1. The Common Law and Statutory Law

Introduction

"Common Law" is frequently characterized as "judge-made law." It is the law of precedent, created through a process of constant evolution as courts interpret and apply previous judicial decisions. While it is true that, as many people insist, judges do not make laws (lower case "l") but legislatures do, judges do shape society's legal fabric – its Law (upper case "L") – through this interpretive process.

"Statutory Law" is the law of "statutes" or what we commonly refer to simply as "laws," created by legislative bodies such as Congress, state legislative counterparts of Congress, or other such bodies. Unlike Common Law, Statutory Law is a product of attempts to take a broad view and, usually, to make major adjustments to the Law. Common Law is built in a more piece-by-piece fashion, one brick at a time, by practitioners who are not concerned with the big picture, but rather with the case at hand.

The U.S. Federal Court system is essentially a three-tiered system, resembling a pyramid. At the lowest level are the District Courts, scattered all over the country. There are currently ninety-four federal District Courts. Each state has at least one, as do the District of Columbia and Puerto Rico. Three Territories of the United States also have Federal District Courts – Puerto Rico, Guam, and the Northern Mariana Islands. The District Courts are usually the starting point for litigation or prosecution if federal courts have jurisdiction over a case (which will be discussed in Chapter 15).

The middle level of the U.S. judicial pyramid consists of the Circuit Courts of Appeals. There are eleven regional judicial Circuit Courts of Appeals, each encompassing several states (and in some cases a U.S. Territory), listed in Table 1, which hear appeals from the District Courts in those states and territories. There is also a Circuit Court of Appeals for the District of Columbia, as well as a Federal Circuit Court of Appeals, which hears appeals on specific issues such as those involving patent, trademark, and copyright matters. Cases brought before the Circuit Courts of Appeals are typically heard by a panel of three Circuit Court judges.

At the apex of the judicial pyramid sits the United States Supreme Court, comprised of nine Justices, which hears appeals it chooses to accept from the Circuit Courts of Appeals.

Most state judicial systems mirror the three-tiered federal model.

It is important to grasp the organizational structure of the court systems in order to understand how the Common Law's precedent-based model works. Judicial decisions by courts of equal stature in the hierarchy, or from different circuits, are not binding on

Table 1: The Regional Federal Judicial Circuits

First:	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second:	Connecticut, New York, Vermont
Third:	Delaware, New Jersey, Pennsylvania, Virgin Islands
Fourth:	Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth:	Louisiana, Mississippi, Texas
Sixth:	Michigan, Kentucky, Ohio, Tennessee
Seventh:	Illinois, Indiana, Wisconsin
Eighth:	Arizona, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth:	Alaska, Arizona, California, Guam, Hawaii, Idaho, Mariana Islands, Montana, Nevada, Oregon, Washington
Tenth:	Colorado, Kansas, New Mexico, Utah, Wyoming
Eleventh:	Alabama, Florida, Georgia

one another. In other words, if the Federal District Court for the Southern District of New York decides a case, and a case with very similar facts is later brought before the Federal District Court for the Eastern District of Pennsylvania, the Pennsylvania court is free to disagree with the outcome decided upon by the New York court. Even if the Second Circuit Court of Appeals has already affirmed the decision by the New York District Court, the Pennsylvania court may *still* decide otherwise because the Pennsylvania court is in the Third Circuit, not the Second.

However, if a district court is presented with a case in which the facts closely resemble those of a case previously decided by the Third Circuit Court of Appeals – in which the Pennsylvania court is located – the Pennsylvania District Court is *bound* by the appellate court's decision and must follow its lead and apply the same reasoning. Similarly, this notion of "binding precedent" applies to all courts in the judicial system – appellate as well as district courts – once the United States Supreme Court has ruled on a particular issue.

The attorneys for the parties in a common law case devote a great deal of time and effort to unearthing cases similar to the one before the court, which support their arguments and which might weaken the cases relied upon by the other party.

The idea of a generalized "theory" of common law dates from the second half of the eighteenth century, when recorded judicial opinions became broadly available. "Case-based" arguments and decisions could be possible only if previous decisions were available to both judges and attorneys. The hypothesis was that the same "scientific approach" could be applied to both physical and social phenomena: regularities could be found and patterns discovered, yielding predictability.

American common law differs from the common law of England, from which it is descended, in several ways. American legal professionals approached the creation of their legal system with the idea and belief that it should all somehow make sense. Thus, the American system is more rigid and tends to have more abstract, universal "rules."

Partially, this rigidity comes from the American practice of publishing *one* opinion, which is the official opinion, or "holding," of the court. (Although concurrences and dissents are commonly published along with the holding, their content is not binding on any other courts.) In England, every judge on the panel hearing a case writes a separate opinion, and all the opinions that agree with the majority result are considered authoritative; that is, they constitute the official opinion of the Court for the purposes of precedent. Change is therefore harder to achieve in American common law because

once the Court settles an issue, attorneys have fewer judicial points of view to use and interpret in framing subsequent arguments.

In the early part of the twentieth century, there was a general belief that a sharp line could be drawn between the courts and the legislatures. Legislatures, it was felt, made the laws and could change the rules, while courts primarily carried out those legislative "commands." This turned out to be an erroneous view of the way things worked.

Courts *interpret* statutes and thus often make statutes just another tool to be used in building the common law. Statutes, in fact, are often attempts by legislatures to curb some direction the courts seem to be taking. We will see many instances of such attempts later in this book. Nonetheless, it is true that courts are more tied down in making their decisions when the cause of action arises from a statutory, as opposed to common law source. With fairly explicit instructions from a legislative body, it is harder for a court to find a way to reach a decision it might believe to be the most reasonable and just in the circumstances.

The following two cases (presented in redacted form, meaning that they have been edited down to their relevant parts, as have all the cases in this book) illustrate the different ways in which courts approach analysis of (1) a common law matter (*Peevyhouse v. Garland Coal and Mining Company*) and (2) a statutory issue (*In re Phillip B.* and its continuation, *Guardianship of Phillip B.*). Reading judicial decisions can be daunting for a novice unfamiliar with the style of writing. It is important to remember that the cases are about real people, and it is helpful to try to picture those people and get a feel for what they are doing and the situation in which they find themselves. One should always ask, "Why are these people in court? No one wants to go to court. It is expensive, time consuming, and stressful. What is the story that brought the parties before a judge and jury?" In an attempt to clarify the story underlying the litigation, and to make the cases easier to understand, comments on the text of the cases have been indented and are in bold face.

The Common Law and Statutory Law: Case 1

Willie PEEVYHOUSE and Lucille Peevyhouse, Plaintiffs in Error, v.
GARLAND COAL & MINING COMPANY, Defendant in Error

No. 39588

Supreme Court of Oklahoma

382 P.2d 109; 1962 Okla. LEXIS 554

December 11, 1962

OPINION: JACKSON, Justice:

I. Facts

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, [. . .]

Willie and Lucille own a farm. It is at least 120 acres (it is hard to tell for sure from what we have in the decision), most of which, Willie says, is "in good grass." So, it is pasture land.

In 1951 Willie builds a home on the property.

[. . .] and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A 'strip-mining' operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts.

In 1954 a guy from Garland comes knocking at the screen door. He wants to propose a deal. Garland wants to strip-mine some sixty acres of Willie and Lucille's land for coal. Garland offers to pay Willie and Lucille some amount (unknown) for a five-year license to strip-mine the land.

In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

Garland also offers Willie and Lucille some amount of royalties on the coal produced, and promises specifically in writing to restore the land when the work is done (which we know will cost some $29,000 to perform).

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Note that the parties are not arguing about whether the contract was breached, only about the amount of damages.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the 'diminution in value' of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract – that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

Once the coal is removed, Garland refuses to do the restoration work, claiming the cost of restoring the land far outweighs the actual diminution in value of the land ($300). Garland feels that is all it should have to pay Willie and Lucille. What Garland is saying here is that the market value of the land in its restored state would only be $300 more than its market value in its unrestored state.

Willie & Lucille sue Garland. They want [almost as much as the] "cost of performance" ($25,000) as damages for breach of contract. Garland obviously wants damages to be only $300.

II. Procedural Story

The trial court (the lower, entry-level court in which the suit was initially brought) actually instructed the jury that it must return a verdict for the plaintiffs and should solely consider the amount of damages (i.e., breach of contract is admitted by the defendant, so only damages are at issue).

The jury awarded $5,000 to Willie and Lucille. Great discretion was given by the judge in instructions to the jury, telling them they were at liberty to consider the "diminution in value" of the land as well as the cost of "repair work" in determining damages.

Willie and Lucille were unsatisfied and so appealed. (They based their appeal on erroneous jury instructions, although this is not explicitly stated in the decision. You cannot just appeal because you are unhappy with the decision. There must be legal grounds for an appeal.)

Garland was also unsatisfied with the verdict and so cross-appealed (on the same grounds).

III. What Kind of Sources Does the Appeals Court Use?

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance 'limited, however, to the total difference in the market value before and after the work was performed'.

It appears that this precise question has not heretofore been presented to this court. In *Ardizonne v. Archer*, 72 Okl. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

So, the first thing the Court does is look at other cases with similar facts although it notes these *precise* facts have not arisen before.

Plaintiffs rely on *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the 'cost of performance' rule as-opposed to the 'value' rule. The result was to authorize a jury to give plaintiff damages in the amount of $ 60,000, where the real estate concerned would have been worth only $ 12,160, even if the work contracted for had been done.

It may be observed that *Groves v. John Wunder Co.*, supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon *Sandy Valley & E. R. Co. v. Hughes*, 175 Ky. 320, 194 S.W. 344; *Bigham v. Wabash-Pittsburg Terminal Ry. Co.*, 223 Pa. 106, 72 A. 318; and *Sweeney v. Lewis Const. Co.*, 66 Wash. 490, 119 P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the 'value' rule instead of the 'cost of performance' rule. Plaintiff points out that in the earliest of these cases (Bigham) the court cites as authority on the measure of damages an earlier Pennsylvania *tort* case,

and that the other two cases follow the first, with no explanation as to why a measure of damages ordinarily followed in cases sounding in tort should be used in contract cases. Nevertheless, it is of some significance that three out of four appellate courts have followed the diminution in value rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The Court looks at cases presented by both the plaintiffs and defendants in support of their positions. The Court "distinguishes" (i.e., points out why the precedent's facts differ from the facts in this case) *Groves v. John Wunder Co.*, the plaintiffs' chief case in support of their position, but approves of the defendant's cases.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, *Contracts*, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages 'if this is possible and does not involve *unreasonable economic waste*'; and that the diminution in value caused by the breach is the proper measure 'if construction and completion in accordance with the contract would involve *unreasonable economic waste*' (emphasis supplied). In an explanatory comment immediately following the text, the Restatement makes it clear that the 'economic waste' referred to consists of the destruction of a substantially completed building or other structure. Of course, no such destruction is involved in the case now before us.

On the other hand, in McCormick, *Damages*, Section 168, it is said with regard to building and construction contracts that 'in cases where the defect is one that can be repaired or cured without *undue expense*' the cost of performance is the proper measure of damages, but where 'the defect in material or construction is one that cannot be remedied without *an expenditure for reconstruction disproportionate to the end to be attained*' (emphasis supplied) the value rule should be followed. The same idea was expressed in *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

> The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

It thus appears that the prime consideration in the Restatement was 'economic waste'; and that the prime consideration in McCormick, *Damages*, and in *Jacob & Youngs, Inc. v. Kent*, *supra*, was the relationship between the expense involved and the 'end to be attained' – in other words, the 'relative economic benefit'.

In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the 'relative economic benefit' is a proper consideration here.

Then the Court looks at other cases, mentioned in the Restatement of Contracts (the American Law Institute's summary of the state of the law), finding a couple of cases 'on point' (i.e., having similar facts). It also takes a statute into consideration.

This is in accord with the recent case of *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that 'the defects are

remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained*' (emphasis supplied).

23 O.S.1961 §§ 96 and 97 provide as follows:

> § 96. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides.
>
> § 97. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered.

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the 'cost of performance' rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be 'unconscionable and grossly oppressive damages, contrary to substantial justice' within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the 'cost of performance' rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

[T]he obvious and well known rationale is that, insofar as they exceed the actual damages suffered, the stipulated damages amount to a penalty or forfeiture which the law does not favor.

The Court cites this statute, used mostly for tort cases (i.e., civil cases other than breach of contract), but says it is applicable to contracts too, and points out that the "cost of performance" measure would amount to a "penalty or forfeiture" against Garland since the amount would so grossly exceed the actual damages suffered.

Then comes the "holding," the official statement by the Court of what it has decided. Note how the Court "narrows" the holding by making it very specific to the facts in this case.

We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $ 300.00, and as so modified it is affirmed.

The Court modifies the trial court's judgment in accordance with Garland's request to $300.

Four members of the Oklahoma Supreme Court dissent.

WILLIAMS, C. J., BLACKBIRD, V. C. J., and IRWIN and BERRY, JJ., dissent.

DISSENT: IRWIN, Justice:

By the specific provisions in the coal mining lease under consideration, the defendant agreed as follows:

> 7b Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.
>
> 7c Lessee agrees to smooth off the top of the spoil banks on the above premises.
>
> 7d Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.
>
> 7f Lessee further agrees to leave no shale or dirt on the high wall of said pits.

Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

The dissent takes the older traditional view of contracts:

- **Garland admits it failed to perform its agreed-upon obligations.**
- **Nothing in the record indicates Garland could not perform those obligations.**
- **Therefore the breach was willful and not in good faith.**

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Garland knew, when it "prevailed upon" Willie and Lucille to sign the lease, that the cost of performance might be disproportionate to the value of benefits received by the Peevyhouses for performance.

It must be assumed that Garland thought it would be to its economic advantage to enter into the contract with Willie and Lucille and that it would reap benefits from the contract, despite the cost of restoring the land to its original state, or it would not have entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties.

If the value of performance of a contract should be considered in determining the measure of damages for breach, so too should the benefits received by the breaching party be considered. That is, if the strip mining produces no profit for the coal company, should it be excused from the contract and not have to pay the Peevyhouses at all?

But, the dissenting judge asserts, considering either of these things ignores the "solemnity of the contract."

I am mindful of Title 23 O.S.1961 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases not applicable herein. However, in my judgment, the above statutory provision is not applicable here.

In my judgment, we should follow the case of *Groves v. John Wunder Company*, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, which defendant agrees 'that the fact situation is apparently similar to the one in the case at bar,' and where the Supreme Court of Minnesota held:

> The owner's or employer's damages for such a breach (i.e., breach hypothesized in 2d syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contractor promised to do and which he left undone.

Therefore, in my opinion, the plaintiffs were entitled to specific performance of the contract and since defendant has failed to perform, the proper measure of damages should be the cost of performance. Any other measure of damage would be holding for naught the express provisions of the contract; would be taking from the plaintiffs the benefits of the contract and placing those benefits in defendant which has failed to perform its obligations; would be granting benefits to defendant without a resulting obligation; and would be completely rescinding the solemn obligation of the contract for the benefit of the defendant to the detriment of the plaintiffs by making an entirely new contract for the parties.

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

The dissenting judge thinks the Court should follow the holding in *Groves v. John Wunder Company*, the Peevyhouses' main case, and apply the "cost of performance" rule in assessing damages.

Willie and Lucille's lawyers tried to get a rehearing to recalculate the damages based on the diminution of value of the *whole farm*, not just of the sixty acres used by Garland. They were denied this opportunity because they did not object early on in the proceedings, when the Garland lawyers insisted that only testimony about the sixty acres was admissible in the trial.

What is going on here? Is this a "good" decision?
What is a good decision?

- **A "fair" one?**
- **A "just" one?**
- **One that provides a useful template for future behavior?**

What is that template here?

The template provided by this case is that in situations where the cost of breaching a contract will be less than the cost of fulfilling the contract, the "proper" or perhaps "smart" choice is to breach the contract.

This is now called "efficient breach of contract" and is largely smiled upon today. Garland's lawyers were way ahead of their time.

The Common Law and Statutory Law: Case 2

In re PHILLIP B., A Person Coming Under the Juvenile Court Law.
RICHARD W. BOTHMAN, as Chief Probation Officer, etc., et al., Plaintiffs and Appellants, v. WARREN B. et al., Defendants and Respondents

Civ. No. 44291

Court of Appeal of California, First Appellate District, Division Four

92 Cal. App. 3d 796; 156 Cal. Rptr. 48; 1979 Cal. App. LEXIS 1717

May 8, 1979

OPINION: CALDECOTT, Justice:

A petition was filed by the juvenile probation department in the juvenile court, alleging that Phillip B., a minor, came within the provision of Welfare and Institutions Code section 300, subdivision (b), because he was not provided with the "necessities of life."

The petition requested that Phillip be declared a dependent child of the court for the special purpose of ensuring that he receive cardiac surgery for a congenital heart defect. Phillip's parents had refused to consent to the surgery. The juvenile court dismissed the petition. The appeal is from the order.

Phillip is a 12-year-old boy suffering from Down's Syndrome. At birth, his parents decided he should live in a residential care facility. Phillip suffers from a congenital heart defect – a ventricular septal defect that results in elevated pulmonary blood pressure. Due to the defect, Phillip's heart must work three times harder than normal to supply blood to his body. When he overexerts, unoxygenated blood travels the wrong way through the septal hole reaching his circulation, rather than the lungs.

If the congenital heart defect is not corrected, damage to the lungs will increase to the point where his lungs will be unable to carry and oxygenate any blood. As a result, death follows. During the deterioration of the lungs, Phillip will suffer from a progressive loss of energy and vitality until he is forced to lead a bed-to-chair existence.

Phillip's heart condition has been known since 1973. At that time Dr. Gathman, a pediatric cardiologist, examined Phillip and recommended cardiac catheterization to further define the anatomy and dynamics of Phillip's condition. Phillip's parents refused.