisions and statutes.

The work is an expression of opinion of a group of leading American legal scholars as to what the law should be found to be in an American court not bound to follow the decisions of any particular state courts, but bound to act in accordance with the "common law". Its authority depends upon its source. The *Restatement* was for the most part initially drafted by Professor Samuel Williston, of the Harvard Law School. The chapter on Remedies was prepared by Professor Arthur Corbin of the Yale Law School. Assisting these draftsmen, known as Reporters, was a committee of advisors, all well known as experts in Contracts and related subjects.[2] The drafts were

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[1] "The Council of the American Law Institute considered the respective merits of carefully prepared treatises and the plan, actually adopted, and ultimately decided that increased clearness, brevity, consistency, uniformity, and accessibility could best be achieved by putting the Restatement in the form of concise rules analogous to those in a carefully drawn statute, supplemented however, by comment and illustrations that would preclude as far as possible doubts as to the exact meaning and effect of the rules." Williston, *The Restatement of Contracts* (1932) 18 A. B. A. J. 775, 777.

[2] Zechariah Chafee, Jr. of Harvard, editor of casebooks on equity; Edgar N. Durfee of Michigan, editor of a casebook on equity; Merton L. Ferson of Cincinnati, author of several articles on contracts in legal periodicals; Dudley O. McGovney of California, editor of a

submitted to and approved by the Council of the Institute, composed of eminent members of the American bench and bar. The tentative drafts were then sent to members of the Institute, law school teachers, bar association committees, and other interested persons, before submission to annual meetings of the Institute where they were read and discussed section by section. Since the work was started in 1923 and tentative drafts published, criticisms and suggestions have been invited and in large numbers received and considered by the Reporters, the advisors and the Council, and many changes have been made, especially of a verbal nature, before the final draft was submitted and approved by the 1932 meeting of the Institute. Within the time allotted nothing more could have been done to make this work the joint product of those members of the legal profession who had any interest or desire to take part in the enterprise. The extent to which it has already been cited in opinions and used as a reference book in the law schools indicates that it will soon be regarded as an authoritative source of the law.

Whether or not in cases of conflicting rules the *Restatement* embodies the more desirable choice, it is probable that the courts will not blindly follow the *Restatement* where in a particular jurisdiction a contrary rule has been adopted by a considerable body of decisions. This was illustrated in *Langel v. Betz*,[3] where the New York Court of Appeals, by an unanimous opinion, in which Cardozo, C. J., an active member of the Council of the Institute, joined, refused to follow Section 164, which is to the effect that an assignee of a bilateral contract presumably assumes the performance of the assignor's duties, because of the line of New York decisions to the contrary. On the other hand, where the decisions of a jurisdiction are in a state of conflict or confusion, and have been subjected to criticism as being out of line with the current of authority elsewhere, the *Restatement* will doubtless have a unifying influence and serve as a starting point for a new line of decisions, as in the case of third party beneficiaries in Pennsylvania,[4] and of relative rights of successive assignees in New Jersey.[5] It is the writer's intention to note

casebook on constitutional law and author of articles on contracts; William E. McCurdy of Harvard, editor of a casebook on persons; William H. Page of Wisconsin, author of a treatise on contracts; George J. Thompson of Cornell, compiler of SELECTED READINGS ON CONTRACTS (1931). Of great value were the services of William Draper Lewis, Director of the Institute, an experienced legislative draftsman.

[3] 250 N. Y. 159, 164 N. E. 890 (1928).

[4] Book's Estate, 297 Pa. 543, 147 Atl. 608 (1929); Washington Steel Form Co. v. North City Trust Co., 308 Pa. 351, 162 Atl. 829 (1932). In Saunders Co. v. Galbraith *et al.*, 40 Ohio App. 155, 159, 178 N. E. 34, 35 (1931), (1932) 80 U. OF PA. L. REV. 594, a case of promissory estoppel, the court said, "By following the admirable notes of Professor Ferson it would not be difficult to sustain the soundness of Section 90 as the boiled-down essence of the law of Ohio. We are content, however, to take the restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority. This is not to say that the restatement is of necessity perfect, and that in it is to be found the law's last word. We only hold that he who would not have it followed has the burden of demonstrating its unsoundness."

[5] Moorestown Trust Co. v. Buzby, 109 N. J. Eq. 409, 157 Atl. 663 (1932), overruled a previous decision and followed § 173, preferring a prior assignee over a second assignee who had given prior notice to the debtor.

some of the instances in which the *Restatement* has set forth solutions not heretofore universally accepted, particularly by the Pennsylvania decisions and statutes.

Chapter 1 contains definitions of terms used in the *Restatement.* Chapter 2 contains a few general statements as to parties and in Section 17 asserts the possibility of a contract between "two or more persons acting as a unit and one or more but fewer than all of these persons, acting either singly or with other persons". This is a departure from what has been said in many of the older cases [6] but in accord with the modern view as contained in the *Uniform Interparty Agreement Act.*[7]

Chapter 3 deals with the fundamental elements of contract, manifestation of assent and consideration. As to assent, the so-called objective view is followed,[8] with a few expressed exceptions, that a contract results from a concurrence of manifestations, though a concurrence of actual intent is lacking.

Section 45 provides that where an offer for a unilateral contract is made and the offeree performs or tenders part of the consideration, the offeror is bound by a contract conditional on the full consideration being given or tendered. This is in accord with decisions in cases of the estates of decedents who have made charitable subscriptions, inducing desired action on the part of the charity.[9]

Section 50 provides that an offer is terminated by the fact that before acceptance the proposed contract becomes illegal. Manifestation of assent is a requirement to be distinguished from legality of purpose.[10] Not all illegal contracts are null and void. Rights may exist in an innocent party, ignorant of facts which make the contract illegal, or ignorant of special statutory or executive regulations, Section 599. It would seem better to have said that acceptance results in an illegal contract, and then the rights thereunder depend upon the principles set forth under the topic Effect of Illegality, Sections 598-609.

Consideration, what it is and when it is necessary, is concisely treated in Sections 75-84. It is of course necessary in a restatement of the law of Contracts to deal with this requirement, but the form of the Restatement seems unfortunate in respect to this topic, since it fails to show the trend of

[6] Price v. Spencer, 7 Phila. 179 (Pa. 1870), citing Bosanquet v. Wray, 6 Taunt. 597 (Eng. 1815) to the effect that in such agreement there is a defect of substance, not merely a procedural difficulty. By Act of April 14, 1838, P. L. 457, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 150, action may be brought where there is a non-common party on each side. The common law seems to have been ignored, no misjoinder having been seasonably pleaded, in Laughner v. Wally, 269 Pa. 5, 112 Atl. 105 (1920) (an action by three co-owners against one of their number).

[7] May 13, 1927, P. L. 984, PA. STAT. ANN. (Purdon, 1930) tit. 21, § 551 *et seq.*

[8] Whittier, *The Restatement of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441. See Delaware L. & W. R. R. Co. v. Water Power & Supply Co., 227 Pa. 639, 76 Atl. 425 (1910).

[9] Converse's Estate, 240 Pa. 548, 87 Atl. 849 (1913). See also § 90.

[10] § 19 (b), (d).

the decisions away from the insistence on a technical formal requirement toward the enforcement of promises intended to be binding and which, as a matter of social justice, ought to be binding.

Section 76 (a) makes the performance of a duty owed to the promisor insufficient consideration, a rule in accordance with the legal detriment theory of consideration, and in most cases socially just, but according to many recent decisions not to be applied to situations where unforeseen difficulties of performance are encountered, and the promise is no more than one of indemnity against pecuniary loss.[11] Performance of a contractual duty to a third person is stated to be sufficient consideration.[12]

Section 82 provides that the recital of consideration is inconclusive proof of the fact. It has recently been held to the contrary in *Real Estate Company of Pittsburgh v. Rudolph.*[13] That it is economically desirable to enable parties to bind themselves to a promise without consideration, where it is apparent that they intend to be legally bound, has led the commissioners on Uniform State Laws to recommend for adoption the *Uniform Written Obligations Act* [14] drafted by Mr. Williston.

Under the sub-title of "Informal Contracts without Assent or Consideration", Sections 85-94, are collected some of the common instances of inroads on the conventional doctrine as set forth in the preceding sections. Promises to pay debts barred by the Statute of Limitations, Section 86, or by discharge in bankruptcy, Section 87, are said to be "binding". It is not made clear whether the action should be brought on the old debt or the new promise.[15] The doctrine of moral obligation as a substitute for consideration has had a wider scope in Pennsylvania than elsewhere. Promises by a widow to perform a void promise made when a married woman, such as one of suretyship,[16] have been held "binding".

Section 90 sets forth a rule sometimes called "promissory estoppel", *i. e.*, that a promise which is expected to and does produce substantial action on the part of the promisee is binding if injustice can be avoided only by enforce-

[11] Cases supporting the more liberal view include Blakeslee v. Board of Water Commissioners, 106 Conn. 642, 139 Atl. 106 (1927); Martiniello v. Bamel, 255 Mass. 25, 150 N. E. 838 (1926); Linz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907); King v. Duluth M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895); Gardner, *An Inquiry Into the Principles of the Laws of Contracts* (1932) 46 HARV. L. REV. 1, 37.

[12] § 84. *Accord:* Avondale Marble Co. v. Wiggins, 12 Pa. Super. 577 (1900); Whitehouse v. Green, 81 Pa. Super. 386 (1923).

[13] 301 Pa. 502, 153 Atl. 438 (1930); see (1931) 79 U. OF PA. L. REV. 1139.

[14] May 13, 1927, P. L. 985, PA. STAT. ANN. (Purdon, 1930) tit. 33, § 6, stating a written release or promise is not to be invalid for lack of consideration "if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." See Note (1928) 76 U. OF PA. L. REV. 580; Note (1926) 21 ILL. L. REV. 185.

[15] An action on a promise to pay a debt discharged in bankruptcy may be brought, but not an action on the old discharged debt. Hobaugh v. Murphy, 114 Pa. 358, 7 Atl. 139 (1886); Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142 (1886).

[16] Young's Estate, 234 Pa. 287, 83 Atl. 201 (1912); Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790 (1906). A parent's promise to compensate adult children for services rendered under circumstances creating no legal obligation is binding. Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902).

ment. This rule has been invoked to support many cases of charitable subscriptions, followed by action of the charity in reliance thereon,[17] and has recently been applied, citing this Section, to a promise of a pension to a retired employee, conditioned on his continued loyalty and forbearing to accept competitive employment.[18] For this rule to apply it must appear that something was done or foreborn by the promisee as a reasonable consequence expected by the promisor.[19]

Chapter 4, Sections 95-110, states the common law rules as to sealed instruments. It is noted that in a large number of states (not including Pennsylvania) there are statutory provisions doing away with the distinctions between sealed and unsealed contracts, particularly as to the requirement of consideration. It is stated in Section 101 that a sealed promise can be delivered conditionally to the promisee. This is not true in Pennsylvania in the case of a deed.[20] There is considerable authority in Pennsylvania in accord with the statement in Section 110 that consideration is unnecessary for a sealed promise. Language in the opinion in a recent case appears to throw some doubt on this rule, holding that on opening a judgment entered by confession, lack of consideration can be shown.[21] It is not clear from the record that there was any lack of consideration, however.

The common law of joint rights and joint obligations is the subject matter of Chapter 5, Sections 111-132. Statutory changes have been made in nearly every state, including Pennsylvania.[22]

Chapter 6, Sections 133-147, deals with third party beneficiaries. Creditor beneficiaries and donee beneficiaries are stated to have rights to enforce promises made for their benefit. In Pennsylvania enforceability by third party beneficiaries has been for the most part limited to situations in which a trust has been created, or a fund or property transferred by the promisee to the promisor by means of which it is intended that the promise shall be performed. In the leading case of *Green County v. Southern Surety Co.*,[23] the

[17] President Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689 (1904); Converse's Estate, 240 Pa. 458, 87 Atl. 849 (1913); Univ. of Pa.'s Trustees v. Cox's Executor, 277 Pa. 512, 121 Atl. 314 (1923). See also Armstrong v. Levan, 109 Pa. 177, 1 Atl. 204 (1885), where a promise to pay compensation for a tort operated to enable the injured party to avoid the bar of the statute of limitations, after forbearance.

[18] Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 571 (1932), (1932) 32 COL. L. REV. 1431. The case has been remitted to the common pleas court after overruling a statutory demurrer and is awaiting trial.

[19] Union Trust Co. of Pittsburgh v. Long, 309 Pa. 470, 164 Atl. 346 (1932).

[20] Weisenberger v. Huebner, 264 Pa. 316, 107 Atl. 763 (1919).

[21] Austen v. Marzolf, 307 Pa. 232, 161 Atl. 72 (1932), (1932) 81 U. OF PA. L. REV. 216.

[22] Section 119 provides that judgment against one or more joint obligors discharges the joint duty of the others. This is changed by Act of April 6, 1830, P. L. 277, § 1, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 801, and Act of April 11, 1848, P. L. 536, § 5, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 806. See Miller v. Reed, 27 Pa. 244 (1856). Section 125 provides that the estate of a deceased joint promisor is not bound unless the survivors are insolvent, nor in the event that the deceased promisor was a surety. This has been changed by Act of April 11, 1848, P. L. 536, § 3, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 805, and Act of June 7, 1917, P. L. 447, § 35 (b), PA. STAT. ANN. (Purdon, 1930) tit. 20, § 772.

[23] 292 Pa. 304; 141 Atl. 27 (1927), (1928) 27 MICH. L. REV. 200; (1928) 76 U. OF PA. L. REV. 594. See also Note (1932) 45 HARV. L. REV. 1236; Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds* (1928) 38 YALE L. J. 1.

decisions were reviewed, and it was held that materialmen had no rights under a bond given by the contractor to the municipality, conditioned upon payment of materialmen. The point decided has been changed by statute as regards public contracts,[24] and later cases have qualified the decision somewhat, in cases where the language of the bond more clearly indicates an intention that materialmen shall have the power to enforce the bond.[25] Other recent decisions, citing Williston's treatise and the *Restatement,* indicate the likelihood that Pennsylvania law on third party beneficiaries is in a process of change, and is approaching the position taken in the *Restatement.*[26]

Chapter 7, Sections 148-177, deals with assignment of rights and delegation of duties or conditions. There are two difficult problems under this topic. One is the relative rights of successive assignees for value. The *Restatement* in Section 173 sets forth circumstances in which a subsequent assignee is preferred, but does not include the case of a subsequent assignee who gives notice to the obligor prior to notice being given by the first assignee. In Pennsylvania, under those circumstances, the subsequent assignee would be preferred.[27] In a gratuitous assignment, under Section 158, if "the assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement, and this token or writing is delivered to the assignee" the assignment is irrevocable. This rule has not been applied in Pennsylvania to the gift of savings bank deposits accompanied by delivery of the bank book [28] unless there is also a written instrument of assignment.[29] Another problem is that of whether an assignee of a bilateral contract presumably assumes the duty of performance as is provided in Section 164, referred to *supra.*

Chapter 8, Sections 178-225, deals with the Statute of Frauds. The provisions of the English Statute are set forth in substance, together with their interpretation. It is noted that not all of the several sections of the English Statute have been adopted in all the states. In Pennsylvania the Statute of Frauds was not regarded as part of the received common law.[30]

[24] Act June 23, 1931, P. L. 1181, PA. STAT. ANN. (Purdon, 1930) tit. 8, § 146.

[25] Portland Sand & Gravel Co. v. Globe Indemnity Co., 301 Pa. 132, 151 Atl. 687 (1930); Easton School District v. Continental Casualty Co., 304 Pa. 67, 155 Atl. 93 (1931).

[26] Book's Estate; Washington Steel Form Co. v. North City Trust Co., both *supra* note 4.

[27] Phillips' Estate (No. 3), 205 Pa. 515, 55 Atl. 213 (1903); First Nat'l Bank of Bangor v. Bangor Trust Co., 297 Pa. 115, 146 Atl. 595 (1929). *Cf.* Moorestown Trust Co. v. Buzby, *supra* note 5. But where an attachment by a judgment creditor of the assignor intervened between the first assignment and a later assignment of which notice was given, the first assignee was preferred. Phillips' Estate (No. 4), 205 Pa. 525, 55 Atl. 216 (1903).

[28] Walsh's Appeal, 122 Pa. 177, 15 Atl. 470 (1888); Grigonis' Estate, 307 Pa. 183, 160 Atl. 706 (1932).

[29] *In re* Vance, 106 Pa. Super. 467, 162 Atl. 346 (1932). See Note (1932) 81 U. OF PA. L. REV. 224.

[30] Bell v. Andrews, 4 Dall. 152 (Pa. 1796) (a *nisi prius* proceeding before McKean, C. J., and Shippen and Smith, JJ.). See also Anonymous Case, 1 Dall. 1 (Pa. 1754), stating that the Statute of Frauds and Perjuries does not extend to this province though made before the Penn Charter, because the Duke of York exercised jurisdiction here prior to the Statute.

The Duke of York's Laws, 1676, set forth the requisites of a conveyance (Duke of York's Laws, p. 23) but contained nothing regarding the requisites of a contract to convey.

Classes I and II, contracts of an executor or administrator to answer for a duty of the decedent's estate, and contracts to answer for the debt of another were not adopted in Pennsylvania until 1855.[31]

Class III, contracts in consideration of marriage, has never been adopted in Pennsylvania.

Class IV, contracts for the sale of an interest in land, has been adopted in Pennsylvania, only for a short time, by an act of 1856,[32] repealed the following year.[33] Pennsylvania in 1772 adopted an act requiring all interests in land other than leases for less than three years to be assigned, granted or surrendered, by deed or note in writing signed by the party so assigning, granting or surrendering, or their agents thereto lawfully authorized by writing.[34] This statute has been judicially construed as applying to equitable as well as legal interests, so that actions for specific performance of contracts for the sale of land do not lie in the absence of a written agreement signed by the grantor. The grantor in the case of an oral contract cannot recover a conditional verdict in assumpsit for the purchase price,[35] and the grantee cannot by a plea to an action of ejectment secure specific performance.[36] The grantee is allowed to sue in assumpsit for damages for the grantor's breach of the oral contract, but cannot recover damages based on the value of the bargain, for that would be in effect specific performance; he can recover only hand money paid, expense of searching title, and other expenses incurred on the faith of the contract.[37]

It is stated in the introductory Section 178 that "The following classes of informal contracts are by statute unenforceable etc. . . ." Comment *c* states "Formal contracts (enumerated in Section 7) are not affected by the statute." It is true that a formal contract to pay money, such as a negotiable instrument or a bond, is not affected by the provisions regarding promises to pay the debt of another. But the memorandum relied upon to satisfy the statute for the sale of land, may be a sealed agreement [38] yet it is subject to

These laws were extended to the territories on the Delaware by ordinance of Gov. Andros, 1676 (*id.* 455). They were adopted by Penn on his arrival, and continued until replaced by the new code adopted at Chester (*id.* 298). The Statute of Frauds was enacted in England in 1676, to take effect June 24, 1677.

Wharton's note in 1 Dall. 1, suggests that the Statute of Frauds was not extended in practice to Pennsylvania because its "provisions were inapplicable to the simplicity of the earlier periods in Pennsylvania, and required greater expertness than the practitioners of those days generally possessed."

[31] Act of April 26, 1855, P. L. 308, PA. STAT. ANN. (Purdon, 1930) tit. 33, § 3.

[32] Act of April 22, 1856, P. L. 532, § 5.

[33] Act May 13, 1857, P. L. 500. The repeal seems to have been ignored in Connor's Estate, 85 Pa. Super. 19, 23 (1925).

[34] March 21, 1772, 1 Sm. L. 389, § 1, PA. STAT. ANN. (Purdon, 1930) tit. 33, § 1.

[35] *Semble:* Ellet v. Paxson, 2 W. & S. 418 (1841).

[36] Postlethwait v. Frease, 31 Pa. 472 (1858).

[37] Seidlek v. Bradley, 293 Pa. 379, 142 Atl. 914 (1928), stating also that the measure of damages is enlarged where the original contract is procured by fraud.

[38] Section 207. In Pennsylvania agreements for the sale of real estate when drawn by attorneys or real estate brokers usually are sealed.

the requirement that it state with reasonable certainty [39] the subject matter to which the contract relates.[40]

As the Pennsylvania Statute of Frauds as to land contracts merely prevents the creation of an equitable interest save by a writing signed by the grantor, it is unnecessary that any writing be signed by the grantee, although he be the party to be charged.[41]

Chapter 9, Sections 226-249, is entitled "Scope and Meaning of Contracts." It includes the matters of interpretation, parol evidence rule and usage generally included under the subject of Evidence. It is from the leading work on this subject, Wigmore on *Evidence,* that the term "integration" has been borrowed. Wigmore's first use of the word as a legal term is "The Integration of the act [Jural Act] consists in embodying it in a *single utterance* or *memorial,*—commonly, of course a written one." [42] The *Restatement* defines the term in Section 228, "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." [43] In Section 229 it is stated that "Part of the terms of an agreement may be integrated. . . ." It is unfortunate that the Institute should have found it necessary to express the law in language as yet unfamiliar to the profession at large, by the use of a term the legal significance of which is not ascertainable from its use in judicial opinions.

The sections on the parol evidence rule are in accord with the present Pennsylvania law which has been subject to many fluctuations in the past.[44]

The sections on interpretation of contracts contain many statements of rules for the interpretation of integrated and unintegrated contracts. Each statement is in itself supportable by authority. There is considerable variation apparent on the face of the decisions in regard to the approach to the problem, as to what are primary and what are secondary rules. This part of the *Restatement* seems to be somewhat over-mechanical in describing the

[39] Section 207.

[40] A sealed option or other sealed land contract is within the statute. Barnes v. Rea, 219 Pa. 287, 296, 68 Atl. 839, 842 (1908); Tippins v. Phillips, 123 Ga. 415, 51 S. E. 410 (1905); Booth v. Milliken, 127 App. Div. 522, 111 N. Y. Supp. 791 (1908). The statute requiring signature, a sealed but unsigned deed is insufficient. Miller v. Rubbe, 107 Pa. 395 (1884), though at common law signing of a deed or bond is unnecessary. § 95, Comment b.

[41] Lowry v. Mehaffy, 10 Watts 387 (Pa. 1840); Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229 (1901); Ottman v. Nixon-Nirdlinger, 301 Pa. 234, 151 Atl. 879 (1930). But see Humphrey v. Brown, 291 Pa. 53, 139 Atl. 606 (1927) (apparently applying the statute to vendee's contract made by an agent not authorized in writing).

[42] 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2401. In BIGELOW, BILLS, NOTES AND CHECKS (3d ed. 1928) § 131, it is said that incorporation by reference results in one writing being *integrated* into another.

[43] The use of this term is explained in the introduction to the Restatement at xiii, § 28 being erroneously cited for § 228. The body of the Restatement is remarkably free from typographical errors.

[44] Spier v. Michelson, 303 Pa. 66, 154 Atl. 127 (1931). Folz, *The Admissibility of Evidence to Establish Oral Contemporaneous Inducing Promises to Affect Written Instruments in Pennsylvania* (1904) 52 U. OF PA. L. REV. 601; Harrison, *Pennsylvania Rule as to the Admissibility of Evidence to Establish Contemporaneous Inducing Promises to Affect Written Instruments* (1926) 74 U. OF PA. L. REV. 235.

process and in fixing the order in which various criteria are applied. The Pennsylvania courts have emphasized the principle that the objective is to ascertain the intention of the parties, using rules as an aid thereto.[45]

Chapter 10, Sections 250-311, is entitled "Conditions; and Breach of Promise as an Excuse for Failure to Perform a Return Promise." Section 250 furnishes alternative definitions of a condition: a fact that must exist before a duty of immediate performance arises, in which case the condition is a "condition precedent" or will extinguish a duty to make compensation for breach of contract after the breach has occurred, in which case the condition is a "condition subsequent"; or a term in a promise providing that a fact shall have such an effect. The opinions use the word condition in each of these senses, as does the *Restatement.*

Topic 3, Sections 266-290, is a very lucid exposition of the modern law of constructive conditions. There are occasional instances in the decisions of confusion of failure of consideration which is a condition, Section 274, with lack of consideration [46] necessary for initial validity of the contract.

Section 304 states that where defective performance of a condition is tendered and rejected, the giving of an insufficient reason for rejection is immaterial, unless it induces failure to make seasonably a sufficient tender thereafter. The decisions have sometimes confused cases in which change of position was so induced with those in which it was not.[47]

Under Chapter 11, Sections 312-325, entitled "Breach of Contract", the most conspicuous feature is the disposition of the subject of anticipatory breach. Under the *Restatement* repudiation in advance of performance of a bilateral contract is a total breach, Section 318. The Pennsylvania decisions require that the injured party should have acted on the repudiation for it to be a breach.[48] Under Section 320, manifestation by the injured party of a purpose to allow or require performance does not nullify the effect of repudiation as a breach. The contrary has been held in Pennsylvania.[49] It has even been held that where the injured party does not act on the repudiation he

[45] Bubb v. Parker & Edwards Oil Co., 252 Pa. 26, 29, 97 Atl. 114, 115 (1916); White Heat Products Co. v. Thomas, 266 Pa. 551, 555, 109 Atl. 685, 686 (1920); Bangor Peerless State Co. v. Bangor Vein Slate Co., 270 Pa. 161, 165, 113 Atl. 190, 191 (1931). "The history of the law of Interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism." 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2461. *Cf.* § 231, Illustration 2, to the effect that a private code orally agreed upon that "buy" in a telegram means "sell" is ineffective, with Wigmore's more liberal view in 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2462, 2463, n. 11.

[46] See Allshouse's Estate, 304 Pa. 481, 156 Atl. 69 (1931).

[47] Freedman v. Fire Association of Phila., 168 Pa. 249, 32 Atl. 39 (1895); Popper v. Rosen, 292 Pa. 122, 140 Atl. 774 (1928); Emerson Shoe Co. v. Gruskin *et al.*, 86 Pa. Super. 296 (1925).

[48] Zuck v. McClure, 98 Pa. 541, 545 (1881); Maguire v. Johnston, 207 Pa. 592, 57 Atl. 64 (1904).

[49] Barber Milling Co. v. Leichthammer, 273 Pa. 73, 116 Atl. 677 (1922); Frank Pure Food Co. v. Dodson, 281 Pa. 125, 130, 126 Atl. 243, 246 (1924); McCormick v. Fidelity & Cas. Co., 307 Pa. 434, 161 Atl. 532 (1922).

must tender performance regardless of the repudiation,[50] but this rule appears to be, so far as sales of goods contracts go, directly contrary to the provisions of the *Sales Act*.[51]

Chapter 12, Sections 326-384, is entitled "Judicial Remedies for Breach of Contract." Damages, restitution and specific performance are presented as the three remedies available. It is not usual to consider these matters as a part of the subject of Contracts in law school courses or in text books, but it seems desirable to do so. The topic of restitution is very well presented, and it is likely to call to the attention of teachers, students and attorneys the bearing on the law of contracts of various rules heretofore relegated to quasi-contracts and equity classifications.

Non-performance of a contract within the Statute of Frauds is not a breach of contract, as defined in Section 312. But in some circumstances the contract may be specifically enforced,[52] though damages cannot be given, and even though other remedies are unavailable that of restitution can be had.[53] In Pennsylvania the vendee's remedy for non-performance of an oral contract to convey land is an action for damages on the contract, as has been stated, *supra,* in connection with the Statute of Frauds topic.

The tardy development of equity procedure in Pennsylvania has resulted in specific performance being granted through legal forms of action, such as assumpsit and ejectment. Actions in equity for specific performance often fail because the legal remedies are adequate, such remedies being not merely damages, but equitable relief through legal forms.[53a]

Chapter 13, Sections 385-453, is entitled "Discharge of Contracts." Herein are gathered together and concisely stated a number of rules on various methods of discharge of contracts. Chapter 14, Sections 454-469, deals with impossibility, and its effect as a cause of discharge.

Chapter 15, Sections 470-491, deals with fraud and misrepresentation. Section 473 adopts the rule that "A contractual promise made with the intention of not performing it is fraud." The Pennsylvania cases have not gone so far as this.[54] Section 488 provides for restitution to the injured party in

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[50] Huessener v. Fishel & Marks Co., 281 Pa. 535, 127 Atl. 139 (1924); Fairfax Textile Mills, Inc. v. Feingold, 273 Pa. 73, 116 Atl. 525 (1922).

[51] The Sales Act, May 19, 1915, P. L. 543, § 64 (4), PA. STAT. ANN. (Purdon, 1930) tit. 69, § 293.

[52] Section 197. In Pennsylvania there must be not only possession by the grantee, open and exclusive, but expenditures in the making of improvements which cannot be adequately compensated in damages. McKowen v. McDonald, 43 Pa. 441 (1862); Whiting & Co. v. Pitts. Opera House Co., 88 Pa. 100 (1878); Piatt v. Seif, 207 Pa. 614, 57 Atl. 68 (1904); Parry v. Miller, 247 Pa. 45, 93 Atl. 30 (1915).

[53] Section 355.

[53a] See Smaltz's Appeal 99 Pa. 310 (1882); Dalzell v. Crawford, 1 Pars. Eq. Cas. 37 (Pa. 1842).

[54] Smith v. Smith, Murphy & Co., 21 Pa. 367 (1853); Backentoss v. Speicher, 31 Pa. 324 (1858); Penn Lumber Co. v. Hanover Bending & Mfg. Co., 96 Pa. Super. 16 (1929). *Cf.* Harner v. Fisher, 58 Pa. 453 (1868); Cincinnati Cooperage Co. v. Gaul, 170 Pa. 545 (1895); Allen *et al.* v. Sarshik, 299 Pa. 257, 148 Atl. 25 (1930) (criticising rule of older decisions and distinguishing facts of instant case).

cases of contracts voidable for fraud or misrepresentation. Section 499 provides, by cross reference to this section, for a similar remedy in cases of duress and undue influence; the subject matter of Chapter 16, Sections 492-499. The chapter on mistake, Chapter 17, Sections 500-511, makes no provision for restitution in cases of part performance of a contract voidable for mistake, concerning which there is an abundance of authority.

Chapter 18, Sections 512-609, the final chapter, is entitled "Illegality." It is admitted in the comment [55] that not all kinds of illegal contracts can be listed, but the more usual varieties are included. In accordance with the common law, bargains for arbitration are stated to be not specifically enforcible.[56] Under a recent statute, they are enforcible in Pennsylvania [57] as in some other states. Section 548 (1) provides that a bargain in which either a promised performance or the consideration for a promise is concealing or compounding a crime or alleged crime is illegal. The matter is also dealt with under the chapter on duress, Section 493. In Pennsylvania the use of criminal process as a means of enforcing civil liabilities not only is a common practice but has legislative approval [58] in regard to some offenses.

The remarkable thing about the *Restatement* is not its departure from the body of the law of any particular state in many particulars, but the fact that the law of contracts of so many jurisdictions is so nearly identical that the *Restatement* is possible, and that the choices made between conflicting views have met the approbation of such a body of persons learned in the law as the members of the American Law Institute. The *Restatement* is on the whole a statement of the law of today. It is better that it should be taken for what it is, the consensus of scholarly opinion, than that it should be enacted as a code, for the courts should remain free, as in the past, to develop in accordance with economic and social needs the solution of contract problems, without being rigidly restricted by *stare decisis* or by legislation.

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[55] Section 512, Comment *b*.
[56] Section 550.
[57] Act April 25, 1927, P. L. 381, PA. STAT. ANN. (Purdon, 1930) tit. 5, § 161.
[58] Act March 31, 1860, P. L. 427, § 9, PA. STAT. ANN. (Purdon, 1930) tit. 19, § 491. See Geier v. Shade, 109 Pa. 180 (1885); Rothermal v. Hughes, 134 Pa. 510, 19 Atl. 677 (1890); Brown v. McCreight, 187 Pa. 181, 41 Atl. 45 (1898); Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937 (1905).