

1982

Conditions of Personal Satisfaction in the Law of Contracts

James Brook

New York Law School, james.brook@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [Contracts Commons](#)

Recommended Citation

27 N.Y.L. Sch. L. Rev. 103 (1981-1982)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

CONDITIONS OF PERSONAL SATISFACTION IN THE LAW OF CONTRACTS

JAMES BROOK*

Entering into a contract is engaging in the art of compromise. The end product represents not only a compromise between the needs and desires of the various parties, but for each of the parties it is in effect a compromise that he has entered into with himself. As long as the contract remains executory, as long as one promise which affects him either as promisor or promisee is yet to be performed, each party has been able to achieve a measure of assurance about what he must do or what he is to receive at some date in the future. What he cannot be assured of is that when the time comes for performance he will feel as positive about the then current state of affairs as he had thought, hoped or merely assumed he would have at the time of contracting. He may not have positive thoughts at all. In the interim his needs may have changed (he may no longer need a house in a new town) or his own ability to perform may have changed (he can no longer afford such a house). It simply may be that his tastes have undergone a transformation, subtle or otherwise (Spanish Modern, once his favorite architectural style, is now abhorrent to him).

Of course a carefully drawn contract may help to minimize these possibilities, but the basic problem is always there. While gaining the security of future performance under contract, we compromise our futures. By its very nature, the executory contract relationship leaves open the possibility that the future we have contracted for and bound ourselves to will be a disappointment. The process of contracting can bring about a more certain future, but it cannot leave us confident that we will be satisfied with the future once we get there.¹ Our happiness cannot be unalloyed. Our law of contracts can do so much; it can do no more.

A contract for the future enhances certainty and security which necessarily carries with it a restriction on unfettered choice and freedom. This would seem an inherent characteristic of contract law, indeed it is that which separates it from the barter process. From a very early time, however, man has attempted to have things both ways by

*Associate Professor of Law, New York Law School; B.A. 1968, Harvard University; J.D. 1972, Harvard Law School.

1. It would be more accurate, of course, to acknowledge that the "certainty" each party gains is not that what is promised in the contract will actually come to pass, but only that either it will come to pass or the parties will find themselves in a new legal relationship which after much wrangling may result in a court ordered remedy against one party in favor of the other.

creating a more certain future through the means of contract while allowing at least one party to retain independent choice in the future, unrestricted by binding obligation.² In particular, agreements may be written to allow one party's performance to be conditioned upon his "satisfaction" with some thing or state of affairs in the future.³ While such contracts usually involve one party's obligation to accept and pay for another's performance in the future only if he is then "satisfied" with it, an agreement may be drafted to provide that an obligation will arise only if a person is "satisfied" with some event or condition totally beyond the control of the other contracting party. For example, a contract for the purchase and sale of land can provide that the purchaser is to take the land only if he can acquire "satisfactory financing" or if he is able to obtain a zoning variance "satisfactory to him."⁴

2. Professor Patterson has traced the history of such contracts and the law applied to them back to ancient Rome and a contract for the sale of a slave, "if he has kept his master's accounts satisfactorily." Patterson, "*Illusory*" Promises and Promisors' Options (pt. 1), 6 IOWA L. BULL. 129, 142-43 (1921), reprinted in AALS, SELECTED READINGS IN THE LAW OF CONTRACTS 401, 409-10 (1931) [hereinafter cited as Patterson].

3. Considering the variety of words that are similar to or synonymous with the word "satisfaction," it is remarkable how often that particular word is chosen for the contract. Parties may, of course, choose another term, but the courts usually reduce the question to that of satisfaction. See, e.g., *Fulcher v. Nelson*, 273 N.C. 221, 159 S.E.2d 519 (1968) (holding that satisfaction is synonym for happiness). In the field of the sale of goods the question may arise in the context of a "sale on approval" or "sale or return." U.C.C. § 2-326, Comment 1.

4. The possibility that a promise may be conditioned on something other than the other party's performance was overlooked by the original Restatement of Contracts which spoke only of "the promisor's satisfaction with an agreed exchange." RESTATEMENT OF CONTRACTS § 265 (1932) [hereinafter cited as RESTATEMENT]. The Restatement Second changes this to the satisfaction of the obligor "with respect to the obligee's performance or with respect to something else," and comments that, "[u]sually it is the obligee's performance as to which the obligor is to be satisfied, but it may also be something else, such as the propitiousness of circumstances for his enterprise." RESTATEMENT (SECOND) OF CONTRACTS § 228, Comment a(1981) [hereinafter cited as RESTATEMENT (SECOND)]. While this article, following convention, will speak in terms of conditions of personal satisfaction, it must be recognized that contracts often contain language reading as a promise to satisfy. On the particular question with which we are primarily concerned, the test to be applied to claims of dissatisfaction, most courts apparently find the distinction to be of no significance and treat the problem as one of conditions. 5 S. WILLISTON, CONTRACTS § 675A, at 203 (3d ed. 1961) [hereinafter cited as WILLISTON]. Other writers on the subject also treat the problem as one properly within the law of conditions. Only Corbin makes any real effort to distinguish the promise from the condition, 3A A. CORBIN, CONTRACTS § 645 (1960) [hereinafter cited as CORBIN], though by so doing he does not appear to add anything of significance.

A few cases do contain hints that the promise to satisfy and the condition of satisfaction may be viewed differently, though they are not in agreement as to what exactly the difference should be. Compare *Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960) (fulfillment of condition is to be judged by subjective test; dictum that objective test may be appropriate for breach of promise) *with*

Since such an agreement seems at first glance an attempt to take advantage of the classic contract mechanisms unhindered by limitations inherent in the system, it is not surprising that the common law initially found it open to question whether the result could rise to the level of "contract" at all.⁵ This question, addressed in the following section, is one which retains today what might be graciously called historical significance.⁶ For even as at one time the theoreticians of contract law may have wrestled with the concepts of "mutuality" and "consideration" as applied to such arrangements, one thing has long been clear. Responsible seemingly intelligent people have had no difficulty accepting such an agreement as one which may be perfectly appropriate or even desirable in a given situation, and deserving of enforcement. What remains today is the more troublesome question of exactly what it means to state that such agreements are enforced. What precisely is the effect to be given them by the courts? This article examines the rules which have evolved by which the courts interpret or construe such conditions. In particular, it will consider the development of the so-called "objective" test which courts have increasingly injected into the contract relationship and the implications of that decision.

I. THE PROBLEM OF "MUTUALITY"

Our first concern about contracts conditioned on personal satisfaction is whether they are contracts at all. Has either of the parties entering into such an agreement become legally bound to do anything? The problem is the traditional one of mutuality of obligation. It is customary at this point to note the classic statement, said to be the most fundamental of contract precepts, that "in bilateral contracts both parties must be bound or neither is bound."⁷ It follows from this principle that if the conditional promisor, by his agreement to perform only if satisfied, has in effect not bound himself to do anything which he otherwise would not do, then he cannot have bound the other party to do anything, and the agreement becomes a legal nullity. Rather, it has been from the start a nullity and never has risen to the status of an enforceable contract. Expressed in still another way, has the condi-

Corbetta Constr. Co. v. Lake City Pub. Bldg. Comm'n, 64 Ill. App. 3d 313, 381 N.E.2d 758 (1978) (while condition might demand an objective test, purchasers, when suing for damages for breach, were entitled to more than that which might be considered some form of reasonable construction).

5. See note 9 *infra*.

6. See text accompanying notes 7-47 *infra*.

7. J. CALAMARI & J. PERILLO, CONTRACTS §§ 4-14 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO]; J. MURRAY, CONTRACTS § 90 (2d rev. ed. 1974) [hereinafter cited as MURRAY]. It should be noted that both authorities criticize the term "mutuality of obligation" along with its classic expression and call for abandonment of its use.

tional promisor in this situation given valuable consideration so as to make the other party's promise enforceable?⁸

Some early American cases expressed skepticism as to whether a promise, conditional upon personal satisfaction, could ever constitute valid consideration.⁹ Presumably this attitude was to a great extent due to the then predominant influence of the so-called subjective theory of contract law and its fascination with the metaphoric "meeting of the minds" of the parties forming the contract. With this as a background it would understandably be difficult to conceptualize either party being bound and under obligation when one of the parties seems so clearly to have not yet made up his mind at all. By the early part of this century, any doubts regarding the enforceability of such agreements seem to have vanished from the cases,¹⁰ although the exact reason why such a promise could be valid consideration still stirred academic debate as the major theoreticians of the period confronted the problem in the context of the various formulations espoused by the emerging objectivist school of contracts.¹¹

In the rare cases that even acknowledge the problem today, it is usually dealt with in a perfunctory manner.¹² Modern treatises find little reason for a discussion beyond the simple assertion that such agreements are enforceable.¹³ The explanation usually given is based on the fact that in such cases courts will insist upon the promisor's exercising honest judgment in good faith in determining whether or not he has

8. CALAMARI & PERILLO, *supra* note 7, §§ 4-17; MURRAY, *supra* note 7, § 76. Fortunately, there seems to be no reason for us to pursue the controversy whether the two ways of characterizing this issue are equivalent.

9. Gibson v. Cranage, 39 Mich. 49, 50 (1878); Folliard v. Wallace, 2 Johns 395, 402-03 (N.Y. 1807); 5 WILLISTON, *supra* note 4, § 675, at 197 n.18.

10. See, e.g., Hollingsworth v. Colthurst, 78 Kan. 455, 456-57, 96 P. 851, 851 (1908); Livesley v. Johnston, 45 Or. 30, 45, 76 P. 946, 949 (1904).

11. See Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571, 583 (1925); Patterson, *supra* note 2 at 133-38.

12. See, e.g., Loma Linda Univ. v. District-Realty Title Ins. Co., 443 F.2d 773, 777 (D.C. Cir. 1971); American Oil Co. v. Carey, 246 F. Supp. 773, 774 (E.D. Mich. 1965); Mattei v. Hopper, 51 Cal. 2d 119, 122-23, 330 P.2d 625, 626-28 (1958); Boston Road Shopping Center, Inc. v. Teachers Ins. & Annuity Ass'n, 13 A.D.2d 106, 108-09, 213 N.Y.S.2d 522, 525-26 (1st Dep't 1961); Mezzanotte v. Freeland, 20 N.C. App. 11, 16-19, 200 S.E.2d 410, 414-16 (1973).

The only jurisdiction which still has much trouble on the point is Georgia, and there confusion reigns. Compare, e.g., Hatfield v. Teachers Ins. & Annuity Ass'n, 146 Ga. App. 642, 247 S.E.2d 161 (1978) (contracts requiring that one party's performance be satisfactory in the exercise of an honest judgment have been almost universally upheld as not lacking in mutuality) with Stone Mountain Properties, Ltd. v. Helmer, 139 Ga. App. 865, 229 S.E.2d 779 (1976) (contracts conditioned on "discretionary contingencies" lack mutuality).

13. See 1 CORBIN, *supra* note 4, § 150; MURRAY, *supra* note 7, § 76; RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a; 1 WILLISTON, *supra* note 4, § 44.

been satisfied.¹⁴ Thus, the promise to perform if satisfied is seen as distinct from the classic nonpromise of "I'll pay if I wish to do so when the time comes."¹⁵ The conditional promisor has retained control over his future, but not unlimited control. He has fulfilled the theoretician's requirement that he undergo a legal detriment by giving up the freedom to refuse to perform in the future for some reason other than his dissatisfaction with the designated event or performance.¹⁶ Whether or not his theoretical detriment is a real one depends, of course, on the extent to which the requirement of good faith and honest judgment can be and is enforced against the promisor. If it amounts to no more than the requirement that the promisor at one point mouth the words, "I don't like it," then the real value of his conditional promise as valid consideration could legitimately be questioned.¹⁷ The application of the honesty test will be discussed in detail below,¹⁸ but the conclusion can be noted here that the test appears to be as practical and realistic a test as any other calling for a determination of an individual's state of mind. The significant number of cases in which the promisor has been found to be lacking in the requisite good faith or honest demeanor suggests that the test can and does have in practice a real limiting effect on the promisor's behavior.

A different way of viewing the problem of mutuality and enforceable promises leads to the same result. A promise, as distinguished from the poorly named "illusory promise" which is not a promise at all,¹⁹ rather than being defined in terms of its effect on the promisor's future freedom of activity, can be described by the effect it has on the one to whom the promise is given.²⁰ Writing in 1921, Professor Patterson stated:

From an objective point of view, the characteristic of a promise is that it arouses expectation in the promisee. Is the buyer's

14. See note 26 *infra*.

15. 1 CORBIN, *supra* note 4, § 150, at 667.

16. For a discussion of "mutuality" put in terms of the limits placed on the promisor's future freedom of action, see MURRAY, *supra* note 7, § 76.

17. Such a promise might be illusory, and as such could not constitute valid consideration. See CALAMARI & PERILLO, *supra* note 7, §§ 11-18. An illusory promise has been defined as "an expression cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has committed himself not at all." *Id.* §§ 4-17. Corbin has noted that "[i]f what appears to be a promise is an illusion, there is no promise, like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there." 1 CORBIN, *supra* note 4, § 145 at 627.

18. See notes 48-63 and accompanying text *infra*.

19. RESTATEMENT (SECOND), *supra* note 4, § 2, Comment e. See also note 17 *supra*.

20. This is the type of definition given to the word "promise" by the Restatement Second. "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." RESTATEMENT (SECOND), *supra* note 4, § 2(1).

promise in a "sale on approval" reasonably calculated to arouse expectation in the promisee? The answer is to be sought, not deductively, but empirically. In this view of the matter, the answer is given in no uncertain terms. The fact that contracts for "sale on approval" have been made and judicially enforced from the time of Justinian, if not earlier, down to the present day, is sufficient evidence that the expectations aroused by such promises are so weighty that they cannot be ignored in any legal ordering of society.²¹

In the ensuing years the situation has not changed. The uninitiated observer might first question the wisdom of forming what purports to be a binding agreement but which is to stand or fall on the future satisfaction of one of the parties. Yet such terms are not uncommon, nor apparently thought of as particularly risky or daring, even in agreements involving large sums of money and major enterprises. These terms appear in documents which have every appearance of being drafted with care and the counsel of attorneys, a group normally adverse to risk and innovation, and obviously give rise to genuine expectations in the parties involved.²² There can be no doubt that courts will look approvingly on such agreements and give them the effect of enforceable contracts.²³ The nature of the contract that the parties have made for themselves, and *how* the courts will enforce the arrangements, is a much more difficult question, and one to which we must now turn our attention.

II. AN INTRODUCTION TO THE TWO TESTS

Even as it has become increasingly safe to say that an agreement conditioned upon the personal satisfaction of one of the parties does indeed bind them legally,²⁴ it has become less certain what exactly they have bound themselves to do. Under what circumstances will the party's statement of dissatisfaction have the effect of serving as a failure of the condition, thus relieving him of his obligation? His statement of dissatisfaction in and of itself will not be sufficient to free him of his duties.²⁵ Minimally, the statement, and the process of decision

21. Patterson, *supra* note 2, at 137. While Patterson refers to "sales on approval," it is clear that he is considering contracts conditioned upon personal satisfaction generally. *Id.*

22. A separate question that has been addressed by Patterson and later Corbin is the extent to which the presence of language of "satisfaction" will influence a determination of whether or not negotiations in a particular case have advanced to the point of contract. *Id.* at 138-42; 3A CORBIN, *supra* note 4, § 644, at 79-80.

23. See note 12 *supra*.

24. See generally CALAMARI & PERILLO, *supra* note 7, §§ 11-18.

25. *Id.*; RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a.

which preceded it, must be made honestly and in good faith.²⁶ This requirement is now generally recognized as the very reason such agreements become binding at all.²⁷ But is honest judgment and good faith enough? The answer today is simply put: Sometimes yes and sometimes no. It is generally recognized that in any given case the trier of fact may be required to apply one of two tests in determining whether legal effect should be given to the conditional promisor's decision that he is dissatisfied with the performance or other state of affairs he is to judge.

- (1) The subjective test — Was his decision of dissatisfaction made honestly and in good faith?
- (2) The objective test — Was his decision made reasonably: That is, would a reasonable person have been dissatisfied with the performance or other state of affairs?²⁸

The distinction between these tests and the appropriate method for choosing between them is the fundamental problem that confronts the courts today with respect to contracts conditioned upon personal

26. *In re Estate of Hollingsworth*, 88 Wash. 2d 322, 328, 560 P.2d 348, 351 (1977); RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a.

27. The good faith requirement is an essential element in classifying the promise as nonillusory. This classification allows the promise to constitute consideration. See note 17 *supra*.

28. This test is generally referred to as an "objective" test, and we will bow to the usage though the message it conveys is probably misleading. We think of objective tests or criteria as being measurable in concrete terms, independent of personal judgment and evaluation. The type of test we are dealing with here merely replaces the fact finder's individual judgment of one party's state of mind with his judgment of an even more vague (arguably meaningless) concept. The factfinder's determination under the test may ultimately rest on hard facts and figures, but there is certainly no requirement that it do so.

It appears that the notion of "objective" tests so described, and the "reasonable person" himself, first worked their way into contract vocabulary to settle questions which arise when parties misunderstand or misinterpret each other's "true" intention. Emphasis is to be placed not on the subjective intention of the party making a manifestation but on the effect it had on the "reasonable" viewer or listener. No doubt encouraged by the very language chosen (who would want to defend "unreasonable" behavior?), the idea spread to questions in the law of contracts quite distinct from these initial concerns about faulty communication. See generally *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 760-65 (2d Cir. 1946) (Frank, C.J., concurring); 1 CORBIN, *supra* note 4, §§ 105-106.

Of course, even the most carefully stated objective criterion, used in the most narrow sense, resolves itself into a matter of individual subjective judgment. You ask me to obtain for you a piece of pipe "three feet long." If your need is only to prop up a window, a piece of pipe within a few inches of the theoretical ideal of "three feet" will probably do. One only a few millimeters off, however, would not meet the criterion if it is to be fit into the highly precise workings of a spacecraft, for example. With any "exact" measure the limit of tolerance which can be permitted is a matter of individual need and, if you will, taste.

satisfaction. Before becoming too deeply involved with the history and details of each test, it seems wise to discuss precisely what each test involves and what each purports to do. Discussion of this topic is so often overwhelmed and rendered of questionable value by carelessness and uncertainties of language,²⁹ that the actual nature of the decision can easily be overlooked. Too often, decisions seem simply to be in terms of whether or not the court will countenance the promisor's being "unreasonable" in the situation, whatever that word may be thought to mean. It will not surprise anyone that such vague words may only mask the true nature of the question actually before the court.

There is significant difference between these two tests and it is not merely the degree of latitude given to the conditional promisor in making his judgment.³⁰ They differ in the very nature of the question of fact which the trier must confront. To judge the honesty and good faith with which a decision is made is to inquire into the process of decision making. Strictly speaking, it does not concern itself with the decision that results from that process. Though in individual cases the conclusion reached may be taken into account in determining whether the decision-making process was characterized by the appropriate behavior on the part of the promisor,³¹ it is only evidence to be weighed in determining the ultimate issue of fact.³² The objective test avoids this inquiry into the party's state of mind. In fact it avoids all inquiry into *how* the decision was made, or at least it purports to do so.³³ As

29. Two words that are often used by the courts and authors which seem to leave us in doubt are "arbitrary" and "capricious." Is either or both to be used as signifying a decision made in bad faith or rather a decision made unreasonably, whatever that may mean? To say the very least, the cases offer no consistent use of these words. The language slips and slides, and often the distinctions are totally lost in the shuffle. The best we can offer is to set aside such words and try to use the terms "subjective" and "objective," whatever their faults may be, consistently in order to keep the distinction clear.

30. There is a temptation to think of the objective test as "stricter" or "more limiting" than the subjective test, though in theory this need not be true. They measure different things and in any given case the judgment of the party could pass either, neither, or both of the tests. Just as we can imagine an unreasonable decision being honestly made, we can envision a decision that is reasonable (a reasonable person could be dissatisfied with the matter to be judged), but not being honestly asserted.

In truth, the decision that the court must make is not between the two tests separately applied, but between applying the subjective test alone or applying the subjective test *along with* the objective test.

31. See note 61 and accompanying text *infra*.

32. That this is a question of fact to be weighed like any other, see note 52 *infra*.

33. Of course the party claiming dissatisfaction will want to put before the trier of fact whatever information he can about how and why he made his final decision in order to influence the determination that his decision was a reasonable one. He will attempt to best articulate his own reasons for being dissatisfied and try to make them appear "reasonable."

traditionally stated, the objective test focuses exclusively on the outcome of the process, on whether the decision of dissatisfaction arrived at coincides with the factfinder's belief as to what a "reasonable person" would have been dissatisfied with. This standard is further complicated by the refinement that the question be considered as it would be by "a reasonable man in the position of the obligor,"³⁴ although the exact meaning of this qualification is not at all evident.³⁵

Suppose that a man has contracted to pay another for painting the exterior of his house a specific color with the contract providing that he is to pay only if he is "satisfied with the job" upon completion. When the painting is done it is found to have some minor cracks and drips, but it can be shown that they are the types of imperfections that "always show up" on any such job, in that they are avoidable but normally tolerated in such exterior painting. Further, it is discovered that the color the house has been painted is slightly different than the color contracted for, although the difference is not one the average homeowner would be able to notice, much less care about.³⁶ Can the homeowner, honestly dissatisfied with the job, refuse to pay? Would it make a difference if his dissatisfaction with the workmanship stems from the fact that he has for some unexplained and unexplainable reason a fear of living in a home "all cracked and splotchy," or in other words that he is supersensitive for no "good" reason? What if his sensitivity to such defects arises from his own experience as a particularly careful and meticulous painter of houses?³⁷ If this is the case would it matter

34. RESTATEMENT (SECOND), *supra* note 4, § 228. Surprisingly few cases even bother to add this extra bit of verbiage and I have found none that discuss what it could mean. Is this some reflection on how much sense it makes to pose the question altogether?

35. Neither the Comments nor the Illustrations to the Restatement offer any assistance. What if the promisor finds himself (or has voluntarily placed himself) in a position of greater need than that of the average individual? What if he has finer tastes, more rigid ways, or higher standards? In what instances will such information serve simply to clarify our understanding of his "position" rather than make him "unreasonable"? Corbin at one point refers to the "experienced and reasonable man." 1 CORBIN, *supra* note 4, § 150, at 670. Is the experienced individual harder or easier to satisfy? I suppose how one answers that question is a measure of one's view of life, optimistic or pessimistic. What if our particular party is "inexperienced"? Should this work against him?

36. A wrong color would be a technical breach of the contract to paint the house the specified color. As a result, our homeowner might prevail without having to rely upon the satisfaction clause. However, difficulty will be encountered because of the doctrine of substantial performance and the difficulty of proving damages for breach if the market value of the house was not adversely affected by the color it was actually painted. See *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921). Presumably, the very reason our hypothetical homeowner wanted a satisfaction clause was because he had anticipated this problem, was aware that his preferences were not those of the crowd, and felt he had to somehow deal with his needs in a different manner.

37. This hypothetical is basically the same as that found in Professor Murray's treatise which will be discussed later. See text accompanying notes 266-67 *infra*. The courts

if he normally charged more for his especially neat services?

If the homeowner claims dissatisfaction with the color, should we then ask what would be the attitude of "a reasonable man with a particularly fine sense of color?" If the answer seems clearly to be no, consider the possibility that the homeowner is a famous visual artist with a sensitivity to slight variations of color and that the housepainter was aware of this at the time of contracting. If the homeowner is a struggling unknown artist, with unrecognized promise as a colorist, is he entitled to his satisfaction any less? And what are we to say to the individual who has no particular reason for having a particularly fine eye for color (he might even be a lawyer!), but who just does?³⁸

Before we go too far in trying to carefully particularize the reasonable person, we should probably get to know the breed in a general way. Who is this reasonable person and what does he want? What gives him satisfaction? Imagine yourself on a jury charged with deciding whether or not a reasonable person would have been satisfied with the housepainting in the previous hypothetical. Since you know that men may differ in their opinions, you realize that the real question is whether *every* reasonable person would have been satisfied. Can you conceive of a man acting in a reasonable manner who would not be satisfied with paying for a job that he personally — and honestly — did not like? Certainly that is not hard. You yourself, looking out for your own best interests, would think yourself perfectly reasonable in not paying for something you were actually dissatisfied with when that is what your contract specifically allowed you to do, *if* the law would allow you to get away without paying. The law would not make you pay if you were acting reasonably. It all seems totally circular.

Indeed, the whole problem *is* circular if we try to view the question as whether the party acted reasonably in response to his own self-interest. Fortunately, that does not seem to be the attitude of the law's "reasonable person." He is not an individual primarily concerned with himself. Rather, he is concerned (obsessed?) with the well being of others. He is the common person with the average, normal community standard of concern for others, and with the recognition that he must act on that concern for the benefit of his fellows. An odd chap, he is that rather dull, frightfully unexceptional person,³⁹ who just happens

have held that a contract for the painting of a house is the kind to which the objective test should be applied. *Marcus v. Nelson*, 119 N.Y.S. 1085 (App. Term 1909) (interior painting); *Miller v. Phillips*, 39 R.I. 416, 98 A. 59 (1916) (exterior painting).

38. Such examples cannot be dismissed as farfetched. Who would be more likely to insert a satisfaction clause into a house painting contract than a person who knows himself not to be satisfied with the types of imperfections which have come to be accepted, perhaps even expected, by the ordinary buyer in the ordinary course of things?

39. "The person concerned is sometimes described as 'the man in the street' or 'the man in the Clapham omnibus,' or . . . 'the man who takes the magazines at home, and in

to be able to live his entire life up to the standard of that classic ideal, the Golden Rule. He may be a bore, but he's also a saint, at least by local community standards. So far as I know, the best expression of this aspect of the reasonable person's basic nature is by the comic author A. P. Herbert in his recounting of the fictional case of *Fardell v. Potts*, where he notes:

This noble creature stands in singular contrast to his kinsman the Economic Man, whose every action is prompted by the single spur of selfish advantage and directed to the single end of monetary gain. The Reasonable Man is always thinking of others; prudence is his guide, and "Safety First," if I may borrow a contemporary catchword, is his rule of life.⁴⁰

Considered in this light it is difficult to understand how easily this figure has made his entry into the contract law over the last century.⁴¹ In tort law he represents the community's expectation that each of its members has some responsibility to look out for the safety of others.⁴² What then is he doing in the contract law where the basic premise would seem to be that parties are to look out for themselves, that this promotion of action based on self-interest is a positive good? How, to borrow Herbert's phrase, can he "stand in singular contrast to the Economic Man" when he is the Economic Man himself? In the law of contracts we may ask the Economic Man to modify his selfish goals to some extent, demanding from him good faith, the absence of fraud and duress and so forth, but what can it mean to go beyond this and demand of him "reasonable" behavior?⁴³

In the context of our discussions of conditions of personal satisfaction, the progressive adoption by the courts of a "reasonableness" requirement in many cases indicates a belief that the conditional promisor is in some way being unfair or oppressive to the other party by insisting upon a standard of performance or quality greater than that generally given in the situation and which has found acceptance by the

the evening pushes the lawn mower in his shirt sleeves.' " *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205, 224.

40. A. HERBERT, *UNCOMMON LAW* 2-3 (1935).

41. On this point, see note 28 *supra*.

42. See W. PROSSER, *THE LAW OF TORTS* 170-76 (4th ed. 1971).

43. In the context of our housepainting hypothetical, see notes 36-38 and accompanying text *supra*, consider how you, as a jury member, should decide whether a typical member of our community with a good appreciation of his own self interest and tastes, but with the appropriate amount of concern for the interests of the housepainter as expected by the community, would have been satisfied with the way this house was painted. Remember, he is always aware, and he is aware the housepainter is aware, that he is not to pay "if he is not satisfied" with the work done. This extended consideration of the nature of the question before you certainly has not made your job as a juror any easier.

majority of the community.⁴⁴ This, despite the fact that both parties contracted on the basis of his "satisfaction," being determinative. This moralistic notion is hard to avoid in light of language that has often worked its way into the decisions: "That which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."⁴⁵ In response, we naturally question, why? Would it not be more forthright to say "that which the law will say a contracting party ought in reason to be satisfied with, that the law *will* say he ought to be satisfied with." This certainly gives no justification for the result. But what justification is there for the notion that a person with a particularly fine sense of color or especially demanding taste "ought to be satisfied" with something less than that which truly pleases him merely for the sake of being "reasonable"? Is it "unreasonable" for a person to have perfect pitch when the rest of us trek through life with something less? Or is it "unreasonable" for that person with perfect pitch to be discontented with a slightly sour tone? Can the suggestion be that the law serves a legitimate and useful function by resolving that every person "ought to be satisfied" with that which satisfies "the reasonable person" — perhaps a paragon of virtue in many ways, but never before a leader in fashion or taste?⁴⁶ We will

44. There may also be the feeling in such situations that the party must be lying when he says he is dissatisfied, but that the other party cannot really be expected to prove it. If this is the underlying concern, it is properly dealt with by the requirement of honesty and good faith. That requirement has more teeth to it than people seem to imagine. See text accompanying notes 53-60 *infra*. In another context, Professor Alan Schwartz has argued that the problem of bad faith rejection of goods (based on quality defects in the goods but actually motivated by other reasons of the buyer) is not as great as one might first imagine, at least in the case of the sale of goods to be used by the purchaser. Schwartz, *Cure and Revocation for Quality Defects: The Utility of Bargains*, 16 B.C. INDUS. & COM. L. REV. 543, 557 (1975). Satisfaction clauses would presumably almost always be in contracts of this type rather than in ones involving goods bought for speculation.

45. *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 479 (1872); *Miesell v. Globe Mut. Life Ins. Co.*, 76 N.Y. 115, 119 (1879). The language actually first appears in these cases prior to the formal creation of the objective test in the 1880's, but is later used in cases applying the test as an explanation of its origin. *Breslow v. Gotham Sec. Corp.*, 77 Misc. 2d 721, 723, 354 N.Y.S.2d 550, 552 (1974); *Fessman v. Barnes*, 108 S.W. 170, 171 (Tex. Civ. App. 1908).

46. We can wonder how likely it is that the objective test would have been adopted or gained much support if it had been phrased to inquire what would satisfy the "normal person" or the "person of typical needs and desires." Either of these is probably a more correct characterization of what is really being sought. The objective test often seems to gain credence because to fail it is to be found "unreasonable", which has strong antisocial connotations. But in this instance, at least, the opposite of "reasonable" would more fairly be something like "unusual" or "atypical" which does not necessarily convey a negative image. Pushing to the extreme, one could argue that having failed to be satisfied by that which would satisfy "the unreasonable person" gives him the right to be considered "the discriminating person"; and then what have you?

return to a consideration of whether an "objective test" is ever appropriately applied to a condition of personal satisfaction, and if so when and why,⁴⁷ following an examination of the present state of the law and how it got to be as it is.

III. THE SUBJECTIVE TEST

To apply the subjective test to an obligation conditioned upon personal satisfaction is to say, in effect, that the person whose obligation is contingent on his satisfaction must perform if, after considering whatever it is he is to consider, he actually is satisfied. We only ask that the person come to some conclusion and report that conclusion honestly and in good faith.⁴⁸ The first aspect of the problem, that the individual take stock of the situation, come to some definitive judgment and actually know his mind, is presumably a concern of the psychological sciences rather than the law. Contract law would, at least, seem to work on the assumption, which would probably not be well received in the world of modern psychology, that all of us can and will be "honest" with ourselves as to how satisfied we are at any given moment.⁴⁹

Thus, the legal inquiry is whether the individual, in making his determination, has acted in good faith and is now honestly reporting his decision to the other party. The important thing to emphasize here is that this test has real substance. Although it has sometimes been forgotten,⁵⁰ the test does not permit a person to get out of his deal at will or merely because he is willing to take the time and energy to mouth his dissatisfaction. The simple statement of dissatisfaction is never conclusive.⁵¹ The question of a person's honesty in reporting his

It has been said that "[t]he reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man." G.B. SHAW, *Man and Superman, Maxims For Revolutionists* in *COMPLETE PLAYS WITH PREFACES*, VOL. III 739 (1963).

47. See text accompanying notes 273-78 *infra*.

48. "Good faith, in contrast [to reasonableness], suggests a moral quality; its absence is equated with dishonesty, deceit or unfaithfulness to duty." *Guntert v. City of Stockton*, 43 Cal. App. 3d 203, 211, 117 Cal. Rptr. 601, 606 (1974). See also *RESTATEMENT (SECOND)*, *supra* note 4, § 205, Comment a.

49. Suppose a buyer, having previously claimed dissatisfaction, felt compelled to testify under oath at trial: "I thought I was dissatisfied with it, but I realize now that I was just in a bad mood because of something else." This is not that unusual a statement, but what does it say about the person's "honesty" at the time of the initial expression of dissatisfaction?

50. See, e.g., *Crawford v. Mail and Express Pub. Co.*, 163 N.Y. 404, 57 N.E. 616 (1900). This case is criticized in 3A *CORBIN*, *supra* note 4, § 647, at 104-05.

51. *Mills-Morris Co. v. Champion Spark Plug Co.*, 7 F.2d 38 (6th Cir. 1925); 3A *CORBIN*, *supra* note 4, § 645, at 90; *RESTATEMENT (SECOND)*, *supra* note 4, § 228, Comment a (citing *McCartney v. Badevinac*, 62 Colo. 76, 160 P. 190 (1910)).

state of mind is capable of being determined by the trier of fact like any other question of fact.⁵²

Moreover, a review of the cases suggests that the test has more than theoretical significance. There is a temptation to conclude that once any question has come down to whether a person has honestly reported his state of mind, for all practical purposes that person is home free regardless of the rule of law. In our case, how could a party expect to successfully sustain the burden of proving the dishonesty of his opponent's articulated unhappiness?⁵³ While there is no way to know, of course, how often the realities of this situation have discouraged parties from challenging a brusque statement of dissatisfaction, there is no lack of cases where the performing party has raised the issue and won.⁵⁴ Application of the subjective test rarely leaves the jury with nothing more than the look in his eye and the tremor in his voice on which to judge the challenged party's conduct. The reported cases reveal many factual situations that so richly detail the surrounding circumstances that inferences may be drawn concerning the party's honesty or lack thereof.⁵⁵ Often the facts make a conclusion of dishonesty not only supportable but virtually unavoidable.

For one thing the courts have held that even before considering the question of whether the decision was honestly made, there is a re-

52. "This condition of personal satisfaction is a 'state of mind'; but it is a fact that is capable of proof like other facts." 3A CORBIN, *supra* note 4, § 644, at 80. That one party may have to prove the other's "state of mind" at trial should not overly concern us. We see it in other areas of contract law, for example, in the question of whether a claim forborne can constitute consideration. RESTATEMENT (SECOND), *supra* note 4, § 74. In addition, a party's subjective intention "in remaining silent and inactive" may become an issue of fact when the question is that of purported acceptance by silence. *Id.* § 69(1)(b). We note that, especially in this latter example, the party who finds himself in the unenviable position of having to prove his opponent's state of mind can be said to have brought it upon himself by the way he made the offer. *Id.* Comment c. Arguably, someone who agrees to a contract where the other party will be obligated only if satisfied is likewise responsible for whatever difficulties he may have as a litigant.

Professor Patterson argued in 1921 that the difficulty of proving a person's state of mind was "probably less real today than it was in the time of [the Roman Jurist] Ulpian, owing to the development of that deadly forensic weapon, cross-examination." Patterson, *supra* note 2, at 146.

53. The burden of persuasion is on the party trying to prove that the claim of dissatisfaction was not honestly made. See *Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co.*, 202 F.2d 372, 376 (5th Cir. 1953); *Zeiss v. American Wringer Co.*, 62 App. Div. 463, 466, 70 N.Y.S. 1110, 1112 (2d Dep't 1901); *Golden State Mut. Ins. Co. v. Kelley*, 380 S.W.2d 139, 141 (Tex. Civ. App. 1964); 3A CORBIN, *supra* note 4, § 645, at 93. But see Patterson, *supra* note 2, at 146-47 (burden of proof on party alleging dissatisfaction).

54. See, e.g., *Coats v. General Motors Corp.*, 11 Cal. 2d 601, 81 P.2d 906 (1938); *Diamond v. Mendelsohn*, 156 A.D. 636, 141 N.Y.S. 775 (1st Dep't 1913).

55. See, e.g., *Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co.*, 202 F.2d 372 (5th Cir. 1953); *Van Demark v. California Home Extension Ass'n*, 43 Cal. App. 685, 185 P. 866 (1919); *Diamond v. Mendelsohn*, 156 A.D. 636, 141 N.Y.S. 775 (1st Dep't 1913).

quirement that the party to be satisfied go through the evaluation process in a good faith manner.⁵⁶ The work to be judged must be sufficiently completed so that its quality or character can be fairly determined,⁵⁷ and the judging party must have taken the opportunity to actually view, test or consider the work.⁵⁸ Strictly speaking, this is not a matter of honesty. A person may honestly believe that he has seen enough or tested something long enough to make up his mind, but the court may require something more. He must give the other party "a fair chance to win him over." In other instances the party's lack of good faith can be found by the trier of fact because the situation presents ample evidence that the party's decision not to pay comes from some other motivation.⁵⁹ The party whose honesty is now being questioned may, in fact, himself provide the evidence that defeats him.⁶⁰

The point is, of course, that when the question concerns a party's honesty there is no reason to believe that the trial will necessarily degenerate into simply a credibility contest between the parties. Evidence of a concrete nature will often be available to the plaintiff to help him prove his case. Can that include evidence of the "unreasonableness" of the defendant's articulated decision? The treatise writers indicate it can.⁶¹ There would seem to be no real objection to allowing

56. See, e.g., the series of early Vermont cases discussed in notes 88 & 89 and accompanying text *infra*. See also RESTATEMENT (SECOND), *supra* note 4, § 205, Illustration 7; WILLISTON, *supra* note 4, § 675A, at 203-04.

57. Hood v. Meininger, 377 Pa. 372, 105 A.2d 126 (1954).

58. Hartford Sorghum Mfg. Co. v. Brush, 43 Vt. 528 (1871); RESTATEMENT, *supra* note 4, § 265, Illustration 2.

59. See, e.g., Commonwealth Dep't of Property & Supplies v. Berger, 11 Pa. Commw. Ct. 332, 312 A.2d 100 (1973) (clause used as an excuse to break lease); Kramer v. Philadelphia Leather Goods Corp., 364 Pa. 531, 73 A.2d 385 (1950) (employee-foreman fired after project was abandoned); Studner v. H. & N. Carburetor Co., 230 N.Y. 534, 130 N.E. 883 (1920) (carburetor for which employee was sales manager was defective and unmarketable).

60. See, e.g., Williams v. Hirshorn, 91 N.J.L. 419, 103 A. 23 (1918). In *Williams*, the defendant had agreed to pay for a cellar's waterproofing "after a rain and a satisfactory test" had been made. *Id.*, 103 A. at 23. The court held that the relevant question was one of the defendant's personal satisfaction, *id.* at 420, 103 A. at 24, but affirmed a judgment for the plaintiff contractor as the defendant's statements and conduct indicated that the defendant himself thought that the water which came into the basement after a rain had come in through the windows and not because of any defect in the work done. *Id.*, 103 A. at 24. See also RESTATEMENT, *supra* note 4, § 265, Illustration 1; RESTATEMENT (SECOND), *supra* note 4, § 228, Illustration 2.

61. CALAMARI & PERILLO, *supra* note 7, § 11-18, at 403; 3A CORBIN *supra* note 4, § 647, at 106. Corbin also makes a statement that is probably the greatest truth of the matter: the jury will probably take this into account whatever might be the rule of law. *Id.* § 645, at 92. Perhaps we should inquire further as to what is meant by "evidence of unreasonableness." It may mean evidence about the physical or other actual characteristics of the thing being judged. This would seem clearly admissible and has been so held.

a jury to consider evidence of how others would value the thing or situation to be judged, or how they themselves would view it, provided that they are clearly instructed as to their duty to determine the honesty of the one party and nothing more. It would even be acceptable for them to make a finding of dishonesty when this is the only evidence offered on the issue of honesty other than the statement, under oath, of the party to be satisfied, that he was not satisfied. Once that party has articulated his own reasons for his decision, however, the jury must be careful to judge only whether he is being honest in what he says, rather than reasonable in what he thinks. They must distinguish between the party's having *his own reasons* that truly motivate his behavior, however nonsensical they would seem to others, and his having *reasonable reasons*, the kind that would sway the reasonable person.

It is often stated that the judgment must concern the subject matter of the condition and not the underlying bargain.⁶² What does this mean? What could it mean? It may mean that dissatisfaction with some other aspect of the contract, or with life in general at the moment, cannot be masked by a simple statement of dissatisfaction, when indeed the performance in issue is perfectly acceptable to the judging party. This statement is merely another way of phrasing the requirement of honest judgment and good faith dealing. A party cannot be honest in saying he is dissatisfied with a performance or product when what he is actually thinking is that he could get the same or similar quality, which is perfectly acceptable to him, at a lower price or on more favorable terms.

On the other hand, the statement that the judgment is to be of the performance and not the bargain may mean more, suggesting that the human mind is able to make a determination of satisfaction completely out of the context of the bargain. Is this really possible? I can conceive of myself, very dissatisfied with a meal at an elegant restaurant, advising all within earshot of my dissatisfaction and yet gobbling down the same food without a thought (or a murmur) at the local diner. At the posh establishment I would probably be pointing to (and truly think-

Fur-smidt v. Hotel Abbey Holding Corp., 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960). The question appears different when the evidence offered is of the subjective judgment, expert or not, of others.

62. Western Hills, Oregon Ltd. v. Pfau, 265 Or. 137, 144, 508 P.2d 201, 204 (1973); RESTATEMENT (SECOND), *supra* note 4, Comment a. The Oregon Supreme Court has noted:

It does not follow, however, that dissatisfaction with other aspects of the bargain as well means a party is acting in bad faith. . . . If one of the sources of dissatisfaction gives him a right under the contract to repudiate, the fact that there are other sources of dissatisfaction is immaterial.

Columbia Christian College, Inc. v. Commonwealth Properties, Inc., 286 Or. 321, 332, 594 P.2d 401, 407-08 (1979).

ing about) what I found wanting in the food, demonstrating the limited expertise I have on matters of seasoning, quality of ingredients and preparation, without actually focusing on the plebian matter of price. It probably would not occur to me to state, "I like it, but not at these prices!" My mind would focus on other things. Moreover, imagine how satisfying the same food would be, at whatever the price, if I had just been through a long period of starvation. It would seem best to consider the requirement that the party to be satisfied judge the subject matter apart from the bargain as only a further articulation of the need for good faith and honesty in the process of making the judgment.

IV. THE ORIGINS OF THE OBJECTIVE TEST AND HOW IT GREW

While some early nineteenth century cases could be read as suggesting that the conditional promisor had a duty to act "reasonably" in deciding whether or not he had been satisfied, the modern conception of a generalizable objective test, distinct from the requirements of good faith and honesty, and applicable to a particularly defined class of cases, seems clearly to be the direct result of two cases decided in the 1880's. *Duplex Safety Boiler Co. v. Garden*,⁶³ was decided by the New York Court of Appeals in 1886, and *Hawkins v. Graham*,⁶⁴ was decided in 1889 by the Massachusetts Supreme Judicial Court in an opinion written by Justice Holmes.⁶⁵ A thorough examination of these cases, and an appreciation of the novelty and creativity of their results, requires an initial inquiry into the law as it stood at the time of their decision.

A. *The Subjective Test Stands Alone*

By the early 1880's the American decisions which appear to have been the most generally known and widely accepted were ones utilizing the subjective test without hesitation and not even hinting at the use of any other standard. The most famous of these cases is *Brown v. Foster*,⁶⁶ in which the defendant ordered a custom-made suit of clothes

63. 101 N.Y. 387, 4 N.E. 749 (1886).

64. 149 Mass. 284, 21 N.E. 312 (1889).

65. That a significant change in the American law of contracts took place in the 1880's and that Holmes (along with Langdell and Williston as we shall see) had a role in that change will come as no surprise to readers of Professor Gilmore. G. GILMORE, *THE DEATH OF CONTRACT* (1974). The spirited controversy that this work has generated is reviewed in Danzig, *The Death of Contract and The Life of The Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125 (1977). Those with a particular interest in the debate will want to read the historical material that follows with an especially keen eye for information to bolster their side of the argument. This author's reactions to the particular material will, I assume, be clear from the text. See also note 196 *infra*.

66. 113 Mass. 136 (1873).

from the plaintiff, a tailor, under an agreement that the clothes were to be made to his satisfaction. After the suit was delivered to the defendant, he returned it, stating that it did not fit and was unsatisfactory to him. Apparently the clothes were not a perfect fit.⁶⁷ The defendant consented to model them before the judge and jury.⁶⁸ The plaintiff called several tailors as experts who testified that the clothes did indeed need some alterations before they could be called a "good fit," but that such alterations could easily be made without damage to the suit.⁶⁹ The plaintiff offered further evidence that as soon as the clothes had been returned to him he had written the defendant offering to make the necessary alterations, and even to entirely remake the coat and vest if necessary.⁷⁰ The defendant replied "that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made."⁷¹ Evidence was also introduced showing the custom existing among tailors of making alterations on garments after an initial fitting.⁷² A verdict for the plaintiff for the price of the suit was reversed by the Massachusetts Supreme Judicial Court. Justice Devens, writing for the court, stated:

If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles, when manufactured, should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other party to reject them as unsatisfactory. It is not for anyone else to decide whether a refusal to accept is or is not reasonable, when the contract permits the

67. *Id.* at 137.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* °

72. The jury had been instructed at trial that if the plaintiff had agreed to make the clothes to the satisfaction of the defendant, he was bound to do so, with these qualifications:

[I]f, when the clothes were delivered, there were defects in the fit of them, such as are liable to occur in first-class tailoring establishments, but such as could easily be remedied, and a custom among tailors has been proved, to remedy such defects when they occur, the plaintiff was entitled to a reasonable opportunity therefore, and if he was willing and offered to remedy said defects and the defendant refused to allow him to do so, the plaintiff is entitled to recover if the other facts of the case have been proved.

Id. at 138.

defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered.⁷³

It is important to note that there is no suggestion from Justice Devens that the reasonableness criterion might have been differently received had the subject matter of the contract been something else. Nor did he emphasize the fact that the subject matter of the contract involved an item of the type normally reflecting personal taste and sensibility. After all, the controversy centered on the fit of the clothes rather than styling or color, and the court had no apparent difficulty with the fact that tailors had been called upon as "experts" to testify as to the fit and on the custom of alteration in general.

Two other cases in different jurisdictions decided soon after *Brown* became equally well known. In *Zaleski v. Clark*,⁷⁴ the defendant had ordered a bust of her deceased husband to be made to her satisfaction from a photograph. Apparently her dissatisfaction centered on the fact that the resulting work was not as lifelike as had been her husband.⁷⁵ Here too a judgment for the performing party in the lower court was reversed,⁷⁶ the court expressing its decision as simply a refusal to let the sculptor out of a contract he had bound himself to and a risk he

73. *Id.* at 138-39. Justice Devens cited as his sole authority an earlier Massachusetts case, *McCarren v. McNulty*, 73 Mass. (7 Gray) 139 (1856), in which a workman had been unsuccessful in obtaining relief against the committee members of a church's Young Men's Society. The defendants agreed to pay for a bookcase of a specified kind and size which was to be built "in a good, strong and workmanlike manner, to the satisfaction of the president of the society." *Id.* at 140. The court had held that the defendants could not be liable as the president of the society had never approved the work, saying of the workman "[a]gainst the consequences resulting from his own bargain, the law can afford him no relief." *Id.* at 141.

74. 44 Conn. 218 (1876).

75. *Id.* at 219. According to the trial court:

The bust was a fine piece of work, was a correct copy of the photograph, and accurately represented and portrayed the features of the deceased. The only fault found with it was that it did not have the expression of the deceased during his life, and this the court found from the evidence to have resulted not from any imperfection in the workmanship, but from the nature of a bust as a dead white model, and necessarily destitute of the expression of color and life. The defendant was not satisfied with it, but her dissatisfaction was caused by reasons which would have applied to any bust whatever, and not to this as distinguished from any other.

Id. For the stirring argument by counsel for the plaintiff invoking, in verse form, "the case with Pygmalion of mythological renown," see *id.* at 223.

76. *Id.* at 220.

had knowingly undertaken.⁷⁷ In *Gibson v. Cranage*,⁷⁸ the Supreme Court of Michigan was no more solicitous to the plight of a painter who had contracted to paint an enlarged portrait from a photograph and failed to satisfy his customer. While both cases involved artistic work of the type which we would probably readily admit to being subject to individual taste and fancy (although it might be remarked that each involved artistic reproductions and not original works), neither court saw this aspect of the facts as worthy of special mention, nor does it appear to have influenced either outcome in any way.

Two decisions decided only months before *Duplex Safety Boiler Co. v. Garden*,⁷⁹ provide a clear impression of what the courts of the time considered to be the law applicable to conditions of personal satisfaction. In *Silsby Mfg. Co. v. Town of Chico*,⁸⁰ a manufacturer, agreeing to furnish a steam fire engine to the California town of Chico, warranted that the apparatus would be satisfactory to the town. After a lengthy examination of the facts of the case and particularly those relating to the decision of a Mr. Noonan, the swing vote on the fire committee, the court concluded that in its opinion the committee "ought to have been satisfied" but that the manufacturer had failed to prove "by a preponderance of the evidence that Noonan was in fact satisfied, and, notwithstanding his convictions, in bad faith fraudulently reported that he was not satisfied."⁸¹

77. *Id.* at 224.

78. 39 Mich. 49 (1878).

79. 101 N.Y. 387, 4 N.E. 749 (1886). *Duplex* was decided on February 9, 1886. *Id.*, 4 N.E. at 749. *Silsby* was decided September 7, 1885. 24 F. at 893. *Singerly* was filed October 5, 1885. 108 Pa. at 291, 2 A. at 230.

80. 24 F. 893 (C.C.D. Cal. 1885).

81. *Id.* at 897. The court's entire discussion of the law on the point is found at the beginning of its opinion.

The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser, it must be satisfactory to him, or he is not required to take it. It is not enough that he ought to be satisfied with the article; he must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge, and if he deliberately enters into such an agreement he must abide by it.

Id. at 894 (citations omitted) (emphasis in original). Interestingly, the decision also held that the committee to be satisfied was the one in existence at the time of performance and the tender of the fire engine, despite the fact that two of the three members of the committee (including Noonan) had not been members at the time the contract was entered into. Thus, the manufacturer was held to have bound himself to actually satisfy a group of persons whose identities were unknown to him, and not ascertainable, at the time of contracting. See also *Adams Radiator & Boiler Works, Ltd. v. Schnader*, 155 Pa. 394, 26 A. 745 (1893) (defendant, as executor and devisee of the original purchaser, was the person to be satisfied).

In *Singerly v. Thayer*,⁸² which was to become the leading Pennsylvania case on the subject, Thayer had contracted to install, for a price of \$2,300, his newly patented hydraulic elevator system in a new building Singerly was constructing. His proposal, accepted by the building owner, included the phrase "warranted satisfactory in every respect."⁸³ During the construction period, the elevator mechanism was used for hoisting materials, workmen and occasional passengers. It proved unsatisfactory to the owner. Evidence produced by the owner at trial included testimony that on almost every trip it would drop suddenly from the sixth to the third floor, and additional testimony of the building's architect that he "came to the conclusion that it would never do as a passenger elevator on which ladies were to ride."⁸⁴ The owner notified the elevator's builder that he desired the system's removal, and in fact offered a cash inducement of \$500 to that end. When the manufacturer refused to do so, the owner removed the elevator system himself.⁸⁵ In an action by Thayer for the contract price, the trial judge instructed the jury that the contract required only that the work have been done in a workmanlike manner and that "the elevator, when completed, shall be reasonably fit for the purpose for which it was intended and shall accomplish the purpose for which it was intended with a reasonable degree of perfection."⁸⁶ The Supreme Court of Pennsylvania reversed judgment for the manufacturer in a lengthy and sharply worded opinion critical of any deviation from a standard of good faith alone. The court concluded:

It may have been very unwise in the maker of this elevator to agree to expend labor and furnish materials, and rely for payment on the uncertain approval of one so largely interested in determining whether it was satisfactory to himself. Having, however, entered into a contract whereby he did run the risk, his legal rights are to be determined thereby.⁸⁷

By the mid-1880's, the only widely known American cases which might possibly have given support to the reading of a "reasonableness" component into personal satisfaction conditions were two Vermont cases decided in the previous decade.⁸⁸ But in 1886 the Vermont Su-

82. 108 Pa. 291, 2 A. 230 (1885).

83. *Id.* at 292, 2 A. at 231.

84. *Id.* at 299, 2 A. at 234.

85. *Id.* at 293, 2 A. at 232.

86. *Id.* at 293, 2 A. at 231.

87. *Id.* at 299, 2 A. at 234 (citing *McCarren v. McNulty*, 73 Mass. (7 Gray) 139 (1856)).

88. *Daggett v. Johnson*, 49 Vt. 345 (1877); *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528 (1871). The idea that these two cases point to a different rule in Vermont is found in a textual note in the American Reporter's version of *Gibson v. Cranage*, 39

preme Court, in *McClure Brothers v. Briggs*,⁸⁹ put to rest any suggestion that a different test had been adopted in that state and cited with approval the staunchly anti-objectivist cases of the period.⁹⁰ Certainly the purely subjective standard had never seemed more secure, the trend being towards less patience by the courts for any argument based on what we would call the objective standard. This little piece of the world, at least, was safe from the demands of the reasonable person and his reasonable expectations.⁹¹

B. *The Duplex Decision*

Against this backdrop, in 1886, the New York Court of Appeals issued its decision in *Duplex Safety Boiler Co. v. Garden*,⁹² which, along with Justice Holmes' later decision in *Hawkins v. Graham*,⁹³ was to change this trend. In *Duplex*, the defendants had contracted with the plaintiff for certain specified repairs to boilers already in their building, agreeing to pay \$700 for labor and materials "as soon as we are satisfied that the boilers, as changed, are a success, and will not leak under a pressure on one hundred pounds of steam."⁹⁴ Few facts beyond these are provided by the court of appeals other than that the work was not paid for when completed and that the defendants continued to use the boilers "without objection or complaint."⁹⁵ With only

Mich. 49 (1878). Note, 33 AM. REP. 353-54 (1831). Similarly, it is found in the text in the early Atlantic Reporter's presentation of *Singerly*. Note, 2 A. 235 (1836). In *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 570, 15 N.W. 906, 909 (1883), the two are cited as examples of a class of cases, to be contrasted with the long run of purely subjective cases, where "the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds that are just and sensible." *Id.*, 15 N.W. at 909. See also note 119 *infra*, for a discussion of *Smith v. Buffalo Street R.R. Co.*, 35 Hun. 204 (N.Y. Sup. Ct. 1885).

Exactly how these cases came to be seen as standing for a "contrary result" is hard to understand. In *Hartford Sorghum*, the Vermont Supreme Court specifically stated that the buyer "was not to determine what would be the wishes of ordinary persons under like circumstances, and therefore was not bound to use the care and skill of ordinary persons making the determination." 43 Vt. at 532. In *Daggett* the court found the buyer, in effect, failed in his obligation of good faith since he indicated dissatisfaction without every having put to the test the equipment for the use for which it was intended. 49 Vt. at 345.

89. 58 Vt. 82, 2 A. 583 (1886).

90. See *Zaleski v. Clark*, 44 Conn. 218 (1876); *Brown v. Foster*, 113 Mass. 136 (1873); *McCarren v. McNulty*, 73 Mass. (7 Gray) 139 (1856).

91. Other cases during the same year which spoke strictly in subjective terms are *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198, 9 A. 126 (1886) (contract to furnish coal daily to railroad company) and *Exhaust Ventilator Co. v. Chicago M. & St. P. Ry. Co.*, 66 Wis. 218, 28 N.W. 343 (1886) (sale of exhaust fans for blacksmith's shop).

92. 101 N.Y. 387, 4 N.E. 749 (1886).

93. 149 Mass. 284, 21 N.E. 312 (1889).

94. 101 N.Y. at 389, 4 N.E. at 749.

95. *Id.* at 390, 4 N.E. at 750.

this information it is not difficult to see why the court affirmed the judgment for the plaintiff. Even though Judge Danforth, writing for the court of appeals, had to labor mightily to find authority to justify the decision, the impetus for the result is clear. This appears to be a blatant case of the defendants, once the repairs were completed, brazenly attempting to use the condition of personal satisfaction in the contract to avoid paying the agreed price, and in essence, hoping to get something for nothing. If we go beyond the sketchy facts provided by Judge Danforth, however, and examine the record of the case on appeal, we can easily question whether this really is what it first appears to be.

The testimony is conflicting on some points, but it does seem possible to get an understanding of what actually happened, at least from the defendants' point of view. This puts the defendants in a far more favorable light than the court of appeals' scanty version of the facts. The defendants, dissatisfied with some boilers which had been installed in their hat factory, even considered having them completely removed and replaced.⁹⁶ The plaintiff agreed to do repairs on the boilers, primarily to protect the reputation of that type of equipment.⁹⁷ When completed, the repairs did stop the boilers from leaking, but this problem had been termed by the court to be, at most, an "annoyance" to the defendants.⁹⁸ Their main economic complaint had been "the very large and undue consumption of coal,"⁹⁹ and this was unaffected by the work.¹⁰⁰ The repairs, in their eyes at least, were a big bust.

With all this before it, the court sustained the verdict for the plaintiff, putting together a motley assortment of arguments. The discussion of the law begins:

Performance must, of course, accord with the terms of the contract; but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed;

96. Case on Appeal at 14.

97. *Id.* at 5, 14.

98. *Id.* at 4.

99. *Id.* at 14.

100. *Id.* at 14, 17. There was even evidence which leads one to believe the plaintiff had not done one of the alterations specifically called for in the agreement, "raising both boilers enough to give ample fire space." *Id.* at 5-6, 8, 14-17.

time of payment is alone uncertain.¹⁰¹

This initial suggestion, that leaving the defendants free to decide their own satisfaction in effect renders the entire agreement unenforceable, is one which had given the courts some concern in the early part of the nineteenth century,¹⁰² but by the time of *Duplex*, one would not have thought it still deserved attention, at least not so long as the possibility of utilizing the good faith standard existed. In none of the other cases discussed in this section up to this point was the consideration problem even thought worthy of mention. That a promise to pay if satisfied could serve to make a counterpromise enforceable seemed long settled.¹⁰³ The second suggestion offered in *Duplex*, that the satisfaction provision was not a condition precedent to the obligation to pay at all but merely a time-fixing provision,¹⁰⁴ is an interesting one and may even be right. The question is presumably one of interpretation of the parties' intention, and Judge Danforth's opinion provides little support for his determination. The record on appeal makes this interpretation less likely.¹⁰⁵ But even if it were right to consider this only a time-fixing provision it really does not provide any help in answering the question before the court. If the defendants' satisfaction is to measure anything—though to read the provision as one relating only to the time of payment arguably makes it meaningless and superfluous language¹⁰⁶—how then is the satisfaction to be measured? The problem still remains. Is it when the defendants actually are satisfied or when they "ought to be"?

While this limited reading of the satisfaction provision could have been used to avoid the whole issue,¹⁰⁷ Judge Danforth showed no hesitancy to enter the fray. He immediately reached back to the case of

101. 101 N.Y. at 389, 4 N.E. at 749-50.

102. See note 9 and accompanying text *supra*.

103. See notes 12 & 13 and accompanying text *supra*.

104. See generally, RESTATEMENT (SECOND), *supra* note 4, § 227, Comment b.

105. A review of the Case on Appeal and the briefs for both parties finds no mention of this possibility.

106. It is generally held that if language creates only a time-fixing provision, nonoccurrence of the event (here the defendants' being satisfied) will not discharge the obligation (here their obligation to pay), but the obligation will arise within a reasonable time after it is ascertained that the event will not come about. See, e.g., *Mularz v. Greater Park City Co.*, 623 F.2d 139 (10th Cir. 1980). In *Duplex*, therefore, this reading would mean that the defendants were bound to pay, whether they liked it or not, within a reasonable time after completion of the repairs. If so, the result would be the same as if they had left out the satisfaction clause entirely, ending up with a contract for repair with no provision as to time of payment.

107. In the British case of *Dallman v. King*, 4 Bing. N.C. 105, 132 Eng. Rep. 729 (1837), discussed at note 162 *infra*, a similar reading of the satisfaction clause was used to avoid, in effect, determining how "satisfaction" was to be interpreted.

Folliard v. Wallace,¹⁰⁸ decided by Chancellor Kent in 1807. *Folliard* involved a contract to pay for land previously conveyed three months after the buyer was "well satisfied" that he held the land "undisputed by any person whatsoever."¹⁰⁹ The defendant had argued that he was not satisfied with the title because of an outstanding claim. The court, in granting judgment for the seller, stated:

Nor will it do for the defendant to say that he was not satisfied with his title, without showing some lawful encumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were at liberty to judge for himself when he was satisfied, it would totally destroy the obligation and the agreement would be absolutely void. But here was a real obligation contracted, and the true and sound principle is laid down in Pothier, (*Traite des Obligations*, No. 48) that if A promises to give something to B in case he should judge it reasonable, it is not left to A's choice to give it or not, since he is obliged to do so, in case it be reasonable. The law in this case will determine for the defendant when he ought to be satisfied¹¹⁰

Thus, Chancellor Kent coupled the mutuality notion with a citation to Pothier, a leading writer on the civil law whose treatise on the law of obligations had been translated into English only a few years earlier.¹¹¹ Professor Patterson, after tracing the evolution of the Roman and civil law on this problem back to Justinian,¹¹² credited Chancellor Kent (though credited is probably not the right word) with having lifted the notion of an objective test "bodily from the pages of Pothier and transplanted it to the uncongenial soil of the Anglo-American law of contract."¹¹³

108. 2 Johns. 395 (N.Y. 1807).

109. *Id.* at 396.

110. *Id.* at 402-03.

111. Professor Milsom places the earliest translation of Pothier's *Treatise on the Law of Obligations* into English in 1802. Milsom, Book Review, 84 YALE L.J. 1685 n.14 (1975).

112. Patterson, *supra* note 2, at 142-45.

113. *Id.* at 144. Patterson continued:

Thus, though an unfortunate borrowing by New York's distinguished Chancellor of a Roman law doctrine which is now thoroughly exploded in the two leading countries of the modern Roman law there has developed the peculiar New York view (adopted in a number of other states) whereby as Professor Williston says, "a broad and artificial meaning" is given to promises of this sort, with the result that many of the New York decisions are hopelessly irreconcilable.

Id. at 145 (footnotes omitted).

The real responsibility for the innovation of the objective test in this country would seem to be better given to Judge Danforth rather than to Chancellor Kent. It was Judge Danforth's idea to resurrect this otherwise all-but-forgotten *Folliard* opinion,¹¹⁴ with little regard for the course of the law in the intervening eighty years. As Patterson noted, he seemed to find the importance of *Folliard* in its concern for the possibility that the defendant could evade liability by "a simple allegation of dissatisfaction" which "might be a mere pretext and cannot be regarded."¹¹⁵ But by this time the courts had encountered any number of cases where this would have been a problem and had obviously concluded that the test of good faith and honest judgment was sufficient to protect any seller who had put himself knowingly in this position.¹¹⁶ Judge Danforth was correct in pointing out that *Folliard* had been cited in two contemporary cases,¹¹⁷ although the suggestion that each stands for the adoption of the objective test is probably misleading.¹¹⁸ What he failed to deal with or in great part to even acknowledge was the large number of cases since *Folliard* which had ignored that case entirely and relied on the exclusive use of the subjective standard with no qualms.¹¹⁹ His response to cases like

One of the footnotes omitted from this passage deserves special recognition: "In a remarkable letter discovered about 1897 at Jackson, Miss., Chancellor Kent explains that he was wont to mystify his less learned colleagues by expounding to them the doctrines of the Civil Law." *Id.* at n.75 (citations omitted).

114. Cases similar to *Folliard* concerning contracts for the sale of land with an agreement to provide "satisfactory title," are the subject of Annot., 47 A.L.R.2d 455 (1956). This annotation cites several cases decided between the time of *Folliard* and *Duplex*. Of these, only one cites *Folliard*. None of the New York cases do. *Folliard* was not cited in plaintiff's brief to the court of appeals in *Duplex*. In fact, their brief cites no cases whatsoever.

115. Patterson, *supra* note 2, at 144-45.

116. See, e.g., *Lynn v. Baltimore & Ohio R.R.*, 60 Md. 404 (1883). See also text accompanying notes 66-91 *supra*.

117. 101 N.Y. 387, 390, 4 N.E. 749, 750 (1886).

118. *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 479 (1872), involved the enforcement of a promise made to the city by a contractor laying railroad track to keep pavement under good repair "under the direction of such competent authority as the common council may designate." *Id.* at 480. The city, having been held liable to a traveller for his wrecked wagon, sued the contractor on this promise. The case had nothing to do with a condition on payment for the contractor's services. The citation of *Folliard* in *Miesell v. Globe Mut. Life Ins. Co.*, 76 N.Y. 115, 119 (1879), was clearly dictum.

119. *McKenzie v. Decker*, 94 N.Y. 650 (1884); *Spring v. Ansonia Clock Co.*, 24 Hun. 175 (N.Y. Sup. Ct. 1881); *Wilson v. Gould*, 21 Hun. 446 (N.Y. Sup. Ct. 1880); *Gray v. Central R.R. Co.*, 11 Hun. 70 (N.Y. Sup. Ct. 1877); *Hoffman v. Gallaher*, 6 Daly 42 (N.Y. Ct. C.P. 1875); *Tyler v. Ames*, 6 Lans. 280 (N.Y. Sup. Ct. 1872); *Heron v. Davis*, 3 Bosw. 336 (N.Y. Super. Ct. 1858); *Hart v. Hart*, 22 Barb. 606 (N.Y. Sup. Ct. 1856).

To be fair we must acknowledge *Smith v. Buffalo Street R.R. Co.*, 35 Hun. 204 (N.Y. Sup. Ct. 1885), where the court, in dictum, after discussing the general line of subjective cases, noted that there are some cases in New York which "look in a different direction."

Brown, Zaleski and Gibson and similar New York cases¹²⁰ is not very helpful.

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself — if the other party so agree — whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes or undertakes to fill a particular place as agent, mold a bust, or paint a portrait, may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.¹²¹

The notion that the prior rule was reserved for cases of taste, personal convenience or "individual preference" is the basis for the fundamental division of contracts containing conditions of personal satisfaction into two types that was soon to become popular.¹²² Even assuming for the moment that such a distinction makes any sense whatsoever, it had to be known to Judge Danforth that none of the cases he mentioned as holding to the subjective test attached any importance to this aspect of the contracts involved. Beyond this, he failed to acknowledge the prior New York case of *Gray v. Central R.R. Co.*, that had involved a contract for the purchase of a steamboat "provided, upon trial, [the buyers] are satisfied with the soundness of the machinery, boilers, etc."¹²³ *Gray* was adamant on the exclusive use of the subjective test, and this was in a case where the question of satisfaction was expressly limited to matters of a mechanical nature. When is a boiler different from a boiler?¹²⁴ And how different was the boiler in *Duplex* from the mechanism of a hydraulic elevator or a fire engine? Judge Danforth does not even mention *Singerly* or *Silsby*.¹²⁵ It seems fair to characterize the

Id. at 207. This discussion, however, depends to some extent on the court's belief that there existed a different "Vermont Rule." *Id.* As we have seen, within a year the Vermont Court would disavow any such idea. See notes 88-90 and accompanying text *supra*.

120. *Tyler v. Ames*, 6 Lans. 280 (N.Y. Sup. Ct. 1872); *Hoffman v. Gallaher*, 6 Daly 42 (N.Y. Ct. C.P. 1875).

121. 101 N.E. at 390, 4 N.E. at 755.

122. See, e.g., text accompanying notes 199-220 *infra*.

123. 11 Hun. 71, 73 (N.Y. 1877).

124. For yet one more boiler case, see *Adams Radiator & Boiler Works, Ltd. v. Schnader*, 24 F. 893 (1885) (boiler for household heater was to be judged by subjective standard alone).

125. Of course anything can have an aesthetic or decorative component. Certainly the design of an elevator is not all functional mechanical elements. But note that in *Singerly* the contract covered only the hydraulic elevator system. The passenger car was not included in the contract. 108 Pa. at 299, 2 A. at 233. See also *Campbell Printing Co., v.*

Duplex result and opinion as a great "creative" leap; whether the court made that leap consciously or with full appreciation of where it was to land is impossible to say.¹²⁶

C. *Oliver Wendel Holmes and the Case of Hawkins v. Graham*

The decision rendered by Justice Holmes for the Massachusetts Supreme Judicial Court in *Hawkins v. Graham*,¹²⁷ is surely no less remarkable than *Duplex* in what it accomplished, though far more elegant in the way it goes about it. Once again, the dispute involved a boiler. Hawkins, the plaintiff, had offered to provide a heating system for Graham's new mills located in Philadelphia. The offer, which Graham accepted and which the court ruled as constituting the terms of the contract,¹²⁸ included Hawkins' agreement to install a system which would meet certain heating criteria "for and in consideration of the sum of fifteen hundred and seventy-five (1575) dollars, to be paid to me upon the satisfactory completion" of the work.¹²⁹ The offer concluded with the following language:

It is further declared, and distinctly understood, that in the event of my not being able to properly heat every portion of the building as hereinbefore provided for, and in accordance with the requirements as above set forth, upon a ten (10) days' notice from yourself, to the effect that the buildings are not being properly and sufficiently heated, and I cannot heat it in

Thorp, 36 F. 414 (C.C.E.D. Mich. 1888), for what the writer of the opinion himself "regard[s] as an accurate summary of the whole law on the subject." *Id.* at 418. The case applied the subjective test alone to a contract for printing presses and refers to a great range of cases from the period prior to *Duplex* which applied only the subjective standard to contracts for mechanical objects, ranging from a harvesting machine or machine for generating gas to a grain binder, cord binder, or fanning mill. The opinion acknowledged *Duplex* and the cases on which that opinion is based, but found "the difference more apparent than real," *id.* at 416, and applied what it believed still to be the accurate rule with no hesitancy. *Id.*

126. The adoption of the objective test in New York got a boost with a second case, offering a different rationale. *Doll v. Noble*, 116 N.Y. 30, 22 N.E. 406 (1889), also concerned a condition of personal satisfaction. The court first cited one of the long line of New York cases involving contracts calling for the satisfaction of a third-party such as an architect. The New York rule on such contracts, contrary to the general rule which prohibits inquiry into the architect's decision other than on the question of honesty and good faith, would allow consideration of the "reasonableness" of the architect's judgment. CALAMARI & PERILLO, *supra* note 7, §§ 11-17. The leading New York case on this point was decided only seven years before *Doll v. Noble*. *Nolan v. Whitney*, 88 N.Y. 648 (1882). Having laid out this rule in the third-party satisfaction cases, the court in *Doll v. Noble* concluded, "the reason for the exception to the requirement that the architect be satisfied and issue a certificate applies with much greater force where the work is to be done to the satisfaction of the party himself" 116 N.Y. at 233, 22 N.E. at 407.

127. 149 Mass. 284, 21 N.E. 312 (1889).

128. *Id.* at 285, 21 N.E. at 313.

129. *Id.*, 21 N.E. at 313.

ten days thereafter, I shall and will at my own expense remove all machines and appurtenances belonging to the system, leaving the entire mill in a condition equal to that prior to the introduction of the same. In this event, no charges of any kind will be made by me on account of any kind of aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of \$1,575 as above provided for to be paid me, after such acknowledgement has been made by the owner or the work demonstrated.¹³⁰

After reproducing the contract in full, Holmes' opinion noted the finding of the trial judge that the case did not come within the scope of *Brown v. Foster*,¹³¹ and that the trial was to proceed "on the theory that the satisfaction of the defendant was eliminated from the case."¹³² Evidence which the defendant had offered to show his dissatisfaction was ruled immaterial. The plaintiff apparently did give evidence of the system's performance, which inexplicably included the information that the temperature in various parts of the mill varied by as much as ten degrees.¹³³ The judge gave no instructions whatsoever on the question of satisfaction and the jury returned a verdict for the plaintiff.¹³⁴

These are the facts provided by the opinion, and there is a temptation as in *Duplex*, to view the situation as one in which the equities are all in the plaintiff's favor. But again a review of the record on appeal fleshes out the situation and gives us more to consider. Among other things it helps to understand what does read like a rather odd contract. The concluding language of the agreement, by which the contractor agreed to remove the entire heating system if it was not prop-

130. *Id.* at 285-86, 1 N.E. at 312. The Northeastern Reporter does not contain the more extensive set of the facts or prior history that is available in the official reporter.

131. 113 Mass. 136 (1873). See notes 66-73 and accompanying text *supra*.

132. 149 Mass. 286-87, 1 N.E. at 312. The papers available relating to this appeal do not include the trial court's opinion, so we cannot ascertain why the judge thought that element "eliminated" from the case. The plaintiff's Brief to the Supreme Judicial Court indicates that the lower court had agreed with an argument by the plaintiff that "satisfaction" was not the same as "satisfactory to the defendant" in this case and hence this was not a case like *Brown*. Brief for Plaintiff at 1, *Hawkins v. Graham*, 49 Mass. at 287, 21 N.E. at 312-13. Note that Justice Holmes in his opinion distinguished *Brown*, but not on the basis of the particular language chosen. See text accompanying notes 140-43 *infra*.

133. 149 Mass. at 287, 21 N.E. at 312-13. The court presumably obtained this information from Defendant's Bill of Exceptions. One can only assume that the information about the temperature fluctuation was not offered willingly by the plaintiff but was brought out in the cross-examination of a witness for plaintiff who had testified on the completeness of the system.

134. *Id.* at 286, 21 N.E. at 313.

erly functioning and stating that installation was being done at his risk "absolutely," is difficult to comprehend. The contemporary reader is apt to dismiss it as merely formalistic boiler-plate language from a by-gone era, and perhaps it is. But consider the following language from the defendant's brief on appeal, nowhere contradicted in the record by the plaintiff:

The system of heating described in plaintiff's proposition, by exhaust steam, is one not in common or general use. The terms of the contract everywhere show that, so far as the defendant was concerned, it was purely experimental. The plaintiff promises not only good workmanship and material and sufficient heat, but in addition takes upon himself the burden of making the system satisfactory in its results.¹³⁵

Further, the defendant was able to establish some grounds for his dissatisfaction beyond mere caprice, particular problems he had with the heat, or lack thereof, provided by the system.¹³⁶

The defendant might have been legitimately unhappy with the weather conditions inside his mill, but the mill *was being heated* by the plaintiff's apparatus, however imperfectly. If this was the case, was there any justification for defendant's refusal to pay even one penny for it? But it may *not* have been the case. The defendant's answer contained a demand for a set-off, referring to the plaintiff's agreement to remove the work if it proved unsatisfactory and stated: "The defendant was obliged to take and remove said machine and appurtenances at an expense of a large sum of money to wit \$600 which said sum the plaintiff owes the defendant."¹³⁷ In an annexed account, the defendant alleged that he had spent a total of \$593.43 on removing the machines from the building "and putting building in original condition."¹³⁸ The fact that exact figures were presented leads one to believe that the work actually was removed. The plaintiff's demurrer to the set-off did not deny that it was removed, only that "the demand set forth in said declaration in set-off did not exist at the time of the commencement of the above suit."¹³⁹ The set-off was never mentioned again.

If the defendant spent almost \$600 to remove the work in an effort to convince the court of the sincerity of his unhappiness with the system, it was money spent in vain. The Supreme Judicial Court upheld

135. Brief for Defendant at 1.

136. The defendant submitted evidence that "the thermometer may indicate a temperature of 70° Fahrenheit, and yet the system of heating, by reason of its variation, its hot currents of air, & C., be far from satisfactory to the most reasonable of men." *Id.*

137. Defendant's Answer at 4.

138. *Id.*

139. Demurrer and Answer to Defendant's Declaration Set-Off at 1.

the verdict for plaintiff, awarding him the full contract price plus interest. Holmes, in his opinion, did not so much attempt to distinguish the prior cases dominating the field up until this time, as to pass over them with a minimum of bother. After noting that agreements conditioned on personal satisfaction are "usually" construed as requiring an honest expression of dissatisfaction in order to make them enforceable contracts, he stated, "[i]n view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved."¹⁴⁰ He cited the familiar run of cases, including *Brown*,¹⁴¹ *Singerly*,¹⁴² and *McClure Brothers*.¹⁴³ What Holmes wrote is perfectly true. One can well imagine a young portrait painter, or a tailor new in town, agreeing to such a risky contract as the only way of getting new customers to try out his services. Of course, the same might be true for the manufacturer of a new "experimental" heating system which he was trying to get mill owners to take a chance on.

Before proceeding any further with an examination of Holmes' opinion, consideration should be given to some additional background which may indicate his true motivation. Eight years before *Hawkins* was decided, in *The Common Law*, Holmes discussed, and disagreed with, what was then clearly the leading Massachusetts case on the subject, *Brown v. Foster*, the case of the ill-fitting three piece suit.¹⁴⁴ In his discussion on voidable contracts he wrote:

[A] promise to pay for clothes if made to the customer's satisfaction, has been held in Massachusetts to make the promisor his own final judge. So interpreted, it appears to me to be no contract at all, until the promisor's satisfaction is expressed. His promise is only to pay if he sees fit, and such a promise cannot be made a contract because it cannot impose any obligation. If the promise were construed to mean that the clothes should be paid for provided they were such as ought to satisfy the promisor, and thus to make the jury the arbiter, there would be a contract, because the promisor gives up control over the event, but it would be subject to a condition in the sense of the present analysis.¹⁴⁵

He plainly had no taste for the *Brown* result nor for the general rule of which it had become a prime example. Now, sitting on the Supreme Judicial Court, he was apparently in no position to overturn that case.

140. 149 Mass. at 287, 21 N.E. at 312.

141. 113 Mass. 136 (1873). See notes 66-73 and accompanying text *supra*.

142. 108 Pa. 291, 2 A. 230 (1885). See notes 82-87 and accompanying text *supra*.

143. 58 Vt. 82, 2 A. 583 (1886). See notes 89-91 and accompanying text *supra*.

144. 113 Mass. 136 (1873).

145. O. HOLMES, *THE COMMON LAW* 247 (1881 Howe ed. 1963).

Nor would it make much sense for him to follow his line of reasoning even if he could and hold that the arrangement between the parties here, under which a large and complex heating system had already been installed, was "no contract at all."

What Holmes could and did do with *Brown* and other cases like it was to distinguish them away as quickly as possible and then move on.¹⁴⁶ He continued with a statement that was the seed from which the new wisdom was to grow:

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant.¹⁴⁷

Thus in one stroke Holmes not only enunciated the existence of two tests, each equally respected and based on precedent, but established that the objective test — the consideration of "what ought to satisfy the defendant" — was the preferred one and was to be the result in "doubtful cases." The fact is, of course, that the cases we reviewed, decided just prior to *Duplex*, specifically criticized any attempt to introduce such an objective standard.¹⁴⁸ The courts in those cases were most definitely not, at least as they expressed it, performing the function of interpretation and choosing between two possibly valid ways of reading such a contract. They were applying *the* test as they understood it.

The support that Holmes provided for his sweeping statement is less than overwhelming. His suggestion that the courts had been hesitant to allow a seller or manufacturer to lose the entire value of goods already delivered or services already performed has to be judged in light of cases such as *Zaleski v. Clark*¹⁴⁹ and *Gibson v. Cranage*.¹⁵⁰ It is true that in those cases the purchasing party did not end up with possession of the goods contracted for, a portrait bust or painting of a family member, respectively, but would this really matter to the artist? Unless he could find another buyer for a bust of someone else's de-

146. 149 Mass. at 288-89, 21 N.E. at 313. See also text accompanying notes 140-43 *supra*.

147. *Id.*, 21 N.E. at 313 (citing *Sloan v. Hayden*, 110 Mass. 141, 143 (1872); *Braunstein v. Accidental Death Ins. Co.*, 1 B & S. 782, 799, 121 Eng. Rep. 904 (1861); *Dallman v. King*, 4 Bing. N.C. 105, 132 Eng. Rep. 729 (1837)).

148. See notes 79-91 and accompanying text *supra*.

149. 44 Conn. 218 (1876). See notes 74-77 and accompanying text *supra*.

150. 39 Mich. 49 (1878). See note 78 and accompanying text *supra*.

ceased husband or a portrait of somebody else's child, the value of his labor and materials would seem totally lost. If, instead, Holmes, meant that the defendant buyer would be enriched at the plaintiff's expense if allowed to keep the heating system without paying for it, then it must be noted that this need not have been the result even if the defendant avoided his obligation to pay on the contract. As reported by Holmes, the plaintiff's offer clearly contemplated the possibility that if the heating system was not as contracted for, and if the problems were not remedied within ten days of written notice, the plaintiff could remove the apparatus at his expense.¹⁵¹

If the defendant had not given the plaintiff proper notice of dissatisfaction, nor given the plaintiff a chance to remedy, he could be charged with a lack of good faith and the plaintiff allowed recovery without the infusion of a reasonableness standard.¹⁵² If the defendant had acted in good faith and was still not satisfied, the plaintiff apparently would have had the right (indeed the responsibility) under the contract to remove the system. If the defendant balked at this, his honesty could have been questioned or he could have been made to pay on a restitution theory. If the plaintiff did finally remove the system, he would be left in the same position as the elevator company in *Singerly*.¹⁵³ In fact, it is arguable that he is better off than the rejected artists in *Zaleski* and *Gibson* because the recovered apparatus is, at least, partially reusable unlike the nearly valueless recovered materials of the artists. As a matter of fact, *we* know what Holmes must have known but what a reader of his opinion could not have been aware of without reading the record on appeal ¹⁵⁴ — that the mill owner claimed to have had the heating system removed from his building and the mill restored to its original condition. In addition, he alleged he paid to

151. 149 Mass. at 286, 21 N.E. at 312. See note 130 and accompanying text *supra*. The offer specifically provided that "[in the event the system is not as contracted for] no charge will be made on account of any of the aforementioned work; it being distinctly understood the providing of the entire system is to be done at my own risk absolutely." 149 Mass. at 286, 21 N.E. at 313.

152. What would happen if the purchaser had claimed dissatisfaction and was willing to give the seller the chance to remedy but did not specify any reason for his dissatisfaction? Does the seller really have an opportunity to remedy when all he knows is that the buyer honestly does not like the performance but can find out no more? The buyer's refusal to give any reason for his dissatisfaction, where a contract specifically gives the seller the right to remedy within a specified period, might of itself constitute bad faith. But is it really bad faith for someone to say of a portrait of himself or a loved one, "I don't know why, but I just don't like it?" In any event, in *Hawkins*, (see notes 127-36 and accompanying text *supra*) there is no indication the seller did not have notice of the fluctuating heat problem. The millowner did have his reasons; whether or not they were "reasonable" is another matter.

153. See text accompanying note 85 *supra*.

154. See text accompanying notes 135-39 *supra*.

have this done.¹⁵⁵ Based on these facts, any concern over the defendant's enrichment rings fairly hollow.

Holmes cited three cases to support his assertion of "what courts have been inclined to do" in "doubtful cases."¹⁵⁶ The only American case, *Sloan v. Hayden*,¹⁵⁷ seems to be of questionable authority. *Sloan* held that the language in dispute, while referring to the defendant's satisfaction did not create a condition on payment at all. Instead, it was what is now called a time-fixing provision.¹⁵⁸ Even if this distinction had not been clearly understood or appreciated at the time of *Hawkins*, *Sloan* would have been of doubtful authority. That opinion distinguished an earlier and better-known Massachusetts case standing for a strictly subjective standard, without discussion, by merely stating that "the facts of that case differ so widely from those of the case at bar that it is inapplicable."¹⁵⁹ Even more telling is that *Sloan*, although decided a year earlier, was not even mentioned in *Brown*,¹⁶⁰ the leading Massachusetts case in the field. It is difficult to avoid the conclusion that Holmes came up with a rather limp example in his search for an American case to bolster his contention.¹⁶¹

The two English cases Holmes cited are probably worthy of greater respect but neither stands squarely for the proposition he set

155. See text accompanying note 137 *supra*.

156. *Sloan v. Hayden*, 110 Mass. 141 (1872); *Braunstein v. Accidental Ins. Co.*, 1 B. & S. 782, 121 Eng. Rep. 904 (1861); *Dallman v. King*, 4 Bing, N.C. 105, 132 Eng. Rep. 729 (1837).

157. 110 Mass. 141 (1872).

158. On this distinction in general, see discussion in connection with *Duplex Safety Boiler v. Garden* 101 N.Y. 387, 4 N.E. 749 (1886), at notes 104-06 and accompanying text *supra*.

159. 110 Mass. at 143 (distinguishing *McCarren v. McNulty*, 73 Mass. (7 Gray) 139 (1856)).

160. 113 Mass. 136 (1873) *discussed in* notes 66-73 and accompanying text *supra*.

161. Plaintiff's Brief in *Hawkins* did not mention *Sloan*. The defendant referred to it stating only that the instant case "is not within the reasoning" of *Sloan*, "but even if it were, still the ruling that the satisfaction of the defendant was substantially eliminated from the case would be more unjust to the defendant than the case would warrant." Brief for Defendant at 2. *Sloan* does seem an aberrational case, wedged as it is between *McCarren* and *Brown*. Perhaps the result can best be understood by noting another case which immediately precedes it in the Massachusetts Reports. *Gaffney v. Hayden*, 110 Mass. 137 (1837). *Gaffney* was brought against the same employer as in *Sloan*, Hayden. In addition, plaintiff's counsel was the same in both cases, the trials were before the same court and Judge Morton wrote both opinions for the Supreme Judicial Court. Both cases appear to be the result of patently egregious attempts by the defendant employer to avoid paying an employee what was due him. In *Gaffney*, the employer was claiming that he owed the plaintiff, a minor, only \$3.65 for two full months of work computed on a piece work basis. *Id.* at 137. The court allowed the plaintiff to avoid the contract as a minor and affirmed a judgment for \$37.52 based on *quantum meruit*. *Id.* at 138. *Sloan* and *Gaffney* may best be understood as a pair of cases which stand for the proposition that the courts can countenance just so much outrageous behavior.

forth. The first decision, *Dallman v. King*,¹⁶² held that a particular provision calling for the "approval" of the defendant could not be read as a condition at all, thus virtually reading the provision out of the contract. Several judges commented that the provision, regardless of whether it was a condition, could not be read to allow the defendant to "capriciously withhold his approval."¹⁶³ Nowhere, however, in any opinion is there any indication that the decision required a reasonableness test beyond the test of good faith or honesty. In fact, the word "reasonable" never appears in the decision.

In the second case, *Braunstein v. Accidental Insurance Co.*,¹⁶⁴ the justices did conclude that an insurance company which was required by agreement to make payment when satisfactory proof of an accident was received, had to act "reasonably" and not "capriciously."¹⁶⁵ However, once again, there is nothing in this decision suggesting the holding means anything more than that the law would put *some* limitation on the type of proof the insurance company could demand. The limitation could as well be one of good faith as of reasonableness.¹⁶⁶

162. 4 Bing. N.C. 105, 132 Eng. Rep. 729 (1837).

163. *Id.* at 109, 110, 112-13, 132 Eng. Rep. at 730, 731, 732.

164. 1 B. & S. 782, 121 Eng. Rep. 904 (1861).

165. *Id.* at 797, 121 Eng. Rep. at 910.

166. *See id.* at 794, 795, 797, 799, 121 Eng. Rep. at 909, 910. English courts have not agreed with the approach taken by Holmes in his reading and use of *Dallman* and *Braunstein*. *See, e.g.,* *Stadhard v. Lee*, 3 B. & S. 364, 122 Eng. Rep. 138 (1863); *Andrews v. Belfield*, 2 C.B. (N.S.) 779, 140 Eng. Rep. 622 (1857). To be fair it must be said that today *Dallman* and *Braunstein* are taken as authority in England for an objective criterion similar to the American rule. 9 HALSBURY'S LAWS OF ENGLAND 355 (4th ed. 1974).

An intriguing question is how Holmes became aware of these two English cases. They were nowhere cited to the court by the plaintiff, though the contrary English case of *Andrews v. Belfield*, *supra*, was noted on behalf of the defendant. Defendant's Brief at 3. I have found no reference to them in any American case prior to *Hawkins*. Holmes probably was aware of the two cases through his familiarity with the Langdell case book on contracts, first published in 1871 and the summary which Langdell prepared as an appendix to the second edition in 1879. From the beginning, *Braunstein* was included in the casebook. C. C. LANGDELL, CASES ON THE LAW OF CONTRACTS 827 (1871). The pertinent passage in the summary is as follows:

A condition which makes the payment of a debt dependent upon the will and pleasure of the debtor is repugnant to the debt itself, and hence it will either destroy the debt, or the condition itself will be void. [Citing *Dallman* and the Pothier treatise]. Therefore, a proviso in a contract that work shall not be paid for unless it be done to the satisfaction of the employer, will be construed to mean, *ut res magis valeat quam pereat*, ["That it may rather become operative than null"], unless it be done to his reasonable satisfaction. [Citing *Dallman* and *Braunstein*].

II C. C. LANGDELL, CASES ON THE LAW OF CONTRACTS 1006 (2d ed. 1879). It is worth noting that the reason Langdell gives for requiring satisfaction, that it is necessary to prevent the agreement from becoming a nullity, is the same justification given by Holmes in *The Common Law* published in the next year, but abandoned by him for another justification by the time of *Hawkins*.

Our extended discussion and dissection of this crucial paragraph in Holmes' opinion has been justified by the pivotal role that it, together with the *Duplex* case, played in the introduction of an objective test for cases of this kind into American law. While he actually went on to affirm the judgment for the plaintiff on different grounds,¹⁶⁷ and while his own use of *Hawkins* in a case ten years later suggests no such radical intention,¹⁶⁸ Holmes had provided the language from which the new wisdom was to grow.

D. Professor Williston And The Spread Of The Objective Test

Within fifty years the innovation of the 1880's was to become the accepted and established legal principle of the first Restatement of Contracts.¹⁶⁹ From the time of its adoption by the Restatement, the

167. He examined the language of the contract in detail and concluded, in effect, that this was not strictly speaking a case involving a condition of personal satisfaction at all.

The last words, "or the work demonstrated," offer an alternative to the owner's acknowledgment. They imply, that if the work is demonstrated [to meet the contract specifications] it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all requirements," tend the same way.

149 Mass. at 288, 21 N.E. at 313.

168. See *Williams Mfg. Co. v. Standard Brass Co.*, 173 Mass. 356, 53 N.E. 862 (1899). *Williams* involved a contract by the plaintiff to construct for the defendant equipment to be used for melting brass, the installation to be paid for after a sixty-day trial period if the equipment proved satisfactory to the defendant. Holmes specifically stated that the jury's findings required the assumption that the work was done in accordance with the specifications of the contract and in such a manner as to satisfy the reasonable man. Holmes, in sustaining defendant's exceptions to judgment against it, stated:

We are of the opinion, also, with some slight hesitation on my part, that the defendants' liability was conditioned as above suggested, and that *bona fide* even if unreasonable dissatisfaction of the defendant is an answer to the plaintiff's claim. . . . [T]he contract does not provide a test alternative to satisfaction, as was the case in *Hawkins v. Graham* . . . where the money was to be paid after acknowledgment of satisfaction by the defendant "or the work demonstrated."

Id. at 360, 53 N.E. at 862-63. It now appears that what Holmes thought he was stating in *Hawkins* (or at least what he claimed he meant to be stating) was merely that a court should prefer the interpretation that no condition was intended when confronted with ambiguous language, not that language which does clearly indicate a condition of this type should be read as requiring only that which would satisfy a reasonable person for its fulfillment.

Interestingly, in *Williams Mfg. Co.*, he remarked that the equipment to be installed "seems to have been regarded as more or less of an experiment, which facts confirm and give a reason for the interpretation we adopt." *Id.*, 53 N.E. at 863. I have previously commented on Holmes' cavalier attitude towards a similar indication in the *Hawkins* record. See note 135 and accompanying text *supra*. On this more limited reading of *Hawkins*, see also *Weinstein v. Miller*, 249 Mass. 516, 144 N.E. 387 (1924).

169. In his introduction to the first Restatement of Contracts, William Draper Lewis, Director of the American Law Institute, noted the expectation "that the Restatement of this and other subjects will be accepted by the courts and the legal profession generally as *prima facie* a correct statement of what may be termed the general common law of the

place of an objective standard relative to personal satisfaction conditions would be unquestioned (or at least noncontroversial).¹⁷⁰ It is not possible to establish in precise fashion how the idea of an objective, reasonable person test grew to be generally accepted over this period of time. No single line of authority can be cited that will cover every jurisdiction. A review of materials covering these years, however, does leave a distinct impression that while the idea certainly was picked up by some courts following the *Duplex* and *Hawkins* decisions, its spread was hardly that of an uncontrovertably brilliant (or necessary or modern) idea which could not be denied. Rather, it appears to represent the popularization of an idea, and in that respect we encounter the next major actor on the contracts scene, Professor Samuel W. Williston.

Within three years of his appointment to the Harvard Law School faculty, in 1890, Professor Williston took over the task of editing the venerable treatise, *The Law of Contracts*,¹⁷¹ originally written by Theophilus Parsons. The seventh edition of that work, prepared "with additions by" William Kellen in 1883, discussing personal satisfaction conditions, stated: "If A agrees to make something for B, to meet the approval of B, or with any similar language, B may reject it for any objection which is made in good faith and not merely capricious."¹⁷² Kellen then cited a familiar set of purely subjective cases.¹⁷³ In the eighth edition of the treatise, prepared by Williston in 1893, the quoted text remained unchanged, but the central passage of Justice Holmes' opinion in *Hawkins v. Graham*,¹⁷⁴ had been added to the footnotes,¹⁷⁵ introduced by Williston's comment that "[t]he law on the point is expressed with characteristic terseness and accuracy by Holmes, J. in *Hawkins v. Graham*."¹⁷⁶ He also included citations to the two British cases relied upon by Holmes, as well as to a New York case

United States." RESTATEMENT, *supra* note 4, Introduction at xiv.

170. But see the discussion at note 198 *infra*, of the Pennsylvania cases.

171. Theophilus Parsons was the Dane Professor of Law at the Harvard Law School from 1848 to 1870. In 1853 he first published his treatise on contracts with the help of Langdell as a student assistant. G. GILMORE, *THE DEATH OF CONTRACT* 107 n.16, 109 n.20 (1974). Williston was an assistant professor and professor at Harvard Law School from 1890 to 1938. A. SUTHERLAND, *THE LAW AT HARVARD* 408 (1967).

172. 2 PARSONS, *THE LAW OF CONTRACTS* 62-63 (7th ed. Wm. V. Kellen ed. 1883) [hereinafter Parsons (7th ed.)].

173. Kennen cited *Brown, Gibson, and Zaleski*, see notes 66, 74 & 78 and accompanying text *supra*, and the English case of *Andrews v. Belfield*, 2 C.B. (N.S.) 779, 140 Eng. Rep. 622 (1857). 2 PARSONS (7th ed.), *supra* note 172, at 62-63.

174. 149 Mass. 284, 21 N.E. 312 (1889).

175. 2 PARSONS, *THE LAW OF CONTRACTS* 62-63 (8th ed. S. Williston ed. 1893) [hereinafter cited as PARSONS (8th ed.)].

176. See the passage quoted at text accompanying note 147 *supra*.

which followed the objectivist line.¹⁷⁷

In another editorial assignment taken on by Williston, that of preparing the third edition of *Wald's Pollack on Contracts* in 1906, he was no less bold in introducing the *Hawkins v. Graham* result as the established doctrine of contract law.¹⁷⁸ He also noted the *Duplex* decision, presenting it in such a way as to give the reader the (correct) impression that it was an unusual and questionable result.¹⁷⁹ Curiously, he failed to make the same clear in his discussion of *Hawkins*.

Williston, apart from simply willing the *Hawkins* result and language into the body of "accepted" law, attempts to give that result even greater respectability by critical comparison with *Duplex*.¹⁸⁰ The fact is that for most writers the two cases, although they arrive at their results by very different routes, were noteworthy for what they had in common, their introduction into the law of a whole new approach on personal satisfaction contracts.¹⁸¹ They were seen as a something of a pair, which together produced a change in the law. But for Williston their importance was in their difference. *Hawkins*, at least as he presented it, was merely an articulation by Holmes that the courts are often called upon to interpret ambiguous language chosen by the parties. What is so shocking about that? The fact is, of course, that until only a few years prior to *Hawkins*, the courts had consistently viewed such language as unambiguously meaning just what it states.¹⁸² Additionally, in *The Common Law*, Holmes had criticized the earlier established result, not on the grounds of questionable interpretation, but on the lack of consideration.¹⁸³ Neither of these facts was acknowledged by Williston.¹⁸⁴ The result is that Williston's presentation hardly permits the reader to appreciate, much less to be aware of, the significant innovation that *Hawkins* undoubtably represented.

Williston, instead, tried to focus attention on what he saw as a sharp distinction between this result, put in terms of simple contract interpretation, and what he characterized the New York court as do-

177. PARSONS (8th ed.) *supra* note 175, at 62-63. The New York case of *Doll v. Noble*, 116 N.Y. 230, 22 N.E. 406 (1889), *see* note 126 *supra*, is cited. To those who understandably wonder why Williston did not take this opportunity to cite and promote *Duplex*, *see* notes 185-87 and accompanying text *infra*.

178. Compare POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 44 n.10 (2d American ed. G. Wald ed. 1885) with POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 51 n.59 (3d American ed. G. Wald and S. Williston eds. 1906).

179. His discussion of *Duplex* was that basically included later in his own treatise. *See* text accompanying note 185 *infra*.

180. *See* notes 185-87 *infra*.

181. *See* note 188 and accompanying text *infra*.

182. *See* notes 66-91 and accompanying text *supra*.

183. *See* note 145 and accompanying text *supra*.

184. For a discussion of the extent of Holmes' influence on Williston, *see* G. GILMORE, THE DEATH OF CONTRACT 113 n.39 (1974).

ing—creating out of whole cloth an objective test, as a matter of positive law, of construction rather than interpretation. By the time of the preparation of the first edition of his own treatise in 1920, he had made his position perfectly clear. After setting forth the general requirement of honest judgment and good faith dealing, he continued:

In New York and in some other States a broader and more artificial meaning is given to such a promise. It is construed as a matter of law as imposing upon the promisor the duty only of satisfying a reasonable man, unless the subject-matter of the contract involves personal taste. In such a case even in these latter States the contract is held to require the actual satisfaction of the promisee. Frequently, no doubt, on a true construction [by which is presumably meant interpretation] of promises for satisfactory performance, reasonable satisfaction and not actual satisfaction of the promisee is all that is required. Especially is this likely to be the case where the contract provides definite tests or specifications for the required performance, and the satisfaction of one of the parties is not made the sole determining factor.¹⁸⁵

This statement was further refined and strengthened in the 1936 revised edition of his work. He stated that the New York rule was “an arbitrary refusal by the court to enforce the contract that the parties made and seems unwarranted.”¹⁸⁶ The correct view for him remained simply one of deciding upon the “true interpretation” of such a provision.¹⁸⁷

During this same period, from *Hawkins* in 1889 to the First Restatement of 1932, other writers were not as ready as Professor Williston to admit the accepted principles of contract law included a consideration of what the promisor in such a situation “ought to have been satisfied with,” *however* such a test was understood or *whenever* it was meant to be applied.¹⁸⁸ By the end of the 1920's it appeared that some

185. 1 S. WILLISTON, *THE LAW OF CONTRACTS* § 44, at 76-77 (1920).

186. 3 S. WILLISTON & G. THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* § 675A, at 1946-47 (rev. ed. 1936).

187. *Id.* at 1947. Two student commentaries dealing with the subject published in the Harvard Law Review during Williston's tenure at that law school testify to his influence as a professor. Both share his criticisms of the New York approach. 11 HARV. L. REV. 477 (1898); 20 HARV. L. REV. 558 (1907).

188. Several treatises of the period (primarily those whose editors were identified with schools in the Northeast) were favorably inclined to the objective test. G. ARCHER, *THE LAW OF CONTRACTS* § 233 (1911) (G.L. Archer, Dean of the Suffolk School of Law); C. ASHLEY, *THE LAW OF CONTRACTS* § 61(b) (1911) (C.D. Ashley, Professor and Dean of New York University Law School); W. BRANTLEY, *CONTRACTS* § 144 (2d ed. 1912) (W.T. Brantley, Reporter of the Maryland Court of Appeals, formerly Professor, University of Maryland). But as often the writer would simply report the New York and Massachu-

form of the objective test had spread to a few other states, including California,¹⁸⁹ Illinois,¹⁹⁰ and Rhode Island.¹⁹¹ But it could hardly be said to have gained any kind of national acceptance. Student comments of the period tended to characterize these jurisdictions as being unusual or in the minority.¹⁹²

This, then, was the situation at the time of the drafting and adoption of the original Restatement of Contracts. The section on this subject was undeniably the work of Williston. Appearing in none of the earlier Restatement drafts, it was included only at the last moment and adopted without discussion.¹⁹³ The section, as one might expect from Williston, put the problem strictly in terms of interpretation of language.

A promise in terms conditional on the promisor's satisfaction with an agreed exchange, gives rise to no duty of immediate performance until such satisfaction; but where it is doubtful whether the words mean that a promise is conditional on the

sets type of result as a minority rule. 2 W. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS §§ 1603-1605 (1913) (identified only as the co-author of several treatises); L. HAMMON, CONTRACTS § 443 (1902) (unidentified); E. HARRIMAN, CONTRACTS § 283 (2d ed. 1901) (Professor of Law, Northwestern University); 5 W. PAGE, THE LAW OF CONTRACTS §§ 2618-2623 (2d ed. 1921) (W.H. Page, Professor of Law at University of Wisconsin); 13 C. J. CONTRACTS § 769, at 677 (1917). At least one author showed outright hostility to the idea. J. LAWSON, CONTRACTS § 429 (3d ed. 1923) (J.D. Lawson, Professor of Law, University of Missouri). Professor Patterson in his article on the subject in 1921 accepted as the prevailing American doctrine and personally supported a rule which rejects inquiry into the question of reasonableness. Patterson, *supra* note 2, at 145-52. Although the article suggested Patterson's agreement with the "Massachusetts rule," it interpreted the rule, and in particular the case of Fechteler v. Whittemore, 205 Mass. 6, 91 N.E. 155 (1910), as requiring only honest satisfaction. Patterson, *supra* note 2, at 146.

189. See, e.g., *Thomas Haverly Co. v. Jones*, 185 Cal. 285, 197 P. 105 (1921); *Jones-McLaughlin, Inc. v. Kelley*, 100 Cal. App. 315, 279 P. 1076 (Dist. Ct. App. 1929).

190. See, e.g., *Union League Club v. Blymyer Ice Mach. Co.*, 204 Ill. 117, 68 N.E. 409 (1903).

191. See, e.g., *Hanaford v. Stevens & Co.*, 39 R.I. 182, 98 A. 209 (1916); *Pennington v. Howland*, 21 R.I. 65, 41 A. 891 (1898).

192. 22 ILL. L. REV. 780 (1928); 8 TEX. L. REV. 423 (1930); 77 U. PA. L. REV. 920 (1929). But see 14 MINN. L. REV. 87, 88 (1929) ("authority is divided").

193. Restatement § 265 made its first appearance in Proposed Final Draft No. 13 with the explanation that "[t]he point covered by the proposed new Section seems sufficiently important to justify its insertion." RESTATEMENT OF CONTRACTS § 265, at 15 (Proposed Final Draft No. 13, 1932). This draft was primarily a "patch-up" document, making changes in previously discussed sections. Section 265 was then placed before the A.L.I. meeting along with thirteen other sections where changes had been suggested by Williston, who said he doubted there was anything in any of them to involve dispute. "The reasons for them are explained and I doubt if any member of the Institute would find reason to quarrel with any of them." When offered for discussion they received no comments and the meeting moved on to other matters. 10 ALI PROCEEDINGS 173-74 (1931-1932).

promisor's satisfaction with an agreed exchange, or on the sufficiency of that exchange to satisfy a reasonable man in the promisor's position, the latter interpretation is adopted.¹⁹⁴

A single comment to the section offered nothing to explain or justify this interpretational preference.¹⁹⁵

The inclusion of this "reasonable man" test in the Restatement, without any suggestion that it was other than the accepted law as the drafters had found it, seems to have insured that it indeed would become the established rule. From that time, the possibility of an objective component to such conditions seems to have lost its controversial nature.¹⁹⁶ Today, general authorities report it as a well established

194. RESTATEMENT, *supra* note 4, § 265.

195. The only comment on the section reads:

A promise conditional upon the promisor's satisfaction is not illusory since it means more than the validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine.

Id. Comment a. Of the four offered illustrations, only the last in any way deals with an objective test. It reads, "A promises to pay \$1500 for a heating plant if on demonstration the plant works satisfactorily. A's promise is interpreted as meaning that he will pay if the plant would be satisfactory to a reasonable man in his position." *Id.* Illustration 4. Although not so identified, this illustration is clearly based on *Hawkins*; even the price is within seventy-five dollars of the original. But notice as summarized the contract in the illustration hinges only on the purchaser's satisfaction with the heating plant. The point Holmes made central to his decision, the inclusion in the contract of a "test alternative to satisfaction," see notes 167-68 *supra*, has been eliminated. We are left to ponder whether what we have seen is Williston's furthering of Holmes' idea and intent, or rather a situation in which Williston has taken the single Holmes opinion for more than its author would have anticipated and extended it to support his own ideas.

196. To say *how* a change in the law came about is not to say *why*. The reader by now has the benefit of my research and my beliefs on the question, but I might add a word on the evolution of those beliefs. It became apparent very quickly that *Duplex* and *Hawkins* were the leading modern cases in the field by the turn of the century. See notes 92-168 and accompanying text *supra*. A reading of those opinions, compared to earlier cases like *Brown*, may make it seem as if they were a perfectly predictable reaction to the change in the times and the change in the type of cases coming before the courts. Where satisfaction cases had once dealt with quirky situations of portraits being painted and suits made to order, these two cases were evidently of a different type. Along with the modernization of industry in the period came cases where the subject matter was a major industrial item of a clearly commercial nature. What became apparent with further investigation, however, was that cases of this type had been coming to the courts before and had given them no noticeable difficulty. See note 125 *supra*. Consideration of the record in each of the cases also makes it much more questionable whether the particular result was necessitated by the actual situation presented. In each the equities seem far more complex; certainly the older more conventional result could have been easily justified by highlighting other aspects of the record.

I also note that in at least one major industrial state, Pennsylvania, the law has

principle with the only remaining question being *when* not *whether* to apply an objective test.¹⁹⁷ The change from the unquestioned case law of the early 1880's had, through the influence of the Restatement, become complete.¹⁹⁸

V. THE SUBJECT MATTER DISTINCTION

Even as the objective test for the fulfillment of conditions of personal satisfaction was being introduced into the law, it was recognized that it would not overtake the field completely. There were too many instances, too many disappointing portraits and unacceptable tailoring jobs, in which the courts insisted on each person's right to be judged of his own satisfaction, to abolish or ignore the purely subjective standard altogether.¹⁹⁹ The decisions in *Duplex* and *Hawkins* acknowledged

advanced without any apparent need or pressure to adopt an objective test. See note 198 *infra*. Finally, if we wish to consider the effect of economic forces, it might be argued that in a period of rapid industrial change and improvements in technology the traditional latitude given to buyers in satisfaction cases should have been strengthened. By so doing the law would have given an additional bargaining chip to the technological innovator who might have been able to market his wares to a skeptical public only by this rather unconventional type of arrangement. I have no special knowledge on the subject, but this appears to me to be what was happening in the 1880's with the producers of new "experimental" types of boilers and elevator systems.

197. See, e.g., CALAMARI & PERILLO, *supra* note 7, §§ 11-18; MURRAY, *supra* note 7, § 152.

198. To be perfectly accurate, the transformation to the objective test has not been totally complete. Though it seems to have been overlooked by every authority, there is at least one major jurisdiction which has never even hinted at a reliance on the objective test. See *Jenkins Towel Serv. Inc. v. Tidewater Oil Co.*, 422 Pa. 601, 223 A.2d 84 (1966), where the court stated:

Such contracts are not strangers to the law of Pennsylvania and have been considered by us on numerous previous occasions. We have consistently held that where a contract provides for performance by one party to the satisfaction of the other, "the test of adequate performance is not whether the person for whom the service was rendered *ought* to be satisfied, but whether he *is* satisfied, there being, however, this limitation, that any dissatisfaction on his part be genuine and not prompted by caprice or bad faith."

Id. at 606, 223 A.2d at 86 (emphasis in original) (citation omitted). The Pennsylvania cases are grounded on *Singerly* and include several other construction cases of the kind that in most other jurisdictions would bring out the objective test in full force. *Hood v. Meininger*, 377 Pa. 372, 105 A.2d 126 (1945); *Brouman v. Bova*, 198 Pa. Super. Ct. 279, 182 A.2d 245 (1962); *Solomon v. Ford*, 108 Pa. Super. Ct. 43, 164 A. 92 (1933). For more recent cases, see *Aster v. BP Oil Corp.*, 412 F. Supp. 179 (M.D. Pa. 1976); *Canonsburg Supply & Equip. Co. v. John Deere Indus. Equip. Co.*, 388 F. Supp. 135 (W.D. Pa. 1975); *Marine Transp. Lines, Inc. v. Publicker Int'l Inc.*, 303 F. Supp. 423 (E.D. Pa. 1969). In at least two other jurisdictions, Connecticut and West Virginia, no cases have been found by the author which accept the idea of an objective standard.

199. See, e.g., *Brown v. Foster*, 113 Mass. 136 (1873); *Gibson v. Cranage*, 39 Mich. 49 (1878). See notes 66-73, & 78 and accompanying text *supra*.

these earlier subjective cases and did not criticize, at least explicitly, any of them. The earlier cases were not wrong, but rather were distinguishable. The puzzle then became when each test was to be used, and how the two could exist in harmony, each finding a place in the scheme of things.

Initially, we might expect that the question would be primarily addressed, and in most instances satisfactorily resolved, by careful examination of the particular circumstances in which the word "satisfaction" has been used and by the exact language of the contract in dispute. Unfortunately, anyone surveying the cases, even the reader not normally possessing a great deal of cynicism, will quickly come to the conclusion that just about the last thing that anyone seems concerned with is exactly what the parties said or wrote. Though it is normally asserted by the courts and other writers that the question is only one of contract interpretation and that the parties can agree to whichever test they wish "by clear language,"²⁰⁰ such statements are usually mere asides as the court imposes its judgment on the parties. It is not unusual to see the court stressing the language used by the parties — provided it reinforces the result which the court has reached. Nor is it unusual to find a decision ignoring what seems to be clear and unequivocal language which fails to suit the court's conclusion.²⁰¹

What quickly became true in most jurisdictions, along with the recognition of an objective test, was that the selection in a particular instance of the appropriate standard was to be dominated by a distinction made between cases based on the "subject matter" of the contract. The classic statement of this distinction would have all contracts fit into one of two categories: the first, consisting of contracts "relating to personal taste or fancy;" the second covering all contracts where the subject matter of the agreement is open to judgment on the basis of mechanical fitness, utility or merchantability.²⁰² Under this scheme,

200. See, e.g., 3A CORBIN, *supra* note 4, § 644, at 80; 5 WILLISTON, *supra* note 4, § 675A, at 207.

201. See, e.g., *Shimek v. Vogel*, 105 N.W.2d 677 (N.D. 1960). One distinction which we might initially expect to be of importance is that between contracts which are conditioned on a thing being "satisfactory" or working in a "satisfactory" manner, with no reference to a particular person, and those contracts expressly providing for satisfaction of the buyer. A few cases do focus on this difference, *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N.E. 420 (1903); *Glyn v. Miner*, 6 Misc. 637, 27 N.Y.S. 341 (1894), but others affirmatively state that a contract calling for something like "satisfactory quality" actually contemplates satisfaction of the particular buyer. *Campell Printing-Press Co. v. Thorp*, 36 F. 414, 418 (C.C.E.D. Mich. 1888); *Devoine Co. v. International Co.*, 151 Md. 690, 693, 136 A. 37, 38 (1927); *Williams v. Hirshorn*, 91 N.J.L. 419, 420, 103 A. 23, 23 (1918). In general, this distinction, like all other subtleties of language, seems to have been quickly overwhelmed by the use of the subject matter distinction to be discussed.

202. *American Oil Co. v. Carey*, 246 F. Supp. 773 (E.D.Mich. 1965); *Isbell v. Ander-*

the subjective honesty test is to apply to (or at least be preferred for) cases in the first category and the objective test is to apply to cases in the second category.²⁰³

Initially, we might point out that this fundamental division of all contracts into two groups does not appear to make much sense. It is difficult to see the distinction. Even if we were to concede that certain contracts seem to fall naturally into the first category, such as agreements for portraits to be painted, or performance by musicians or for valet services,²⁰⁴ in another context we might not think twice about considering questions of "reasonably competent performance" or "performance up to the standard of the trade" in judging such things.²⁰⁵

On the other hand, consider an instance which Corbin suggests

son Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912); *Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960); *Western Hills, Oregon Ltd. v. Pfau*, 265 Or. 137, 508 P.2d 201 (1973). Williston divides all agreements into three categories: "(1) Contracts of employment, (2) Contracts involving matters of personal taste, sensibility, judgment, or convenience, and (3) Contracts in which there is a requirement of satisfaction as to mechanical fitness, utility, or marketability." 5 WILLISTON, *supra* note 4, § 675A, at 191-92. Most authorities, rather than making employment contracts a separate category, would include them in the personal taste and fancy class. *See, e.g., CALAMARI & PERILLO supra* note 7, §§ 11-18, at 402. Far more interesting is that Williston skewed the question for his third category in the way that he phrased it. This class is not usually defined as one where there is a well articulated condition of satisfaction "as to" something like mechanical fitness. This would read something like "provided I am satisfied that it meets the standard of marketability," or "provided I am satisfied it is at least 98% pure." Rather this class is usually seen as being those contracts containing a general condition of satisfaction ("provided I am satisfied with it") where the court decides the subject matter is the kind of thing which is usually judged by others in an "objective" way.

Of course, this classification scheme has not been adopted in a state like Pennsylvania which has never recognized the objective test. *See* note 198 *supra*.

203. *CALAMARI & PERILLO supra* note 7, §§ 11-18, at 402. In most states the distinction is said only to articulate an interpretational preference. *See, e.g., Kadner v. Shields*, 20 Cal. App. 3d 251, 97 Cal. Rptr. 742 (1971); *Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co.*, 202 F.2d 372 (5th Cir. 1953). In New York, the application of the distinction is still undertaken as a matter of law. *Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960). As a practical matter the cases using the preference may place such a great emphasis on this distinction that there may be little real difference between the two approaches.

204. The first two examples are from *RESTATEMENT (SECOND)*, *supra* note 4, § 228, Illustrations 4 & 5, following *Gibson v. Cranage*, 39 Mich. 49 (1878), and *Ferris v. Polansky*, 191 Md. 79, 59 A.2d 749 (1948), respectively. The third is from *Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960).

205. Consider a painter who is to paint a portrait where the contract contains no satisfaction clause. Can he collect his fee if he delivers a signed canvas which is otherwise blank or bearing only one large splotch of color? Does it really matter that the artist honestly believes he has captured the essence of his subject? No matter how far we wish to stretch artistic license, certainly some standards must apply. *See, e.g., McCrady v. Roy*, 85 So. 2d 527 (La. App. 1956).

would "easily" be placed in the second category of contracts, delivery of a "standard motor car."²⁰⁶ What are we to think about ourselves for having wasted so much time in the past agonizing over the various available "standard" colors or interiors? Even on such clearly "mechanical" matters as engine performance or steering, we know that some people will be concerned only with whether the car meets their own understanding of the appropriate mechanical standards as these things show up on sophisticated testing devices. Others of us could not care about such things; for us the question is whether we like the ride or the feel. Isn't it evident that the choice of our more "objectively" minded friends to concern themselves solely with questions of mechanical fitness and numerical standards is in itself a choice reflective of their personal taste or fancy?

Even if we were to suspend our disbelief (or rather simple common sense) for a moment and admit to the possibility that this articulated distinction is a workable one, it would be hard to make much sense of the way in which the courts have applied it to certain classes of contracts in the past. Thus, employment contracts are usually seen as requiring only the subjective test, and this would seem to be so whether or not the employment is one involving a measure of truly personalized service.²⁰⁷ Contracts for the sales of goods also tend to be classed as those requiring only a subjective determination of satisfaction,²⁰⁸ even when the cases involve farm implements,²⁰⁹ heating and ventilation equipment,²¹⁰ and industrial equipment and machinery.²¹¹ On the other hand, the great majority of cases involving construction contracts appear to rely on the objective standard.²¹² While the majority of these decisions can probably be understood and perhaps justified on other

206. 3A CORBIN, *supra* note 4, § 646, at 94. Corbin, in a later hypothetical involving a car, makes a contrary suggestion that only honest dissatisfaction should be required. *Id.* § 647, at 103-04.

207. CALAMARI & PERILLO, *supra* note 7, §§ 11-18, at 402; 5 WILLISTON, *supra* note 4, § 675, at 193-96. *See generally* Annot., 6 A.L.R. 1497 (1920). At one point Corbin asserts, that "with respect to contracts for most kinds of personal service, the community standard of efficiency and 'satisfactoriness' will control." 3A CORBIN, *supra* note 4, at 95-96. He offers little support for this, only two Rhode Island cases of 1916, and it must be seen as unsupported by most of the later cases.

208. *See generally* Annot., 86 A.L.R.2d 200 (1968). The Uniform Commercial Code ducks the issue entirely. "On the point of 'satisfaction' as meaning 'reasonable satisfaction' where an industrial machine is involved this Article takes no position." U.C.C. § 2-326, Comment 1. *See Note*, 42 U. PITT. L. REV. 375 (1981).

209. Annot., 86 A.L.R.2d 200, § 17.

210. *Id.* § 21.

211. *Id.* § 23.

212. *See generally* 3A CORBIN, *supra* note 4, § 646, at 98; Annot., 44 A.L.R. 1114 (1955).

grounds,²¹³ it is hard to see, for example, how the performance of a workman in his employment is to be characterized as involving matters of taste and fancy while that which he creates or constructs is not. The construction of a building, involving not only quality of workmanship but also the appearance of the structure and use of materials often chosen solely for aesthetic reasons, would seem to be a situation where "personal taste and fancy" would be appropriate.

The cases are even more difficult to follow when it is observed that courts apply the distinction based on the "subject matter of the contract," such as bricks or buildings or boilers, with little or no regard to the larger context of the agreement. In New York, for example, the subjective test began to be chosen over the objective standard in cases in which a single article of clothing was to be made for the purchaser's personal use²¹⁴ or the contract was for the employment of someone to design or supervise the production of clothing.²¹⁵ The authority of these decisions was then mechanically applied to a case where a garment manufacturer had entered into an agreement to make a large number of garments over a period of one and one-half years.²¹⁶ While the opinion in *Seitless v. Goldstein*,²¹⁷ provides few details, apparently a large commercial venture was involved rather than the production of a single pair of pants. Without discussing whether, in this particular situation, a standard of merchantability or similar "objective" criteria could apply (and it seems hard to argue it would not), the court, relying on the earlier decisions, held the subjective test alone should apply. Clothing is, after all, clothing. Another well-known New York case, *Fursmidt v. Hotel Abbey Holding Corp.*,²¹⁸ would seem to be uncontroversial in applying the subjective test to a contract described as being for valet services, but descriptions can be deceiving. The defendant in the case was, in reality, not an example of the now rare person blessed with the wealth necessary to employ a private servant. The defendant was a corporation owning a hotel. The plaintiff and his father, under the agreement, had contracted for the hotel's valet and laundry

213. See the discussion of the influence on these decisions of the concern for forfeiture at notes 256-59 and accompanying text *infra*.

214. *Schwartz v. Cohn*, 129 N.Y.S. 464 (App. Term 1911); *Haehnel v. Trostler*, 54 Misc. 262, 104 N.Y.S. 533 (App. Term 1907).

215. *Diamond v. Mendelsohn*, 156 A.D. 636, 141 N.Y.S. 775 (1st Dep't 1913); *Ginsberg v. Friedman*, 146 A.D. 779, 131 N.Y.S. 517 (1st Dep't 1911); *Snyder v. Greenhut & Co.*, 71 Misc. 117, 127 N.Y.S. 1068 (App. Term 1911).

216. *Seitless v. Goldstein*, 164 N.Y.S. 682 (App. Term 1917).

217. *Id.*

218. 10 A.D.2d 447, 200 N.Y.S.2d 256 (1st Dep't 1960). It is arguable that this problem of knee-jerk classification is more pronounced in New York because the *Duplex* approach, which calls for the court to determine as a matter of law the test to be applied, is still followed. See note 203 *supra*.

concession.²¹⁹ Because this was a fairly large commercial deal, it would seem perfectly feasible for the court to have addressed the question of whether the service provided to the guests was such as would normally meet industry standards, even considering the high class of the particular hotel. It is just the kind of question which can be and is regularly considered at trial.²²⁰

I am not contending that the application of the purely subjective test would necessarily be wrong in cases where the contract was formed in a commercial setting. Rather, it is evident that if the subjective test is to be applied in some cases, but not in others, this decision cannot be justified because in these particular cases the nature of the "subject matter" is such that the application of an objective type of test is a

219. 10 A.D.2d at 448, 200 N.Y.S.2d at 258.

220. The reasoning of the opinion deserves closer attention. The court first noted: This agreement provided that the defendant was to exercise strict control and direction of almost every aspect of the plaintiff's operation. The prices were to be fixed by the defendant; disputes with the hotel guests were to be finally resolved by the defendant; the specific hours of service were to be established by the defendant "to conform to the convenience of its guests"; the plaintiff's employees had to be approved by the defendant as were their uniforms; and all the billing was to be done through the defendant as though it were rendering the services to the guests.

Id. at 450, 200 N.Y.S.2d at 259. The court argued this language demonstrated that the performance called for was "much removed" from things normally measurable by objective standards. *Id.*, 200 N.Y.S.2d at 259. But does this follow? It could be argued that the fact that the defendant had retained so much control and in such detail demonstrates objective standards are available. If the valet service did not charge the prices the defendant set, or did not stay open the prescribed hours, and so forth, then the defendant would have had clear-cut reasons to terminate the relationship. As Holmes might have put it, the contract offers specifications as "an alternative to satisfaction." See note 168 *supra*. The opinion also stated:

In this case the defendant did not bargain for a particular type of pressing, stitching or laundering but rather for a relationship between the plaintiff's organization and the hotel's guests as would protect and enhance the good will so essential to the operation of the hotel business. No objective standards of reasonableness can be set up by which the effectiveness of the plaintiff's performance in achieving the effect sought can be measured.

10 A.D.2d at 450, 200 N.Y.S.2d at 260. Does the court really believe that if the contract had contained the plaintiff's agreement to use "best efforts" to enhance the good will of the hotel instead of a satisfaction clause, an action brought on this latter provision would be impossible of determination?

As will be emphasized in the text, I am not necessarily arguing that the result in *Furshmidt*, allowing the defendant's good faith determination to control, is wrong, but only that these arguments advanced for it are all slightly questionable. The best argument that can be made for a subjective test here is that the contract means exactly what it says. "[I]t is distinctly understood and agreed that the services to be rendered by the second party [plaintiff] shall meet with the approval of the first party [defendant], who shall be the sole judge of the sufficiency and propriety of the services." *Id.* at 448, 200 N.Y.S.2d at 258.

realistic impossibility. We may want to rely upon the purely subjective test in many instances, for reasons we may or may not be conscious of, but it is not something that we are compelled to do by the circumstances.

VI. THE RESTATEMENT SECOND, PREFERRED INTERPRETATION, AND THE CONCERN ABOUT FORFEITURE

The difficulty with a test narrowly based on the subject matter of the contract, and which ignores other aspects of the contract relationship, may be the reason why the drafters of the Restatement Second of Contracts, have taken a somewhat different tack than the original Restatement.²²¹ The Restatement Second establishes a distinction based not on the subject matter of the contract but on whether "it is practicable" to apply an objective criterion in the particular case.

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.²²²

Unfortunately, the drafters provide no assistance in determining how the issue of practicability should be addressed. In three illustrations the drafters inform us that it is "practicable to apply an objective test" to the installation of a heating system in a factory,²²³ but not to the painting of a portrait of the purchaser's daughter²²⁴ or to the employment of a four-piece musical ensemble.²²⁵ This sounds like the subject

221. RESTATEMENT, *supra* note 4, § 265. See also notes 193-95 and accompanying text *supra*.

222. RESTATEMENT (SECOND), *supra* note 4, § 228.

223. *Id.* Comment b, Illustration 3 (based on *Hawkins v. Graham*, 149 Mass. 284, 21 N.E. 312 (1889)).

224. *Id.* Illustration 4 (based on *Gibson v. Cranage*, 39 Mich. 49 (1878)).

225. *Id.* Illustration 5 (based on *Ferris v. Polansky*, 191 Md. 79, 59 A.2d 749 (1948)). This last Illustration should be examined more fully. It provides:

A contracts to have B furnish a four-piece band to play in A's inn for six months, with a provision, "If band proves unsatisfactory to A contract is subject to two weeks' notice." A occasionally objects when B is absent and a guitar is substituted for B's string bass. After two months, A gives notice of termination, stating that he is dissatisfied for this reason. B has no claim against A since it is not practicable to apply an objective test to the band's performance.

RESTATEMENT (SECOND), *supra* note 4, § 228. In a way this is very similar to *Furmsmidt*. Perhaps, as was argued with respect to that case, it is not truly "impracticable" to apply an objective test here. Could that be why the drafters have included in this Illustration,

matter distinction all over again.²²⁶

The Comments to this Restatement Second section go well beyond the original Restatement and offer something new in discussing and seeking to justify the rule the section adopts. The portion of the original Restatement on the topic,²²⁷ presumably the work of Williston,²²⁸ established the objective test as the preferred interpretation in doubtful cases, but without any explanation. The Restatement Second, also stating that this is a matter of contract interpretation and that the objective test is preferred,²²⁹ attempts to justify this as the rule. This brings us to the question introduced much earlier. What reason can there be for the articulation and imposition of a so-called objective test in *any* such situation, and further, why should it be the *preferred* test in the general run of the cases? It is not unreasonable to ask for some kind of principled justification. Any legal rule is open to this challenge, and it would seem particularly true of one which is sometimes characterized (even by its proponents) as requiring that a person, even one operating in good faith, "ought to be satisfied" with something with which he is not.

The drafters of the Restatement Second have given great weight to this preference. At times they appear to regard the application of the honesty test alone to other than the most clear-cut (and relatively minor) cases as a failure of the legal system. Thus, the comment:

If . . . the circumstance with respect to which a party is to be satisfied is such that the application of an objective test is impracticable, the rule of this Section is not applicable. A court will then, for practical reasons, apply a subjective test of honest satisfaction, even if the agreement admits of doubt on the point and even if the result will be to increase the obligee's risk of forfeiture.²³⁰

Are "practical reasons" the only justification that would suggest the conditional promisor's honesty should be the measure? Certainly up until one hundred years ago the courts thought otherwise; their adher-

unlike in the previous portrait painting example, (*see* note 224 and accompanying text *supra*) the reason for the party's dissatisfaction, a reason that is fairly "reasonable" to me?

226. *See* note 202 and accompanying text *supra*.

227. RESTATEMENT, *supra* note 4, § 265.

228. *See* note 193 and accompanying text *supra*.

229. RESTATEMENT (SECOND), *supra* note 4, § 228. The actual text and language beginning the comments state only that the Second Restatement establishes a special standard of preference. *Id.* It is arguable that the drafters have practically given it the force of a rule of law. Note, for example, their later use of the term, "the rule of this section." *Id.* Comment b. In context it practically reads as equivalent to "use of the objective test."

230. *Id.* Comment b.

ence to and belief in the purely subjective test was expressed in a decidedly affirmative way, as that best in keeping with the very nature of the bargain the parties had made for themselves.²³¹ They adhered to the subjective test alone because of a belief that it was fair whatever the consequences of a particular case and not because it was unavoidable under the circumstances.²³²

In trying to understand how this attitude might have changed, it is tempting to view the transformation as the courts' response to glaring examples of unfairness, particularly in the seminal cases of *Duplex* and *Hawkins*. A reading of the appellate opinions in those two cases makes such a conclusion an inviting one. But the decisions preceding the two landmark decisions²³³ and the records of the two cases on appeals²³⁴ make this far less certain. At the very least it could be said that they are not that different from other cases of the period which found no difficulty relying on the old rule. Nor was the situation in either of them, based on an examination of the records before the court, one that cried out for a fundamental reversal of the law to prevent gross injustice.²³⁵

To the extent that the new rule gained validity as a rule of substantive law in the New York mold, through *Duplex* following *Folliard* (which itself borrowed from the civil law),²³⁶ it is hard to see any consistent philosophy or rationale behind it. To the apparently greater extent that the preference for the objective standard was a result of the efforts of Williston making use of Holmes' groundwork in *Hawkins*,²³⁷ the rule is explained and justified in the simplest of terms. It is merely a matter of doing a good job in contract interpretation. No new wisdom is being propounded. An objective test is used because in the particular situation it is what the parties themselves had considered, understood and agreed upon.²³⁸

This type of rationale, that the law imposes nothing on the parties by applying an objective test but only gives them what they intended, is still prominent in the most recent edition of Williston²³⁹ as well as in

231. See notes 66-91 and accompanying text *supra*.

232. In particular, recall the language of the courts in *Silsby Mfg. Co. v. Town of Chico*, 24 F. 893 (C.C.D. Cal. 1885); *Brown v. Foster*, 113 Mass. 136 (1873) and *Singerly v. Thayer*, 108 Pa. 291, 2 A. 230 (1885) as discussed in text accompanying notes 73, 81 & 87 *supra*.

233. See, e.g., notes 66-91 and accompanying text *supra*.

234. See notes 96-100 & 135-39 and accompanying text *supra*.

235. *Id.*

236. 2 Johns. 395 (N.Y. 1807). See notes 108-10 and accompanying text *supra*.

237. 149 Mass. 284, 21 N.E. 312 (1889). See note 188 and accompanying text *supra*.

238. See text accompanying note 185 *supra*.

239. 5 WILLISTON, *supra* note 4, § 675A.

the Corbin treatise.²⁴⁰ It even serves as a justification for the subject matter distinction as that rule is usually expressed. Thus Corbin states:

When A promises to do certain work involving artistic taste or personal fancy "to B's personal satisfaction," it may be this state of mind that is B's chief object of desire, a fact that A has reason to know because it would be the chief object of desire on the part of men in general . . . According to standards of men in general B ought not to be compelled to pay without being personally satisfied.

Where the performance contracted for is one that involves operative fitness and mechanical utility rather than personal taste and fancy, the personal satisfaction of the promisor is much less likely to be regarded by the average man as his chief object of desire. There can be substantial performance in accordance with generally held opinion even though the promisor thinks otherwise. The extent and quality of the performance rendered can be measured by objective tests, scientific and mechanical in character, that have uniform application for all persons alike. In these cases, the fact that A promises expressly

240. 3A CORBIN, *supra* note 4, § 646. Corbin, in fact, uses the example of a case involving such a condition to illustrate the distinction he makes between what he calls interpretation and construction. *Id.* § 534, at 13-15. In an earlier article, he had adopted without criticism both the objective test and the subject matter distinction. Unlike the treatise, however, which emphasized the probable meaning the parties intended for the language (see text accompanying note 241 *infra*) the article stressed the concerns of so-called forfeiture and enrichment:

The decision will depend in part on whether the plaintiff will suffer a heavy loss or the defendant receive unjust enrichment in case personal satisfaction is held to be a condition. An increasing liberality is to be noted in allowing a quasi-contractual recovery by a plaintiff in default, but this is available only where the defendant has received value and not where the plaintiff will merely suffer a heavy loss. In a sale of goods upon a contract that the goods may be returned if not satisfactory to the buyer, personal satisfaction is clearly a condition if the article is one involving personal taste. It is also usually held that if the contract makes the buyer the sole judge he may return the articles even if they do not involve strictly a matter of personal taste, at least in all cases where he can place the seller in *statu quo*. When the consideration furnished is of such a nature that its value will be largely or wholly lost to the one furnishing it unless paid for, and it is not a matter that ordinarily involves merely personal taste, the courts are strongly inclined to hold that the satisfaction of a reasonable man is the only condition. But if the plaintiff's work and material are to result in something involving personal taste or comfort the genuine dissatisfaction of the promisor will defeat a recovery.

Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739, 762-63 (1919), reprinted in AALS, *SELECTED READINGS IN THE LAW OF CONTRACTS*, 871, 892 (1931) (footnotes omitted).

to complete the performance entirely to B's satisfaction is not enough to make B's personal satisfaction a condition of his duty to pay. A renders substantial performance, and B will be compelled to pay, if application of the objective tests shows that reasonable men would be satisfied and that B has received substantially what he bargained for.²⁴¹

Corbin's assumption, in the second paragraph, about human nature, that when parties are dealing in a contract with things measurable by objective standards they probably intended these standards to be applied, raises serious questions. If this is indeed the case, why did the parties include the satisfaction clause to begin with? If Corbin's B is compelled to pay when he "has received substantially what he bargained for," what is the clause other than a meaningless appendage to an otherwise perfectly complete and acceptable agreement? It is at least arguable that a contract dealing with such things as are traditionally thought to be subject to easy evaluation under objective type tests is *just* the contract where we should be most hesitant to assume the parties did not intend honest judgment of satisfaction alone to govern. Why would they have adopted the very unusual, untraditional satisfaction clause for their agreement if they intended B's obligation to come about upon substantial performance "in accordance with generally held opinion?" That is the same result they would have had if they had not included the satisfaction clause and left themselves to be governed by the usual doctrines of substantial performance, merchantability, and so forth.²⁴²

It may be that in many contracts a condition of satisfaction means little in actuality — it may be mere boilerplate language or meant by both parties only as some nebulous promise of superior quality. But should we presume this to be so? This question itself leads to two others. First, is it not possible that the parties included such a clause so that B can be assured of a performance beyond that which generally constitutes substantial performance in like circumstances, but that he never expected the agreement to go to the point where his unfettered

241. 3A CORBIN *supra* note 4, § 646, at 93-94. See also 5 WILLISTON, *supra* note 4, § 675A, at 206.

242. A good illustration of this point is the case of a contract for the sale of land where the vendor promises to provide "title satisfactory to the purchaser." Questions of what title a reasonable buyer would or must take are normally dealt with under the rubric of marketable title. See, e.g., *Cumming v. Dixon*, 265 S.W.2d 386 (Mo. 1954). Corbin's rationale might lead us to conclude that since the parties know such a "uniform objective" test existed, they must have intended to apply it to their case. But why did they add the very unconvventional satisfaction language when all they intended was the very traditional marketability result which they would have had without such language? Perhaps this accounts for the fact that the cases are evenly split on this particular question with no indication of a consensus forming. See Annot., 47 A.L.R.2d 455 (1956).

opinion, albeit honestly held, would totally control? B may have, in effect, bargained for a performance to meet his particular standards of perfection, quite above that which the reasonable person (even the reasonable person in B's position) would ask for or even notice. Some standard quite apart from either mere honesty or full-fledged reasonableness may have been what was intended.²⁴³

A second question that might be asked is, if such a clause is viewed as mere boilerplate or fuzzy language, whose boilerplate or fuzzy language is it? Virtually all of the writers on the subject avoid any discussion of how and by whom the satisfaction language was first introduced into the relationship. Instead, they rely on the fiction that the language was arrived at by both parties acting together in some kind of joint drafting exercise. Those writers who do deal with this aspect of the problem appear, if anything, to offer us an image of the party in B's position, the conditional obligor, being the one who forced the language on the unwitting A and is now more than willing to selfishly take advantage of it. This is the tone taken by a comment to the Restatement Second, which after noting the "selfish interests" of the obligor, concludes that if he "would subject the obligee's right to compensation to his own idiosyncrasies, he must use clear language."²⁴⁴ I can well understand the drafters' concern for the interests of A in this situation. We could not be very happy forcing on him a bargain that he did not think he had made. But I submit the problem comes out looking very different if we consider B's position. It might be better to state that if the obligee, A, would subject the obligor, B, to the duty to pay for something with which he is not truly satisfied, then A must use clear language or in some other manner let B know that in this in-

243. B might even wish to bargain for very "objective" sounding results which no reasonable man would care about but which are still capable of determination with mathematical precision. Suppose, for example, he contracts to have a pin stripe suit made to order and to his satisfaction and makes it clear to A that this satisfaction clause is required because he is only satisfied with such suits when they have an even number of stripes running down each leg. If this is not the result he should not have to accept the suit, however unreasonable this may seem. If however, he finds himself dissatisfied, even honestly dissatisfied, with the suit because he has changed his beliefs and now wants only odd numbers surrounding him, we might feel this should not justify his rejecting the suit. The point is that many demands of individual taste, fancy or whim can be expressed in perfectly concrete measurable terms. If these are clearly understood by both parties, presumably that measure, which is neither a general "reasonable person" standard nor a totally subjective one, should apply.

244. RESTATEMENT (SECOND), *supra* note 4, § 228, Comment b. Remember that according to comment a to the same section, the terms "satisfaction" and "complete satisfaction" are definitely not clear enough for this purpose. *Id.* Comment a. So A is happy, B is not. Whatever we may think of this crass, pushy (idiosyncratic!) character B, I'd hate to think where the law of contracts would be today without one person being willing to advance his own "selfish interests" over those of another.

stance the word "satisfaction" means something other than the usual meaning of the word B probably learned at a tender age.

The Restatement Second's bias against the obligor reflects, consciously or not, the presumption that the obligor, since it is he who may take advantage of the clause, must have originally introduced it into the agreement. But this presumption may not ring true if we recall all those late night television advertisements offering everything from vegetable slicers to collections of favorite Christmas melodies, each trumpeting the fact that we need pay "only if fully satisfied." Even in the full light of day, perfectly reputable manufacturers may go out of their way to advertise "Satisfaction Guaranteed" for the very purpose of inducing people, who might not otherwise do so, to deal with them. Imagine how you would feel if you tried to return the vegetable slicer, but were unsuccessful because it was a mechanical device which had been highly praised by every other buyer, all reasonable people.²⁴⁵ By focusing for the moment on the instance of the slicing and dicing machine, I do not mean to minimize the seriousness of this point. In many of the cases considered thus far, it might be reasonably assumed without knowing more, that the satisfaction clause was offered initially by the seller of the goods or services involved with the clear purpose, and perfectly honorable purpose, of attracting a dubious customer. Certainly this would appear true in the portrait painting type of case. What is more surprising is that our examination of the available records in *Duplex*²⁴⁶ and *Hawkins*²⁴⁷ makes it seem likely in those cases as well.²⁴⁸

245. It's after making a statement such as this that an author is tempted simply to rest his case. If you ever do run into this problem you might get some help from the fact that contracts for the sale of goods are usually placed in the personal taste and fancy category no matter what the actual nature of the goods involved. See note 208 *supra*.

The fact that few of the reported cases actually deal with the classic consumer context, in which we seem to see "Satisfaction Guaranteed" language so often, may be an indication of how rarely consumers are dissatisfied in our society. More likely it is a reflection of the expense of bringing even the simplest law suit. It was recently reported that the Federal Trade Commission had undertaken an investigation of the "Satisfaction Guaranteed" claims made by the nation's largest retailers, including Sears Roebuck & Co., the F.W. Woolworth Company, Montgomery Ward & Co. and Korvettes. N.Y. Times, July 31, 1980, §D, at 4, col. 1.

246. See notes 92-126 and accompanying text *supra* for discussion of *Duplex*.

247. See notes 127-68 and accompanying text *supra*.

248. Recall that in *Duplex*, testimony given by both sides indicated that the building owners had been sufficiently dissatisfied with the boilers to want them removed. However, a repair agreement had been entered into in order to preserve the reputation of the boiler company's products. See text accompanying notes 96 & 97 *supra*. In *Hawkins*, the defendant's brief claimed that the heating system to be installed was "purely experimental," thereby suggesting that he was induced to try it because of the protection offered him by the satisfaction clause. See note 135 and accompanying text *supra*. The language of the contract in *Hawkins* was that drafted by the plaintiff-seller for his offer. 149 Mass.

To be sure, all authorities, including Corbin, agree that the obligor "by apt and convincing language" may make honest dissatisfaction and nothing more the rule of the contract.²⁴⁹ A Restatement Second comment states that this will result when "the agreement leaves no doubt that it is only honest satisfaction that is meant and no more."²⁵⁰ The illustrations to this section suggest that the distinction is between language like "satisfactory to the buyer," which will not do the trick, and "satisfactory in the buyer's honest judgment," which will.²⁵¹ Is this the type of distinction which we can reasonably expect a typical buyer to be aware of? It is difficult to imagine that even the most alert purchaser would realize he should bargain for a change in the language if he is to get the protection he expects, particularly where the "Pay No Money If Not Completely Satisfied" style of provision has been offered by a seller to induce the sale.

What these questions demonstrate is that the use of, and preference for, the objective test cannot be justified as simply a result of the process of interpretation applied neutrally. Something more is obviously going on here. Some policy consideration, explicit or otherwise, is behind many of the decisions and the rule as generally articulated. This concern is generally and loosely termed forfeiture. The possibility that one party may have performed all or substantially all of what he at least believed he was to do and yet receive not a penny in return gives strong impetus to a court to avoid such a result if it can. Often the problem of so-called forfeiture is seen in tandem with what will be termed unjust enrichment or simply enrichment of the other party, though this need not always be so. A portrait painter, for example, whose work does not satisfy and hence is not accepted, may be thought to suffer a forfeiture if the portrait has not even scrap value. He has even lost the value of the materials used. But there is no enrichment of the other party. If the same painter had completed a mural applied directly to the wall in the other party's home but received no compensation, we might wish to say that the other party has been enriched, at

at 285-86, 1 N.E. at 312. See text accompanying note 130 *supra* for the language of the agreement.

249. 3A Corbin, *supra* note 4, § 646, at 94. See also note 241 *supra*.

250. RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a.

251. *Id.* Illustration 1, based on *Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co.*, 202 F.2d 372, 376 (5th Cir. 1953). However, my reading of *Ard* suggests that the result rests on a number of factors and not particularly on the "clear" meaning of the language as the Comment states. The court neither discusses the language in particular nor contrasts it with any other phrase. See also RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a, Illustration 2, based on *Devoine Co. v. International Co.*, 151 Md. 690, 136 A. 37 (1927). The terms "satisfaction" and "complete satisfaction" are definitely not clear enough in the eyes of the drafters. See RESTATEMENT (SECOND), *supra* note 4, § 228, Comment a.

least if the mural has increased the market value of the home. Of course, we should also consider that the homeowner may not feel himself enriched by a mural with which he is truly dissatisfied adorning his wall. He may only be waiting until he can afford a new paint job to cover up the offending work. Worse yet, there may be times when it will be difficult or impossible to cover up or remove the personally unsatisfactory performance.²⁵²

The consideration of forfeiture is handled in diverse ways. For most of the early writers, it was explained as a factor to consider in the interpretation process, representing no new or distinct understanding about how such contracts should be enforced. It was only a recognition that the parties themselves would surely have had such a problem in mind and that our judgment as to their intent should take this into account.²⁵³ A comment to the Restatement Second also suggests that the importance of forfeiture is how it influences the court's determination of the parties' own use of the satisfaction language. "When, as is often the case, the preferred interpretation will reduce the obligee's risk of forfeiture, so that § 227(1) applies, there is additional argument in its favor."²⁵⁴ Section 227(1) sets forth, as a general preference, the interpretation of language that will reduce the obligee's risk of forfeiture.²⁵⁵

One problem with such statements is that the reasoning given appears to run counter to the traditional subject matter distinction, at least as usually articulated. Things produced to order and valued according to an individual's taste or fancy are the kinds of products which once rejected are most likely to be valueless in the hands of the producer. Who would pay much for a portrait of someone else's spouse or clothing made to suit another's peculiar tastes? The seller is more likely to suffer a large loss on these items than he would on more mechanical items or those normally valued by standards of the trade. For example, if a piece of farm equipment which can be demonstrated to meet the needs of a reasonable buyer is involved, why not say that our particular unsatisfied buyer need not accept the equipment? The dealer can simply find a reasonable farmer to sell it to at a reasonable price. The seller might lose the higher profit he was expecting to receive from the first contract, but this extra profit presumably was to come to him because of his unusual promise to leave the buyer satisfied. When he fails and sells to another, he may not come out as well as

252. Consider: Do you think of yourself as "enriched" by a free haircut that turns out not to your liking?

253. See, e.g., Holmes' language in *Hawkins v. Graham*, 149 Mass. at 288-89, 21 N.E. at 313, quoted in text accompanying note 147 *supra*.

254. RESTATEMENT (SECOND), *supra* note 4, § 228, Comment b.

255. *Id.* § 227(1).

he wished, but the result is nothing like a forfeiture. Accordingly, the possibility of great loss with no offsetting compensation is greater for the seller in contracts for merchandise appealing to highly personal taste or fancy. Yet it is in just these cases that all agree the objective test is not to be applied.

What we can see is that the concern for forfeiture may begin to explain the rather crazy-quilt pattern of actual cases purporting to apply the subject matter distinction. As noted before, contracts for sale of goods and employment contracts tended to be classed as those of personal taste and fancy whatever the nature of the goods or the work to be done.²⁵⁶ Perhaps the truth of the matter is that they are so classified, and hence made subject only to the test of honest satisfaction, because in most cases the courts, by allowing the buyer or employer to avoid any obligation, is not creating what could be construed as a forfeiture. Most often, the seller still has the goods on hand which usually can be sold again. The employee has lost only his employment for the future. But that is no worse than if he had been under the more typical kind of employment agreement. In fact, those employment contracts where an objective standard is applied are usually those in which the employee has already performed substantial work for which he has yet to be compensated.²⁵⁷ On the other hand, as seen earlier, construction contracts are almost always accorded the objective standard.²⁵⁸ This did not make much sense when one considered how subject to personal taste, fancy and even whim, elements of construction can be. It begins to become clearer, however, when we concentrate on the fact that in construction contracts the possibility for a so-called forfeiture and unjust enrichment are most prominent.²⁵⁹

256. See notes 207-208 *supra*.

257. See, e.g., *J.K. Seear (U.S.A.) Ltd. v. C.O. Jones & Sons Ins. Agency*, 364 S.W.2d 640 (Mo. App. 1963); *Breslow v. Gotham Securities*, 77 Misc. 2d 721, 354 N.Y.S.2d 550 (Civ. Ct. 1974).

258. See note 212 *supra*.

259. In viewing a claim of forfeiture or unjust enrichment, we should consider how the party complaining of unfairness got into the situation in the first place. In *Capp Homes v. Duarte*, 617 F.2d 900 (1st Cir. 1980), the defendants contracted to have a "shell" of a house built upon a foundation they provided. The contractor's brochure stated "*YOU MUST BE SATISFIED*" and Mrs. Duarte testified that she understood one of the contractor's representatives as personally assuring them that they would not have to pay for the home (beyond a modest down payment) until they were "100 per cent" satisfied with it. *Id.* at 902. The trial resulted in a judgment for the contractor with what appears to be a substantial set-off for defects in favor of the defendants. While the court of appeals (in a very unclear and confusing opinion) reversed and ordered a new trial, it accepted, at one point, the contractor's contention "that easily correctable defects consistent with substantial performance would be insufficient to justify customer dissatisfaction." *Id.* This decision, in effect adopting an objective test, does not, according to the court make the "claim of dissatisfaction . . . become meaningless," whatever that may mean. *Id.*

More recent writers, reviewing such cases, have concluded that the courts' desire to avoid as a matter of policy, what they see as forfeiture is the real motivation behind the decisions, even if they are expressed in terms of the neutral objective of interpretation. At the same time, growing dissatisfaction with such rationalization can be seen. Thus, in the most recent edition of their treatise, Professors Calamari and Perillo state:

The court's tendency to remake the contract for the parties in cases involving mechanical fitness, utility or marketability can be criticized on the ground that under the guise of interpretation the courts ignore the manifest intention of the parties. In many of the cases such interference with freedom of contract may be justified on the ground that literal compliance with the contract would unjustly enrich the person who received the performance and would be unduly harsh on the person who rendered the performance. If this is the basis of the decisions, it is submitted that forthright recognition should be given to this underlying rationale and a distinction drawn between cases involving unjust enrichment and forfeiture on the one-hand, and cases in which these elements are not present on the other.²⁶⁰

The suggestion that forthright recognition be given to the nature of the question the court is being asked to decide is undoubtedly a wise and welcome one. Unfortunately, the problem cannot really be resolved by invocation of the terms "forfeiture" and "enrichment" alone. They serve merely to rephrase the question rather than make it any easier to answer. Certainly, in recent years there has been a growing sensitivity to forfeiture.²⁶¹ But how are we to judge in a particular situation

At a later point the court seems to put weight on the possible forfeiture aspect of the contract. It finds "some justification" in the contractor's contention "that a representation or agreement that a buyer need pay nothing for a house built on his property if he is dissatisfied with it is not comparable to such an agreement with respect to returnable personality." *Id.* at 903. But if the contractor cannot get back part of his work, whose fault is it? Consider the following from the court's statement of facts:

[A]lthough Capp considered that it had properly completed its undertaking except for a few minor corrections, the Duartes, who during the construction and since have continually claimed dissatisfaction, refused to pay. Their dissatisfaction reached the point that at one stage of the construction they asked that the work be abandoned and the project taken back. Their request was rejected.

Id. What could this last sentence possibly mean? In any construction contract, the builder has no right to continue building nor to run up damages after he has been told to halt construction.

260. CALAMARI & PERILLO, *supra* note 7, § 11-18, at 403.

261. *Id.* § 11-40, at 454; MURRAY, *supra* note 7, § 152, at 297, RESTATEMENT (SECOND),

whether the result when dissatisfaction is claimed is an unwarranted "forfeiture" or instead a perfectly appropriate and foreseeable outcome of the contract working itself to one of its several possible natural conclusions? The term "forfeiture" is often used too loosely to encompass all cases where one party has put a good deal of time and effort into an agreement and stands to receive nothing in return. But it should more accurately be limited to only those instances where the risk of this happening cannot fairly be said, by whatever measure we choose to judge such things, to have been placed upon the producer. Once a party has agreed to be paid only if he satisfies another, it is difficult to argue that he has not taken upon himself the risk that after much effort he may come up empty-handed. This seems easy to recognize in many instances. An example is the unknown painter, who is able to secure a commission only by making such a deal. The artist has taken a great risk, but it can be appreciated why he would do so. That it is difficult to extend this notion to other situations may only be a measure of our narrow minds and the narrow range of our experience.²⁶² Granted, a supplier of farm machinery may not be expected to take such a risk. But then it would not be expected of him, in the normal course of things, to agree to receive payment only if he satisfied either.

The Calamari and Perillo suggestion to focus directly on the question of which risks are properly placed on each party is a reminder that we are living in a world of particular people and particular bargains, not of classes of contracts of abstract and meaningless description. But it does not really assist in deciding any individual case. What seems like forfeiture when viewed from one party's point of view can seem like simple justice from the other's. There is a similar problem with the notion of "enrichment" in such a context. Normally, enrichment is thought of as being present when one party has received something of value, meaning that the average man in the street would be willing to pay for it. But in this instance the party who has received something

supra note 4, § 229.

262. The concern about a too casual use of the term "forfeiture" in this situation is not new. Judge Learned Hand addressed the problem in *Thompson-Starrett Co. v. La Belle Iron Works*, 17 F.2d 536 (2d Cir. 1927), stating:

That the case is a hard one goes without saying. The plaintiff is defeated in a large recovery by what was apparently the obstinacy and prejudice of the company's superintendant—we speak from the opinion. But it is a misnomer to call this a forfeiture, as the brief repeats on almost every page. The promisee of a conditional promise always runs the chance of losing what he has done, if he fails to fulfill the condition, and when he puts his labor on the promisor's land, the promisor will be the gainer. There is no injustice in that, if he has agreed to bring to pass the condition. It is quite true that we must not read such contracts narrowly, for they are severe; but, once understood, it is as prime a consideration as in any other case that the parties should be confined to their bargain.

Id. at 543.

can argue with some force that he specifically took himself out of the average run of affairs and is not to be judged by them. The notion of enrichment, like that of forfeiture, seems to stand on a base of ordinary "reasonable" expectations and bargains. Once outside that particular realm, it is difficult to see how such terms can offer in themselves a solution to the problems presented.

Professor Murray's treatise contains virtually no reference to the traditional doctrine in the area, and instead quickly launches into his own analysis, stating:

For many years the abhorrence of forfeitures could be seen in the results if not the rationales of many courts dealing with conditions of personal satisfaction. . . . Courts may feel compelled to circumvent the literal application of a personal satisfaction provision because of tension between freedom of contract and the traditional abhorrence of forfeiture. If the personal taste —mechanical fitness distinction is not used, some courts will simply substitute a reasonableness test while others may even resort to that ultimate ambiguity which is used to cover a multitude of analytical failures: "waiver." In this fashion, the impasse of the clear language of condition of personal satisfaction which cannot be directly attacked (since the judgment of the obligor has been apparently exercised honestly, albeit unreasonably) is avoided.²⁶³

He proceeds to offer a hypothetical similar in many respects to one suggested at the beginning of this article of a housepainter who has contracted to paint a house to the satisfaction of the owner.²⁶⁴ We questioned what should be the result if the homeowner were truly dissatisfied, because of an especially fine eye for color or a particularly fussy nature, with work with which most everyone else would be satisfied.²⁶⁵ Murray's example is of a retired carpenter who inserts a clear condition of personal satisfaction into a contract for the construction of a house in which he will reside.²⁶⁶ The house is built to existing standards of carpentry workmanship, but is not pleasing to the carpenter, who sees it as "sloppy" to his trained eye. Murray continues:

Should the obligor receive the benefit without payment? There is no reason to suspect the obligor's honest dissatisfaction though it is established he is unreasonable in his judgment, at

263. MURRAY, *supra* note 7, § 152, at 297-98. He concludes his section on the subject by saying, "it would be helpful if courts would confront the problem and attempt to analyze it rather than paying lip service to the literal rule only to abandon it through the use of covert tools." *Id.* at 300.

264. See text accompanying notes 36-38 *supra*.

265. See text accompanying note 38 *supra*.

266. MURRAY, *supra* note 7, § 152, at 298-99.

least according to current generally accepted standards of reasonable carpentry. Yet, the builder knew he was constructing a house for a retired carpenter who, himself, had performed carpentry in many similar buildings. The builder also knew that he was assuming the risk that the building would meet the personal satisfaction of the obligor — not simply any obligor — but an obligor with a trained eye for carpentry. To suggest that the builder may recover the contract price, *i.e.*, that the condition of personal satisfaction will be excused, is to judicially subtract that risk from the contract which the parties clearly formed. There seems little warrant for doing this kind of violence to the already circumscribed concept of “freedom of contract.”²⁶⁷

He suggests an analysis based on what he refers to as the materiality of the condition “under the circumstances” but which really focuses on the materiality of the *failure* of the condition.²⁶⁸ Is this to be judged from the point of view of the person to be satisfied, the other (performing) party, or some hypothetical third party stance? Murray concludes, by analogy to a section of the Uniform Commercial Code,²⁶⁹ that the question should be addressed from the subjective position of the conditional obligor. “[T]he test might be: Is the value of the performance substantially impaired to the obligor? If the answer is yes, the performance is materially deficient ‘to him’ and may be rejected notwith-

267. *Id.*

268. The two concepts are not identical. The question of materiality of a condition is one which could be answered at the time of contracting, while the materiality of the extent to which a condition has not been met becomes a matter of concern only after the fact. So, for instance, the classic case of a material condition is that of the payment of premiums on an insurance contract conditioning the insurance company's liability. But if the premiums due had been \$500 and only \$499 had been paid, we might want to say that while the condition was and always had been material, the failure of the condition in this instance was not. *See, e.g., Jacob & Youngs v. Kent*, 129 N.E. 889, 230 N.Y. 230 (1921).

As Murray correctly points out, not all conditions of personal satisfaction are material. MURRAY, *supra* note 7, § 152, at 299. For example, if a contract called for a portrait to be painted “satisfactory to the buyer” and also called for “satisfactory notice” of the painting's completion, satisfactory completion of the work would be a material condition to the buyer's obligation to pay for it. His own satisfaction about the notice of its completion, however, might not be material. If a condition of personal satisfaction is clearly not material, then it could more easily be excused for one reason or another, possibly even for what the Restatement Second calls “extreme forfeiture.” RESTATEMENT (SECOND), *supra* note 4, § 229. But in most of the cases discussed, the condition is clearly material, and the question should then become in Murray's mind whether the failure of such a condition should be called material in the particular instance.

269. The analogy he draws is to that section of the Code dealing with the right of a buyer of goods to revoke an acceptance. U.C.C. § 2-608.

standing forfeiture to the obligee."²⁷⁰ The meaning of this test is unclear. What does it mean to assert that a performance is "substantially impaired" as to a particular individual? Is this impairment to be measured on some financial "value" basis? If so, perhaps all Murray's test does is emphasize that the judgment is to be that of a reasonable person "in the obligor's position." This is only the objective test most fully expressed. Or may it be said that the worth of a performance is "substantially impaired" for a person when he expected it to be something which he would like and which he does not? This is certainly a fair statement, but if so, this rule reduces itself to nothing more than the subjective test.

Especially if given the latter reading, Professor Murray's suggestion may also be questioned for being, at least as articulated, too solicitous of the conditional obligor's position. It focuses exclusively on what is in his mind and does not consider what the other party does know, could know, or should know about what is expected of him. Earlier, I criticized the Restatement Second for appearing to show too great a concern for the needs of the nonjudging party to be fully informed and acquiescent to the situation.²⁷¹ Murray's rule simply stated seems to go too far in the other direction. Implicitly, I believe, he realizes this. In his discussion of the house built for the very meticulous carpenter given above, he emphasizes the fact that the builder *knew* he was performing for a retired carpenter with a "trained eye" for such work.²⁷²

VII. CONCLUSION

Setting the question in terms of forfeiture, enrichment or materiality is ultimately unsuccessful because such concepts gain their usefulness by drawing on our beliefs about what typical people would want or expect in typical situations. When applying these doctrines we are always careful, at least in theory, to enunciate their results as subject to revision if it can be shown that the particular parties before the court had themselves entered into a different agreement. Such doctrines operate, in the words of Cardozo, in *Jacob & Youngs, Inc. v. Kent*, "in the silence of the parties."²⁷³ In the situations we have been discussing the parties have not been silent, although they may have been cryptic. The traditional rules, as exemplified by the Restatement Second section, acknowledge that the individualized bargain of the parties is the matter of concern. But these rules prove troublesome because they act on the fundamental assumption which underlies all we do in the name of interpretation — that the parties did have at the

270. MURRAY, *supra* note 7, § 152, at 299.

271. See text accompanying note 244 *supra*.

272. See quotation at note 267 *supra*.

273. 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921).

time of contracting a single common understanding of the meaning to be given to the contested term. The problem presumed by traditional rules is to establish what that common understanding was.

It is submitted that a more realistic and helpful assumption would be that each party, himself, had some understanding of what the term was meant to accomplish but that their understandings did not necessarily coincide. The question then becomes an example of the general problem which must be confronted when there is an actual or claimed misunderstanding of the parties as to the meaning of a material term of the contract.²⁷⁴ If a misunderstanding is shown to have existed at the time of contracting, is there a good reason to hold one of the parties bound to a contract as understood by the other? The reasons which the law allows as being "good" in this situation center around the actual knowledge each party had at the time and that information which he had a "reason to know."²⁷⁵

I would begin with the proposition that both parties know or have reason to know that the conditional promisor may believe that his personal dissatisfaction, honestly arrived at, will relieve him of his duty to perform. The basis for this position is simply the literal reading of the clause with nothing more. Thus, the honesty test alone would be that generally used unless the other, performing party could establish that a different test should be applied. He could do this by proving (1) that at the time of contracting he actually had a different belief, that is, he thought some test other than actual satisfaction was to be used to determine whether the condition had been fulfilled, and (2) that the conditional promisor knew or had reason to know at the time of contracting that this was the other's belief. This rule might result in a decrease in the number of instances in which the objective test is relied upon, but this should not be troubling to us. For one thing, I believe that the subjective test has a greater practical effect (more "teeth" if you will) than might initially be imagined. Beyond this, if in any instance we are not allowing the one party to hold the other judging party to a duty to make a "reasonable determination," it is for a justifiable reason. Either he cannot convince us that at the time of contracting he had in his own mind some test other than honesty, in which case his insistence on an objective test now is an attempt to change the contract after the fact, or he has not been able to demonstrate that the other party knew or had reason to know the different criteria he had in mind. To the extent that this party is now trying to impose upon the other a meaning of the clause at odds with the literal meaning, should

274. See RESTATEMENT (SECOND), *supra* note 4, §§ 20, 201. If the condition of personal satisfaction is not a material term, of course, then it may appropriately be dealt with differently or excused. See note 268 *supra*.

275. RESTATEMENT (SECOND), *supra* note 4, § 20, Comment b.

he not take the burden of establishing this deviant meaning as that which was understood, or should reasonably have been understood, by the other party at the time of bargaining? In effect the rule serves to protect the expectations, provided they are reasonable, of the party who has entered into an agreement under which his "satisfaction" was to determine his obligations.

Note that this proposed rule, in placing upon the nonjudging party the burden of establishing agreement to "some test other than actual satisfaction," acknowledges that this party may wish to, and be able to, establish some standard or measure of fulfillment which is neither the subjective test nor the objective test but something distinct from them both. In our earlier hypothetical about the housepainter agreeing to paint the exterior of a house to the homeowner's satisfaction,²⁷⁶ the painter may be able to establish that the clause should have been understood by both parties to require the owner's honest satisfaction with the quality of workmanship and not the exact color the house was painted. A different test would be workmanship to the general standard of performance normally applicable to interior workmanship, presumably to be a finer quality than and not generally that sought for exteriors. Still different would be a quality of painting "as good as can be done." Any of these possibilities would create its own problems of proof, but the party who is arguing this to have been his understanding of the applicable criterion, and trying to hold the other party to that criterion, would presumably have been aware of this risk at the time he undertook the job. If nothing else, we would expect that the risk was taken into account when the price was set.

What would be "reason to know" in such a case? It would take into account anything of relevance, especially any preliminary communications between the parties.²⁷⁷ In particular, we could consider whether one party had reason to know that the other meant something beyond the literal meaning of the words by virtue of the potential risk he could have foreseen the other might be undertaking of not being paid a penny for a substantial amount of work. Could he reasonably believe the performing party meant to take such a risk? For example, in a construction contract the person for whom the building was being done (to specification and to satisfaction) might have reason to know that the contractor was not willing to risk all on the basis of that one

276. See notes 36-38 and accompanying text *supra*.

277. I have suggested that the traditionally applied rules do not give sufficient attention to this factual background, if for no other reason than the great part played by the subject matter distinction. The more recent proposals concentrating on questions of forfeiture, enrichment or materiality of breach, at least in theory look to the results of the contract relationship after the fact and not at the time of contracting. That such discussions often end up referring to what the parties knew or discussed at the earlier date demonstrates to me the difficulty with using these concepts to analyze the problem.

short satisfaction clause. But then what was the clause to mean? Here is where I find it best to put the burden on the contractor to come forward with *exactly what* he believed the parties agreed to by its inclusion. If it was not the test of honesty and good faith dealing alone, then what was it? And on what basis can he hold the other party to this meaning? In particular, if he claims the clause is to be read as requiring only an objective test similar to the traditional measure of substantial performance, thus effectively robbing the clause of any significant effect, he should be able to show that the purchasing party knew or had reason to know that this was what he was signing.

The proposed rule is also particularly effective in that it implicitly takes into account by whom and how the satisfaction clause was introduced into the contract relationship. If a purchasing party first suggests the clause, for example, by agreeing to take an item "only if I'm satisfied with it," it may be quite possible for the seller to establish that by agreeing to this further condition he only meant to warrant that the item would meet the particular standards or expectations the purchaser had outlined during the course of negotiations as being of special concern to him, and furthermore that the purchaser should have been aware of this as the seller's understanding. At the same time, the proposed analysis provides maximum protection to the average consumer lured into a purchase by a general proclamation of "Satisfaction Guaranteed."

The reasonable person first made his way into the law of contract as the clumsy metaphor for a fundamental principle of how it would deal with problems inherent in communication.²⁷⁸ He stands for the proposition not that each of us is to look out for his fellows as a part of the bargaining process, but that we must, in bargaining, take the risks of our own "unreasonable" use of language, signs and gestures, "unreasonable" meaning a use of such signs which is far from the community norm. We do so not because of concern for others, but in recognition of the fact that our chance of gain by entering into the marketplace carries with it attendant responsibilities. But these are responsibilities to ourselves; if we fail to make our own special wants or needs — our idiosyncracies — clear, we suffer the consequences. It is well to remember this. The law has no way of knowing what would, could or should satisfy the reasonable person. It has no business deciding what "ought to satisfy" anybody. It is quite another thing for the law to say that each of us "ought to" make clear what we expect out of the bargaining process and take the consequences of the failure to do so. It is this and nothing more that the proposed rule seeks to accomplish.

278. See note 28 *supra*.

