CONTRACTS - INTRO

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HURLEY V. EDDINGFIELD (1901) (DOC WOULDN'T COME CARE FOR PT)

All contracts must be made voluntarily between parties

- There are NO REQUIRED DUTIES in contracts (unlike torts)
    - EXCEPT IN ANTI-DISCRIMINATION LAWS
        - Employment, public accommodations
- The "tortification" of contractual relationships [Doc's refusal to aid (enter into a contract with pt.) was some breach of contract]

DONOVAN V. RRL CORP. (2001) (THE WRONG JAGUAR CASE)

Errors in judgment vs. clerical/mechanical errors (Kemper vs. City of LA)

If a case seems to force party(ies) into contract against will, something's not right – either there's a statute, some other reason, or the party suing is WRONG

Damages can be benefit of the bargain or specific performance (breach of contract), loss in change of position (reliance), perceived unjust enrichment (restitution), or nothing (no breach/no contract)

MF KEMPER V. LA (1951)

When there is an error in judgment – hold contract made

When there is a clerical error – no contract

DAVIS V. GENERAL FOODS CORP. (1937) (JELLO RECIPE)

No contract is formed when one party has complete discretion on the terms of the agreement. Here, the D could choose to use the recipe or not and if it did, it could choose an appropriate compensation

Distinguish from Liggett Tobacco case – Davis didn't seem to expect payment, and GF replied with letter claiming unlimited right, to which it seems Davis agreed

UCC (UNIFORM COMMERCIAL CODE)

- VALID STATUTES – MATTERS OF LAW
- State government can make contract law
- No national contract or interstate commercial law
- But 50+ state laws regarding common contracts
- All states (exc. LA) have passed similar uniform codes regarding goods, services, etc.

RESTATEMENT OF CONTRACTS

Contracts are the sets of promises that the law will enforce

- Interpretation vary from state to state

- If the restatement contains parts regarding your case, you would mention to judge (influential, but NOT statute)

LIGGETT TOBACO V. MEYER

When one sends goods to someone else without an express contract, but under the circs which indicate a sale is intended, and the receiver of goods retains those goods → contract of sale will be implied!

Damages (if not otherwise listed by parties), will be reasonable value!

BALFOUR V. BALFOUR (1919) (WIFE SUING HUBBY)

Agreements made in amity btw married couples are not held has contracts to be enforced under law → not arm's length bargaining

A promise that is not intended to be legally binding is not an enforceable contract

- If wife had said that agreement made when couple was estranged, may have been a different matter

ARMSTRONG V. M'GHEE (1795)

An outward manifestation of intent to enter a contract is all that matters – the law is not concerned with what people are secretly thinking to themselves

Detrimental reliance = expectation + change in position

LEONARD V. PEPSICO

Not a complete contract (unlike Armstrong, who couldn't get horse back), all Leonard really lost was his pride

- Problem – obvious that L had lawyers before he even made the order

BASEBALL CARD CASE

Agency problem – seller and buyer both knew value, but agent didn't

Kid likely knew he was getting too good of a deal

Not necessarily fraud, unless kid made affirmative statement

- Offer was a mistake

EMBRY V. HARGADINE (1907, MISSOURI APP., J. GOODE)

How much protection do we give someone who has reasonable relied? What are the damages?

- Interest of expectation (full benefit) – give him his job back
    - Somewhere in btw is reliance measure

- No enforcement - $X prorated

We want contracts to be voluntary, but we also want to protect ppl on receiving end who would take you at your word and RELY on that understood agreement

E v. H at a time of academic reaction against "subjective" contract

- *Holmes, The Common Law 230, 1881*: "the whole doctrine of contracts is formal and external"
- *Hotchkiss v National City Bank of New York, 1911, L. Hand*: "intent as expressed is what makes contract enforceable or unenforceable"
- *Williston, Law of Contracts, 1920*: Common law doesn't require a positive intention to create a legal obligation as an element of contract"
- *Restatement of Contracts, 1932:*
    - §3 – an agreement is a manifestation of mutual assent by two or more persons to one another
    - §20 – manifestation of mutual assent is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts. Neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.
        - External appearance of agreement is necessary for contract formation
        - Agreement is voluntary
        - Internal agreement or intent of legal binding
- *Ricketts v PA Railroad* (1946, 2nd Cir., J. Frank)
    - War between actual (mental) intent and objective intent.
    - Actual intent method created too much fictitious discourse by assigning to parties intentions they never had
    - Objective, reasonable man std won out over time
- *Corbin, Law of Contracts (1960):*
    - Law of contracts can not be explained by either form alone…

MILLER V STANICH (1930) (LESSOR AND TENANT OVER 5YR LEASE EXTENSION)

We would really rather not enforce a contract that was involuntary if someone didn't lose anything (rely)

? **HENKEL V. PAPE 1870**

- Gun manufacturers and mistake by telegram agent of "the" for "three"

- Should the judgment be for 3 at 35s
- Was there reliance on part of P? can they possibly sell all the extras?

COBAUGH V KLICK LEWIS, INC. (1969) (HOLE-IN-ONE AND CAR)

- Intentional agreement on both sides? No
- Was there an apparent agreement? Maybe
- Was there reliance? No?
    - Reasonable expectation that car offer was valid
    - P's argument is that it's not our fault that they're coming forward now to say we didn't mean it

WARRANTY

WOOD V. BOYNTON (1885) (UNCUT DIAMOND)

Seller cannot rescind a sale after discovering that the sale was grossly unequal

- To rescind, the sale must involve a mistake of delivery (handed over the wrong thing) or fraud
    - Court: you can't go around voiding contracts b/c you find out later you could have gotten a better deal
    - Inequality of bargaining power not a real concern in contract law – everyone is different and has diff strengths and weaknesses
    - P could have gotten a 2nd opinion

UCC §2-313 – Express warranties

THE WHOLE BASIS OF A BARGAIN IS THAT SELLER IS OFFERING X AND BUYER IS BUYING X AND BUYER IS EXPECTING X TO BE X

Re (2) and statements that don't constitute a warranty:

- What statements of the seller have in the circs and in objective judgment become part of the basis of the bargain?
- All statements do so, unless there is good reason not to believe it
- There is a common understanding that some sellers use "puff" to describe their goods (this is awesome!, etc.), so sometimes they won't enter the bargain
- But if it's a false statement of value, possibility is left open so that a remedy may be provided by the courts out of fraud or misrepresentation

CHANDELOR V. LOPUS (1625) (BEZAR STONE)

UCC §2-313(1a)

- any affirmation of fact as part of basis of bargain creates warranty

§2-714(2) – damages for breach of warranty:

- expected value – actual value (P would have gotten money back, since actual value of stone was 0£)

D could have gotten out of warranty assumption by saying "I think it's a bezar stone" or "I'm not sure what it is"

DAUGHTREY V. ASHE (1992) (BRACELET WITH WRONG DIAMONDS)

UCC §2-313: appraisal was never part of the basis of the bargain; neither was the classification of the diamonds

- What did the seller sell – a $15000 bracelet
- What did the buyer buy – a $15000 bracelet + a money-back guarantee if he wasn't happy with bracelet
    - The actual quality of the diamonds and the "appraisal" were never part of the bargain

LAIDLAW V. ORGAN (1817) (TOBACCO DEAL AFTER END OF WAR OF 1812)

Parties are not required to disclose pertinent info (unless fraud or lying) – want to encourage research and reward parties that do

Most basic basis of contract law – no coercion and no fraud

- It may be every man for himself, but NOT no holds barred
- EXCEPTIONS: fiduciary relationships (lawyer/client, parent/child, trustee/beneficiary, guardian/ward, agent/principle) – not allowed to profit in dealings and withhold info b/c you REPRESENT THEIR INTERESTS!!

BUT DECISION OF WHETHER AN IMPLIED REPRESENTATION OR FRAUD HAPPENED SHOULD BE LEFT TO JURY IF, ON FACTS, THOSE ARE PLAUSIBLE (JUDGE DECIDES THIS)!!

TURNER V. GREEN

- Lawyer trickery?
- P's lawyer (Fowler), rev'd a telegram informing him of a result in proceedings that was favorable to the D's, but didn't disclose the info until after the negotiations were settled
- D finds out later and says that contract not binding b/c P had withheld material fact
    - Was info available to both?

- Did P have any duty to disclose that info to D?

BENCH V. SHELDON

Lost sheep case –Ds who found the sheep lied to P and said "they would probably never be found" at which point P signs over the sheep to Ds for $10 = Fraud

- Different from Laidlaw – when asked a question the Ds weren't silent, but outright lied

? **THE CLANDEBOYE**

CONTRACTS - CONSIDERATION 9/28/2010 11:36:00 PM

DAVIS V MORGAN (M GETS OFFER FROM FLORIDA, D SAYS STAY ON AND I'LL GIVE YOU A RAISE, THEN FIRES HIM)

Enforceable promises must have consideration

Enforce – Voluntary + Have consideration (quid pro quo)

- If you _____, then I will _____.

No real consideration with a "pre-existing duty" i.e. no new contract?

- M would get promise of extra $
- What does D get in return? The work that D was doing was already required from initial contract
    - It is important that his contract was term-based and not at-will
    - If at will, consideration could be that M gets to keep an employee who could otherwise freely leave, etc.
- It does in some sense appear as though D does get something in return for promise to M – a happier employee, greater likelihood that M will stay and work longer
- ∴ it's not really that this is a nudum pactum, but court is concerned that allowing this contract would create a slippery slope in which employees are motivated to use leverage of leaving to get bosses to pay more.

HARRIS V. WATSON

- D (ship's master and commander) tells P (crewman) that if he performed some EXTRA work in navigating the ship, he would pay him an extra 5 guineas
- P said ship was "in danger" – did he mean that others were mutinying or just there was a storm?
    - Was D being forced by others on board to give extra or forced by emergency situations ?
    - Otherwise, since P was doing extra work (not the same work), the 5gs would have been fair wages

STILK V. MYRICK

Public policy trumps normal consideration – allowing modification in course of performance could encourage coercion

But there are times when both parties may want to modify (just no duress)

? **SCHWARTZREICH V. BAUMAN-BASH**

- BB makes contract to employ S (designer) for term of 12 months at $90/week

MABLEY & CAREW V. BORDEN (1935)

The gratuitous promise received the consideration of the worker's continued employment and became a legally enforceable contract upon the worker's death (while still under employment) Even if express words in certificate don't really carry any legal weight, the CONDUCT OF THE COMPANY IMPLIES OTHERWISE AND CREATED RELIANCE

With employment at will, consideration happens with each new day of work

- Court says there were incentives for her to continue, and MC gets something in return

FROM DETRIMENT TO RELIANCE

KIRKSEY V. KIRKSEY (1845)

- A's husband dies; brother-in-law asks her to move to his plantation
- Controversy over what to do with consideration
    - Bargained for (promisor and promissee)
    - Benefit to the promissor only
        - Leave detriment to promisee as reliance/promissory estoppel

§ 90 (1932). Promise Reasonably Inducing Definite And Substantial Action

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

§ 90 (1981). Promise Reasonably Inducing Action Or Forbearance

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

DEVECMON V. SHAW (1888) (UNCLE PROMISES TO PAY FOR NEPHEW'S TRIP TO EUROPE, THEN DIES WHILE HE'S AWAY)

Expenditure of one's own money at the request of another (with promise to reimburse) is sufficient detrimental reliance

If there is an enforceable promise:

- (1) P should get what was promised
- (2) But sometimes, P may just get what was suffered in reliance
- Kirksey – (1) house and land, (2) compensation for moving costs from going from old to new place

PRESCOTT V. JONES (1898) (IF YOU WANT YOUR INSURANCE RENEWED, DO NOTHING)

An offer cannot create a binding contract through the offeree's silence or failure to act. An offer can only be accepted by an affirmative act by the offeree

Estoppel doctrine: once you've said something to make someone rely, you can't take it back (otherwise it would be fraud)

1st restatment of contracts (1932, §90) allows estoppel in the form of "reliance" → promissory estoppel

- Clark Contracts: a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it.
    - This refers to scams "if you don't reply, we'll sign you up" – meant to protect the innocent offeree
- More v. Insurance (NY) – a person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract!

COMMONWEALTH V. SCITUATE SAVINGS BANK (1884) - HOLMES

It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it

- Express terms, not intentions?

EAST PROVIDENCE CREDIT UNION V. GEREMIA (1968) (INSURANCE COMPANY FAILS TO RENEW D'S INSURANCE POLICY)

Promise, though gratuitous, induced detrimental reliance from D and thus P is responsible for the loss incurred from Ps failure to carry out promise

- Forebearance – D couldn't renew themselves

ANDERSON V. BACKLUND

- One man telling other that he should get cattle on his land and that he'd make sure there was water
- SCt then said this was not promising, but visiting
- If argued now, P could argue there was reliance/promissory estoppel
    - D would have to argue that he was just giving advice, good reason not to take him seriously

GOODMAN V. DICKER (1948) (RADIO FRANCHISE)

Big question is how much to award in damages for estoppel??

RELIANCE/ESTOPPEL (a representation induced reliance, and that reliance is substantial)

- DAMAGES SHOULD BE JUST WHAT WAS LOST FROM RELIANCE → SUNK COSTS (WHAT WAS LOST IN CHANGE OF POSITION)
- Think Donovans and Kirksey

BREACH OF CONTRACT

- DAMAGES ARE THE LOSSES SUSTAINED AND PROMISED PERFORMANCE

HOFFMAN V. RED OWL STORES (1965)

Couple sells bakery to invest in Red Owl franchise, on assurance that he would get a big store and franchise

H should be able, under promissory estoppel theory, to recover damages for his sustained losses in reliance

- Sale of bakery at a loss
- Loss of investment in first small grocery store
- Lost wages of his wife at bakery
- Loss of DP of new lot ($1000), unless he could get this back

HAMER V. SIDWAY (1891) (UNCLE AND NEPHEW: "IF YOU GIVE UP YOUR VICES, THEN I'LL PAY YOU $1500")

Enforced:

- Bargain promises → CONSIDERATION
- Nudum pactum with reliance

Not enforced:

- Unrelied upon gratuitous promises
    - SOMETIMES THESE GET ENFORCED ANYWAYS (SEE WITH CASES BELOW)

SHADWELL V. SHADWELL

- Uncle wrote to nephew that for new marriage he would give him 150£/yr until he started making 600 guineas/yr
    - Is there consideration here?
        - Maybe – encouraging nephew to get married and this is a huge undertaking → consideration
    - If uncle had promised money in return for marrying girl, there might be consideration there

WHITE V. BLUETT (1853)

- Son (owed money) complained to dad that he was treated worse than other kids
- Father (in return for no more complaining) said he wouldn't make him repay him
- Dad dies and executor is trying to collect on debt
    - What was the consideration for the son?
    - No letter stating relations or terms

WILLISTON'S TRAMP (1920)

Can use "benefit to promissor" in promissee performing consideration (or condition) as an aid (but not a test) to finding legal promises

- Often difficult to distinguish a condition of a promise from a request for consideration
    - Easier to determine if you think about whether the condition is a benefit to the promisor
    - Re asking a poor man to walk across the street and buy a coat for himself on your credit
        - If to the promisor, there is some benefit in seeing the man walk across the street into the store, then possibly consideration and not a gratuitous promise
        - Likely, a gratuitous promise

RICKETTS V. SCOTHORN (1898) (GRANDPA DOESN'T WANT TO SEE GRANDDAUGHTER WORKING)

Even thought there was no reliance, the courts will sometimes enforce a promise to carry out what it sees to be the wishes of the dead relative

"Promissory notes": I promise to pay $X to Y with Z interest until date A

COURT – estoppel was allowed for cases of charitable conscription (listing in

will that estate will continue to make donations after death) even in 1898

- Wasn't long before someone would come up and say this doctrine applied to personal promises and VOILA, we get reliance
- In reliance, detriment must be irreversible (can't go back and undo change in position)

IMPLICIT BARGAINS

YOUNG AND ASHBURNHAM (1587) (A RUNNING UP HUGE TAB AT INN)

- THIS IS VERY CLEARLY AN IMPLIED CONTRACT THAT WOULD BE UPHELD UNDER TODAY'S STANDARDS

LAP DANCING (2005)

- Boys were 1st time strip club attenders and ran up 82 lap dances but didn't realize fee was per dance, per song
- Reasonableness – what would a reasonable person think/do?
- If $ is really exorbinate, don't we want to let person's mental state come into it?

HERTZOG V. HERTZOG (1857)

Implied contracts are hard to prove in certain close relationships, such as families. There are often reasons for family members to help each other out besides the implied expectation of getting paid for it

If P had not been son, he likely would have won, but under implied contract and NOT restitution (if you work, you get paid → implied)

An express contract could be indicated by

- Letter would be clear evidence

An implied contract might be demonstrated by

- Circumstantial evidence only gives inference
- Mutual intention to contract

Typical way to look at implied contracts is to think about cause/effect

- Rule out all other possible causes

QUASI CONTRACTS AND RESTITUTION

EXPRESS CONTRACTS

- Doesn't need to be in writing
- Doesn't need to be spoken
    - Evidence in ledger "how much I owe son"

IMPLIED CONTRACTS

- Restaurant and guest
    - Presumed that you know you have to pay

BLACKSTONE

- Express and implied (implied in fact) contracts – agreements are contractual "meeting of the minds"
- Constructive "contracts" – liability imposed based on fairness (not really a contract at all)
    - AKA "implied in law" contracts or quasi contracts
    - D has become "unjustly enriched" at loss of P
    - Restitution
        - Bank accidentally adds $200 to your account
            - You have to give it back → kind of like a tort claim

COTNAM V. WISDOM (1907) (DOCS TAKE CARE OF UNCONSCIOUS MAN WHO WINDS UP DYING)

Unconscious parties cannot enter implied contracts b/c even those must be voluntarily entered into. The doc here is proceeding on a claim of unjust enrichment.

- He can do this b/c he is a medical professional (a normal bystander would have no claim)
- On a normal restitution claim, the damages are the "benefit of the bargain" (remember we talked about this in the Jaguar case)

Quasi contracts – why are we looking at them?

- Protection of someone who renders services
- Unjust enrichment – liable to other to extent of the benefit received
- History of these kinds of cases (restitution): were argued as contracts b/c at time ppl had to plead these as a writ (?)

MICHIGAN CENT. RR V. STATE (1927) (PRISON GETS TOO MUCH COAL)

If a D is innocent, his eventual liability in restitution cannot leave him worse off that if the transaction in question had not occurred

- Measure damages from D's point of view (in this case, owner)

CONTINENTAL FOREST PRODUCTS V. CHANDLER SUPPLY (1974) (FRAUD OF PLYWOOD AGENT)

Goods supplied by mistake and no contract = unjust enrichment

Restitution is supposed to be painless for the innocent defender

- Hypo 1: how can we rewrite to make sure that Chandler wins?
  - If continental knew that Barker brought order with him from N.Am
  - We aren't supposed to be holding ppl responsible to pay for things that they don't ever intend to buy (deliver something, then send the bill to someone who never ordered the things)
- Hypo 2: How can we assure that Chandler has to pay the full $10000?
  - If there was no credit with N.Am.

VICKERY V. RITCHIE (1909) – TURKISH BATHHOUSE

If a D is innocent, his eventual liability in restitution cannot leave him worse off that if the transaction in question had not occurred

- Measure damages from D's point of view (in this case, owner)
  - Wrong decision: there was no contract at all b/c of fraud – no meeting of the minds at all (they were thinking different figures)
  - Perfect case for unjust enrichment
    - Owner must pay, but for no more than he benefited from the bargain
    - Contractor gets no more than what he increased the property value by???
- No "loss splitting" principle in our legal system!!

DICKINSON V. DODDS (1876) (D GIVES D A FIRM OFFER BUT REVOKES ANYWAY, AND D KNOWS IT)

D gives a firm offer to P, but then sells land to a 3rd party before expiration of the firm offer

Old law – seller not obligated to hold open offer even though promised, but must notify buyer of revocation; If seller had received consideration for his promise to keep offer open, then seller would be bound by promise – NO LONGER GOOD LAW (R2C §43)

Rules of offer and acceptance:

- Very intuitive
- Starts form general premise that contracts are voluntary (not with reliance)
- If certain conditions are met, promises are legally enforceable
- Need a mode of analysis of whether an agreement was made:
  - When made?

- What are terms agreed upon?
- How do you get from start to "ok, it's a deal"??

I make you an offer:

- How long do you have to accept it?
  - You have a reasonable amount of time under the circumstances to make acceptance TO THE VERY SAME OFFER (NO CHANGE OF TERMS)
  - NO CHANGING TERMS OFFER IF ACCEPTANCE MADE IN REASONABLE AMOUNT OF TIME
- What about if before you can say "I'll take it at $500", the offeror says $600?
  - You haven't made an acceptance yet!
    - so offeror can change terms or retract entirely
    - offeree can make counter-offer

THE PS = a firm offer

- Offer with a subsidiary promise (I won't modify or revoke offer)
  - Court says this is nudum pactum and no consideration BUT WAIT!
  - Can say that both sides gave consideration:
    - Exchange/quid-pro-quo
      - The subsidiary promise costs Dodds a lot (flexibility of accepting another offer), so why give it?
      - b/c he knows that it will make it more likely that Dickinson will buy!!
        - Give him time to go to bank to get money in order
        - Get a title report, etc.
        - Dickinson in doing these things could have shown consideration on his end
- Idea of consideration is functional:
  - What's a bargain? → bargains
  - What's not? → gifts
  - D&D weren't family (not gratuitous promise)
  - This seems very much like an arms-length transaction
  - Business ppl aren't in it for their own health
  - If they're giving something up, are they getting something in return?
- Consideration:
  - Functional (looking for a bargain, q.p.q)
  - But sometimes courts also expect to see some formality to put a stamp on a firm offer

        - Perhaps if PS were more like: "in consideration of 1 shilling, which is acknowledged, I promise to hereby hold this offer open…"
        - In this case, judge looking for this more explicit consideration
        - Would normally be wrong
- Kull: this is wrong → UCC §2-205 Options and firm offers
    - Irrevocable and no consideration is needed

JORDAN V. DOBBINS (DEAD CREDITOR HAS TO KEEP PAYING)

Death does not relieve a person of his contractual obligations

- If one dies after having made an offer but before the offer is accepted, the offer is automatically revoked, whether the offeree knows or not

The executor of the decedent's estate should be the one to notify the vendor that the offer to be guarantor for future purchases has been revoked

- When a guarantor offers to pay for goods if the 3rd party can't (Moore), then the guarantor has only made an offer to be bound
    - It is only once the goods are sold that the offer is accepted and the contract formed

JAMES BAIRD V. GIMBEL BROS. (1933) (THE MISTAKEN LINOLEUM CASE)

Subcontractor made a firm offer – promised to keep the offer open for a reasonable time (time for the general contractor to use the subcontractor's bid in its offer)

- The general contractor relied on the subcontractor's bid and so the subcontractor should have been estopped from revoking the offer once it was integrated into the full bid

How do you persuade the judge that the implied promise from Baird is enforceable?

- If A can't count on B, and B can't count on A, this whole system would fall apart!
    - CUSTOM of business practices!!
- If all else failed, UCC §1-203 – GOOD FAITH

Couching this in a FIRM OFFER:

- OFFER: guarantee of price of linoleum
- PROMISE: To hold offer until contractor gets the construction bid accepted by state
    - Gimbel has to write offer this way otherwise would be hard to get acceptance from companies like Baird
- CANNOT BE ONESIDED!
    - If G hadn't withdrawn the offer, and Baird got eh contract from state, could Baird have gone elsewhere?

- NO
- Implied contract (solicitation of subcontracting bids)
  - OR
- Statute requires for public bids that contractor listing subcontractor bids, has to use that subcontractor if bid accepted
  - NO BID SHOPPING!!

DRENNAN V. STAR PAVING (1958) (ANOTHER MISTAKEN BID TRYING TO REVOKE)

Once the general contractor makes a change in position by binding itself to use the subcontractor if the general contractor's bid wins, the subcontractor is also bound

- Why enforce?
  - CUSTOM – how else would this work? Who would bother otherwise?
  - Restatement of Contracts §45 – there's an implied contract (careful, b/c NOT A STATUTE, just an opinion; also §45 applies to unilateral contracts, and not necessarily to firm offers – drawing a thin analogy)
- How do you change facts to have a valid mistake?
  - If Drennan knew other side made a mistake (if all other bids were ~10000, and Star Paving was $700. – transparent error

WOOD V. LUCY, LADY DUFF-GORDON (1917) (WOOD BRANDING LADY)

A LOT OF THESE CASES REVOLVE AROUND IDEA THAT IF THE IMPLIED PROMISE WAS MISSING THAT THESE CONTRACTS WOULDN'T MAKE ANY BUSINESS SENSE AT ALL → THESE PEOPLE AREN'T PLAYING GAMES!! Both parties are bound.

SYLVAN CREST SAND V. US (1945)

If there was really an intent on the part of the US to reserve the right to cancel the contract at any time and for any reason → illusory (and unenforceable) promise

If (as court did) you interpret "any" to mean "some reasonable time", then enforceable

SOUTHWEST NATURAL GAS V. OKLAHOMA PORTLAND CEMENT

- P agreed to supply D with "all the gas it needed for 15yrs"
- 7yrs in, D got new boiler that reduced it's need by 80% and wanted to keep contract
- P sues for damages
  - P agreed to supply "all that was needed", not some set amount per year
  - Nothing to suggest that D knew it would be getting a more efficient boiler

(7yrs in) before hand
    - Was it a rate/amount or a flat fee per year service?

MORAL CONSIDERATION (doesn't really exist)

PILLANS & ROSE V. VAN MIEROP & HOPKINS (1785) - MANSFIELD

- Notion of moral consideration put forward by Lord Mansfield in an attempt to get rid of consideration entirely from common law (commercial context only)
- Commercial case:
    - No nudum pactum in law and usage of merchants
    - Want of consideration was for the sake of the evidence (other contracts) only → if we have evidence that the promise was made (i.e. in writing), then we would enforce it (w/out needing consideration)
    - In commercial cases, no need for consideration

HAWKES V. SAUNDERS (1782) - MANSFIELD

- Good faith = consideration
- Legal: obligation or duty → consideration
    - If legal obligation to pay, pay even if there is no promise made
        - Implied contracts (ordering dinner)
        - Unjust enrichment
    - ∴ Legal obligation = sufficient consideration upon which to enforce promises (does this A→B make sense)?
- Moral: obligation (legally unenforceable) → honesty and rectitude of the thing is consideration
    - If there is a recognized moral obligation and a promise is made upon it, honesty of promise is sufficient consideration
    - Really?? More like common decency, not contractual consideration

Now:

- New promise to pay an unenforceable debt (from SoL) makes it newly enforceable (THERE WAS PAST CONSIDERATION)
    - RoC2 §86(1) – a promise made in recognition of a benefit preciously received by the promisor from the promisee is binding to the extent necessary to prevent injustice
    - R2Contracts §82
    - Infancy - §85

- Bankruptcy - §83
    - → in each of these cases, the new promise revives a formerly enforceable contract that is no longer enforceable for some other LEGAL reason

LAMPLIEGH V. BRATHWAIT (1615) (GET ME OUT OF PRISON)
Promise to repay was supported by some past consideration

MILLS V. WYMAN (1825) (THE SAILOR DIES AND DAD MAKES LATER PROMISE TO PAY)

- MUST BE A PROMISE BASED ON SOME PRE-EXISTING LEGAL OBLIGATION TO PAY THAT IS ENFORCEABLE
- Hypo: How do you change the facts so that dad owes the money?
    - Make son a minor (restitution)
    - Make father have requested the care for his son (like Cotnam v. Wisdom hypo with daughter)
- Hypo with SoL:
    - 1998 – A owes B $5k to pay in 2000
    - 2002 – A hasn't paid at all, but now SoL runs out
    - 2003 – A promises to pay B $5k
        - BECOMES ENFORCEABLE AGAIN B/C THERE WAS PAST CONSIDERATION!!!
    - 2003 – A promises to pay B $2.5k
        - valid for same reasons as above, but now we enforce the new terms
    - MORAL OBLIGATION BASED ON ANTECEDENT CONSIDERATION
    - IF YOU PROMISE TO DO SOMETHING YOU WERE SUPPOSED TO DO ANYWAY, WE'RE GOING TO ENFORCE IT!!

WEBB V. MCGOWAN (1935) (WEBB FLYING ON THE WOOD BEAM SAVES M)
WE ASSUME NO RECOVERY FOR AN AMATEUR HEROIC
PROFESSIONALS MAY BE ABLE TO RECOVER FOR RESTITUTION

- Policy for this distinction
    - pros know what they're doing, so less likely to put themselves in physical/other harm
    - have defined rate/fee structure for services rendered so recovery easier to compute

- What about when the amateur gets hurt?
    - Promisor was benefited
    - Promissee was detrimented
    - But the promise was bargained-for = some connection btw the 2 is required for consideration
- Suggesting a new rule:
    - w/ a prior request, benefit and detriment, we'll enforce a subsequent promise to pay
    - w/out a prior request, and with sufficient consideration or benefit/detriment, in certain severe circs (like WvM) we'll enforce a subsequent promise as an acknowledgement or ratification of consideration
    - §86 of RoC
        - we will sometimes enforce a promise on the basis of a benefit previously received

Contract Formation

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LEFKOWITZ V. GREAT MINNEAPOLIS SURPLUS STORE (MN, 1957) (THE FUR COATS)

The newspaper ad may be considered an offer ready for acceptance if the offer is so specific as to what particular item is being sold, the price, etc. as to leave nothing open to negotiation

KULL: DEPENDS ON LEGAL INTENTIONS OF THE PARTIES (NOT ENOUGH TO HAVE A CLEAR, DEFINITE TERMS → REMEMBER CONTRACTS ARE SUPPOSED TO BE VOLUNTARY (think about looking for apartment on c-list – you can't just call up person and say "I accept" – there are things that most ppl would understand as conditions (bkgrd check, etc.) that make the ad an invitation for an offer)

MESAROS V. US (1988) (GOLD COINS FROM THE MINT)

The whole nature of the sale of coins is that they are a "limited run"

- conditional contract – with subject to availability clause

HARRIS V. NICKERSON (1873) (THE WITHDRAWN AUCTION LOT)

- Contract for offer to allow bidding??

WARLOW V. HARRISON (1859) (HORSE AUCTION WITHOUT RESERVE)

Is there breach of contract?

- Yes, with owner, since auction was listed as NO RESERVE
- NO, with auctioneer

What would be the damages?

- Specific performance → sell horse for 63£ or go to jail
- Value → 130£ - 63£ (not as good as specific performance)

CONSTRUCTION OF "OFFERS"

JENKINS TOWEL SERVICE V. FIDELITY-PHILIDELPHIA TRUST (PA 1960)

An invitation to submit sealed bids seems a lot like an offer to sell to the highest conforming bidder since the group invited to bid was small, they were all known to be interested parties in the sale of the property, and they were asked to submit their highest bid w/o getting to negotiate the price

Kull – firm auction or firm invitation

- Promise to accept the highest conforming bid (with a reserve of $92,000 and other conditions)

- RoC and UCC §2-328 (??)
- D can change mind before opening sealed bids
- Consideration = absolute best price
    - NOT the deposit (b/c you get that back if your bid's not accepted)

MOULTON V. KERSHAW (WI, 1884) (THE SALT DEALERS WITH BIG AMOUNTS)

Question of "reasonable amount" is a matter of fact – court is deciding this case to make it a matter of law

180degree DIFFERENCE FROM MODERN UNDERTAKING – WE INTERPRET CONTRACTS IN LIGHT OF BUSINESS CONTEXT AND INTENTIONS

- PEOPLE (ESPECIALLY IN BUSINESS) DON'T MAKE CONTRACTS IN A VACUUM – WHAT IS THE CUSTOM OF THEIR TRADE???

FAIRMOUNT GLASS WORKS V CRUNDEN-MARTIN WOODENWARE (KY, 1899) (MASON JARS)

A price quote is generally not considered an offer to sell, but here the quote is for a specific quantity of mason jars and seemed to e an offer to sell at that price

- COURT: in construing every contract, the aim of the court is to arrive at the intention of the parties!

Damages – would be difference btw what was actually paid and they would have paid if F had upheld contract

UCC article 1-205

Course of dealing (previous conduct btw parties establishing common affair)

- Course of dealings should be used to interpret/supplement, or qualify terms of agreements

Usage of trade (common practice is trade area)

- Express terms should be construed wherever reasonable to follow trade custom
- Applicable use of trade in performance to be used to interpret performance
- If a party claims that X is trade custom, must support with evidence (testimony) that other party couldn't have been surprised by it

LANGELLIER C. SCHAEFER (MN, 1887) (THE HOUSE SALE THROUGH MR. SCHEFER)

Court holding Mirror Rule – wrong; all the additional terms are "optional" not conditional

BUTLER V. FOLEY (MI, 1920) (SALE OF BY-PRODUCT SHARES)

F's counter-offer supposed to have "subject" – offeror is responsible for the method of communication, so too bad.

Offeror is free to modify or withdraw his offer at anytime before acceptance. Offeree cannot come back and accept the offer after a reasonable time has passed

- TEST – uphold the contract terms when:
  - Party is going to reasonably rely on your statement
  - Going to for business expectations on them

Restatement of Contract (2) §36

Methods of termination of the power of acceptance

- An offeree's power of acceptance may be terminated by
  - Rejection or counter-offer by the offeree
  - Lapse of time
  - Revocation by the offeror
  - Death or incapacity of the offeror or offeree

PETTERSON V. PATTBERG (NY, 1928) (SALE OF MORTGAGE WITH REJECTION THROUGH A CRACK IN THE DOOR)

Offerer may see the approach of the offeree and know he's about to accept, and if he can say "I revoke" before the other can say "I accept", this is an effective revocation

US V. BRAUNSTEIN (NY, 1947) (SPOILED RAISINS CASE)

KULL – COURT SHOULD HAVE FOUND ON BEHALF OF US → THIS WAS A TRANSPARENT MISTAKE THAT WAS FIXED

- BUT THERE MAY BE A PROBLEM B/C WAS MADE AFTER THE "10 DAY" LIMIT ON THEIR OWN ACCEPTANCE

SMITH V. GOWDY (RAGS AND TURKEY FEATHERS CASE)

- What was a reasonable amount of rags to buy?
- What was past history of parties?
- Should be a contract, but maybe B has right to limit quantities (don't want to buy them out)?'

HARVEY V. FACEY (TRYING TO BUY BUMPER HALL ON THE TRAIN)

- F on train and receives telegram from H asking how much he's willing to sell Bumper Hall Pen for with addition of "send lowest case price - answer paid"
    - Is there an understood meaning that this meant we're willing to pay whatever you are willing to sell for, and that F shouldn't respond if has no intent to sell?
- F replies £900 and H sends telegram accepting and asking for title, etc.
- F denied a contract existed
    - Maybe he got a better offer from someone else on the train that he mentioned H's offer to?

FIGA V. LOVE (CAR ACCIDENT/INSURANCE CLAIM WITH OBVIOUS MISTAKE)

R. V. CLARKE (REWARD FOR MURDERER – ACCOMPLICE LIES 1ST TIME BUT STILL WANTS $)

- Acceptance by performance would mean that you got the reward if you turned in info voluntarily, but not once you were arrested and to save your own skin?
- When had the chance to accept, he lied

SIMMONS V. US (BIG DIAMOND JIM)

- Acceptance of unilateral contract by performance?
    - Would make sense, since most winnings are taxable as earnings

LIVINGSTON V. EVANS (BACK AND FORTH OVER SALE OF LAND)

- RoT §36 – offeree's power of acceptance gone after rejection or counter offer by offeree (lost his ability to accept the initial offer after making a counter-offer)

AGREEMENT TO AGREE (not a contract)

How far should the court go to infer what the parties have not entirely spelled out in their agreements?

SUN PRINTING V. REMINGTON PAPER (NY, 1923) (PAPER AND CANADA)

Month	Sept	Oct	Nov	Dec	1920
Price	3.73/ton	4/ton	4/ton	4/ton	??

Better to use business custom to fill in a little where something understood than throw the whole thing out

Kull: S has an option re price

- How hard would it have been to pull a contract out of this
    - Why not just set terms most favorable to the seller (Canadian price and shipping for 12 months)

This case doesn't seem to need a revision by the court, but rather just to read in light of business transactions

UCC §2-204(3) - Contract formation:

- (1) contract for sale of goods can be made in any manner sufficient to show agreement → including conduct that shows performance
- (2) can be shown even if exact moment of acceptance not known
- (3) EVEN THOUGH ONE OR MORE TERMS HAVE BEEN LEFT OPEN, IT DOES NOT KILL THE CONTRACT IF THE PARTIES INTENDED TO MAKE A CONTRACT AND THERE IS REAOSNABLY CERTAIN BASIS FOR GIVING AN APPROPRIATE REMEDY
    - better to use business custom to fill in a little where something understood than throw the whole thing out

ITEK V. CAI (DE, 1968) (STOCKHOLDERS WERE BACKROOM DEALING)

An agreement to agree may not be a binding contract, but it implies that the parties involved will make a good faith effort to come to agreement

- Bargaining in good faith was required
    - Negotiating outside with Bourns is not good-faith
- Complications:
    - Shareholders negotiating with Bourns

THERE IS A LINE IN THE SAND:

- NEGOTIATION → FINALIZED
- PARTIES RETAIN RIGHT TO WALK AWAY UNTIL THEY CROSS THE LINE

DOES LETTER OF INTENT CHANGE THAT LINE AT ALL?

- Why get LoI?
    - Party who wants LoI wants to pin other party down on certain key issues
- But want to retain line above
    - So put in clause about if parties fail to agree, no further obligation to one another

GONZALEZ V. DON KING PRODUCTIONS (NY, 1998)

- What is the industry standard – are draws a loss or a win for purposes of contractual

agreements?

BATTLE OF THE FORMS

UCC §2-207 – statute badly written and confusing

LORD COKE'S STATUTORY INTERPRETATION RULE (MISCHIEF RULE)

- The go-to rule for interpreting vague statutes
- 1) what was the common law before the making of the Act?
- 2) What was the mischief and defect for which the common law did not provide (what problem was the new Act trying to fix or fill in)?
- 3) What remedy the did the Parliament decide would fix this problem?
- 4) The true reason of the remedy
    - THE POINT OF JUDGES AND LEGIS IS TO SUPPRESS MISCHIEF AND ADVANCE THE REMEDY, SO CONSTRUE VAGUENESS TO GIVE RULE THE EXPECTED JUSTICE

POEL V. BRUNSWICK (NY, 1915) (TONS OF RUBBER CASE WITH AGENCY PROBLEM)

1st case where we see ppl contracting for FUTURE SALE OF ITEMS (AND LOCKING IN TODAY'S PRICE!)

- Statute of Frauds – some contracts for sale of goods beyond a certain $ amount ($500) requires a written contract for enforceability (signed by the party TO BE CHARGED)
    - If price of rubber goes up and P defaults, BBC has enforceable contract against P (signed contract on 4/4)
    - If price of rubber goes down and BBC defaults, P would want Item C signed by BBC in order to hold contract enforceable → should have gotten this signed!
- Apparent agency – if Rogers wasn't supposed to buy, but seemed reasonably to be the agent of BBC, P has right to enforce contract and Rogers is BBC's problem
    - BBC bound by the contracts made by it's agent
    - BBC is trying to walk away from the deal – Rubber price must have gone up a lot!

UCC §2-207

- 2 worlds
    - people trying to make an agreement

    - paper with fine print (never read in the filing cabinet)
- real world: ppl think they're in agreement so they perform the contract
- later there's a problem and paper becomes BIG ISSUE
    - B/C of performance, implied contract with terms of last communication (common law's best solution)

§2-207 meant to fix the problem of fine print

- 1a) expression of acceptance (can be flexible format) sent in reasonable time is an acceptance (even if it states different terms) → MIRROR RULE ABOLISHED
- 1b) UNLESS acceptance made conditional on assent to additional terms (I.E. UNLESS THE OTHER PARTY MEANT IT TO BE A COUNTER OFFER)
- 2) Additional or different terms
    - proposals for addition or change to A CLOSED contract (b/c of sub-section 1) → amendments
    - Becomes part of the contract UNLESS
        - Offer expressly says TERMS AS IS (preemptive strike)
        - New terms would materially change the offers
            - Warranty conditions
            - Things that should really be negotiated up front
                - Don't put them in the fine print
        - Objection to new terms already given or given in reasonable time
- 3) if the conduct of the parties implies a contract, although writings don't agree, there is a contract.
    - What are the terms?
        - Part of the written contract agreed upon
        - Supplemented with terms incorporated under other UCC sections → UCC has a default contract!!!

Basically makes this a FIRST SHOT RULE

NORTHROP V. LITRONIC (7TH CIR. 1994) (THE WARRANTY'S ON THE BACK OF THE FORM)

UCC §2-204

(1) conduct of parties, etc. acceptable manner to show agreement of contract

(2) agreement can be formed even if moment of agreement unknown

(3) if one or more terms are left open, still a contract if

- parties intended to contract AND
- reasonable basis for giving appropriate remedy

The "default UCC contract" is for the sale of goods

- Warranties
- Interest terms, etc.

STATUS OF NON-BARGAINED TERMS

KLAR V. H&M PARCEL ROOM (NY, 1946) (THE PARCEL ROOM TICKET AND LOST PACKAGE)

When a bailee wants to limit his liability, he needs to make that limitation clear to the bailor and give the bailor a chance to accept or reject that provision of the contract

- COURTS SHOULD VARY P'S EXPECTED KNOWLEDGE OF THE FINE PRINT TERMS INVERSELY WITH THE SURPRISINGNESS OF THE TERMS

Article 2 is basically a template contract for the sale of goods btw merchants
What about a seller who wants a limited warranty? Like Litronic?

- PUT IT UP FRONT AND GET THE BUYER'S AGREEMENT
- DON'T PUT IMPORTANT TERMS IN THE DARK

Conditions of the parcel room – common, reasonable

NOTES ON FINEPRINT OR BOILERPLATE

Karl Llewellyn on fine print:
Basically, there are 2 things to contracts with fine print:

- The terms that were agreed to (dickered)
- An implicit promise that there's nothing weird going on in the fine print

RoC2 - §211 Standardized agreements

- (1) Except as in (3) when a party signs or otherwise shows assent to a writing and has reason to believe that the writing is commonly used as contract in similar transactions, he adopts the terms of the writing as terms included in his contract
- (2) such a writing is interpreted whenever possible to treat all those in like transactions as understanding the terms regardless of reading them
- (3) if a party proposing the writing has a reason to believe that the party "assenting" would not assent if they knew the terms in the writing, the term is not agreed to (read in favor of signer)

HILL V. GATEWAY 2000 (7TH CIR. 1997) – EASTERBROOK (ARBITRATION CLAUSE IN FINE PRINT)

- §2-206
    - unless otherwise UNAMBIGUOUSLY indicated
        - (a) offer to make a contract = inviting acceptance
        - (b) order or other offers to buy goods for prompt or current shipment = inviting acceptance either by promise of prompt shipment or shipment of conforming goods

§2-207(3) – implied contract by performance with terms agreed (price shipment)

§2-207(1) – by shipping computer G has accepted (see §2-206) and contract formed no later than shipment

§2-207(2) – pamphlet with arbitration clause contains proposals for additional terms

- some are material (arbtration clause in 1997 wasn't standard; very consumer unfriendly) and some are not (ltd warranty and repair terms – industry standards)

Take away:

- Micro level – forcing the Hills to waive their right to court trial is a material change to a contract
- Macro level – if you want to make material alterations like arbitration – do it up front and in the open with your consumer!

UCC §2-206, 2-207

Trying to address technique of forming contracts in terms that aren't communicated sufficiently (like battle of the forms, fine print, boiler plate)

It's clear that the idea that you can still form a contract even if there are different terms applies at the very least to merchants (and also likely to consumers)

- If the merchants weren't aware of a custom, how could one expect a consumer to??

Function of usage and trade circumstances

Compare the effort of communication of a term with what you could have reasonably done

- What are the terms trying to enforce?
    - Normal custom (court likely to enforce)
    - Surprises – court less likely to enforce (especially if it's unclear that the P read or say the terms)

CURTIS V. RYDER (9TH CIR, 2002) (THE RYDER TRUCK LOSES ITS BRAKES – EXCULPATORY CLAUSE)

UCC says that exculpatory clauses must be

- VOLUNTARY
- CONSPICUOUS

Circle of assent doctrine

- Boiler plate contracts are only as valid as the few dickered terms plus anything not objectionable (indecent or unreasonable)

Totality of the circumstance

- Disclaimer in separate doc that agent KNEW C did not read
- Agent didn't point it out
- Did C have enough time to look it over
- Agent didn't explain the impact of signing the release

THIS IS WHY SOME CONTRACTS FORCE YOU TO INITIAL IN THE MARGINS NEXT TO IMPORTANT CLAUSES

CONTRACT BY CORRESPONDENCE

Forming contracts by mail

- When is acceptance effective?

When O receives the acceptance	When A dispatches the acceptance
When O receives the acceptance, but relates back the acceptance to cover from when it was sent	Notice – the acceptance is in the mail, but there's another way of knowing of the acceptance (clues, some other communication, etc.)

The American standard:

MAILBOX RULE:

- When you put the contract in the mailbox, the contract is formed (DEFAULT – IF O SPECIFIES OTHERWISE, OFFER DEFINES TERMS)
- THIS IS WHAT IS MEANT BY "OFFEROR IS THE MASTER OF HIS OFFER"

Revocation of the offer by mail

- Not effective until the notice is recd by the A

What about if you're an A in an "acceptance by receipt" jurisdiction?

- Use Fed-Ex
- Be more careful in relaying the acceptance if you're concerned about not getting it in on time

ADAMS V. LINDSELL (ENGLAND, 1818)

If you're mailing O/As:

- O holds offer until it receives notice from A in reasonable time

LEWIS V. BROWNING

- Stating the idea that an offeror may always if he chooses, make the formation of the contract dependant upon the actual receipt of the acceptance

LANGDELL/LLEWELLYN

- Langdell – for the receipt method
    - If you hold contract at send, and it gets miscarried or lost, you make O liable for a contract that he never knew was complete
    - If you hold contract at receipt, and it gets miscarried or lost, you make A think that contract is complete, but isn't and the worst that happens is that the status quo is held
        - BUT WHAT ABOUT WHEN THE A AFTER SENDING GOES ON TO PERFORM???
        - YOU KIND OF REQUIRE ONE MORE LETTER FROM O→A LETTING HIM KNOW THAT ACCEPTANCE WAS RECEIVED
            - AND THEN WHAT HAPPENS IF THAT GETS LOST???
- Llewellyn – for the dispatch method
    - The A is already relying with the best reason in the world on the deal being on
    - The O is only holding things open
    - In the view of efficiency of communication, we can protect all As in all deals at the price of hardship on Os in very few of them

RI TOOL V. US (1955) (ANOTHER BIDDING MISTAKE, TRYING TO WITHDRAW BID)

Court ignores the Mailbox Rule to find against the US

- A speculating at the expense of the offeror
    - Think trading in something with a volatile price (oil)
    - If we allow A to put acceptance in the mail and then either retrieve it from the mail or call up to revoke while still in the mail
        - You allow them to lock in price X (when letter sent)
        - And if price went down, revoke acceptance
        - And if price goes up, they're happy
    - This just isn't fair

Damages are either:

- RI Tool was forced to sell the bolts at X to the US, but next lowest bid would have been Y
    - Y-X

- RI Tool was forced to sell at X, but reasonable value was Z
    - Z-X

RoC2 §63 – time when acceptance takes effect

- Unless the offer provides otherwise
    - If acceptance is made in the manner the O invites, the contract is made as soon as acceptance is out of A's hand, w/o regard re when it reaches O
    - If the offer is an option contract, no contract until received

Revocation of offer/acceptance

- If recovation of the offer is rec'd before the acceptance is sent
    - NO CONTRACT
- If revocation of offer is sent after the acceptance is sent
    - CONTRACT
- Once an acceptance is in the mail, there is no revoking it
    - This goes back to the "speculating on the offeror" idea

PALO ALTO V. BBTC (THE OPTION TO EXTEND LEASE GETS LOST IN THE MAIL, BUT STILL NOTICE)

Tenants's improvements to the premises are sufficient notification that he intends to exercise his option to renew the lease

Although CA doesn't apply the general rule re receipt for options, it could have found notice above sufficient

RoC2 §63(b) commentaries

- Option contracts
    - Usual understanding for options is that there is no contract until terms are met (i.e. that you send the notice in X time)
    - In this case, A takes the risk that the loss or delay of the acceptance may invalidate the option
    - A can also revoke any time up until the O receives it's acceptance
    - O can also revoke the option up until he receives the acceptance

POSTAL TELEGRAPH V. WILLIS (TELEGRAMMING O/AS FOR COTTON, CUSTOM CAN CHANGE MAILBOX RULE)

But see Lewis v. Browning

- Offeror can always stipulate the terms of his offer and the mode of acceptance

    - If there is a custom that is understood as a usage of trade, then why is it necessary to state it?!?!
    - Remember that telegrams are expensive per word
- See UCC §1-205(3)
    - Usage of trade informs the terms of the contract even if unwritten

ACCEPTANCE BY PERFORMANCE

O is thinking "don't talk to me until you've done the thing I've asked"

- Rewards for lost dogs, etc.

Unilateral contracts

- Not all Acceptance by Performance contracts, but many
- "one-sided"
    - O only comes under obligation/contract when other side performs
    - Can be view as a firm offer
        - There is sufficient consideration for someone to solidify the firm offer
    - Implied subsidiary promise – you can't make someone start to accept, and then pull the rug out from underneath them

In acceptance by performance, often only one side is bound (generally the one who holds open the offer – the performer/acceptor is never bound until performance is complete)

CARLILL V. CARBOLIC SMOKE BALL (TAKE CSB FOR 2 WEEKS AND YOU WON'T GET THE FLU)

An ad in a newspaper will be considered an offer for a unilateral contract if the ad is specific enough

- Once the offer made, subsidiary promise to keep offer open for reasonable time to allow performance of conditions set forth
- Offeree need not notify of his intent to perform, only of his performance

Think about a typical contract

- It's a promise for a promise
- Consideration is the promise (for either side)

This is an exception

- It's a promise for a performance
- Carlill never comes under contract until
    - She buys the ball
    - She uses it as directed

    - She still gets the flu!

A by P is very close to the idea of a firm offer

- There is an offer (unilateral)
- The IMPLIED subsidiary promise is that if you perform, the contract is made
- Something like the paving case (firm offer implied)

DAVIS V. JACOBY (R NEEDS HELP, BUT THEN SUICIDES – PERFORMANCE?)

- If contract is unilateral, then acceptance only effective once niece completes the conditions of the offer (and death automatically revokes offer)
- If contract is bilateral, than acceptance was effective as soon as niece sent word that the offer was accepted (which she did before death)

RoC §31

- When the offer is ambiguous as to whether the intent was to create a unilateral or bilateral contract, presumption is that a bilateral contract was intended (promise for a promise)

Really a great restitution case – nephews were unjustly enriched for R's failure to fix his will (fulfill his contract), and so should have to hand over losses to F&C

- R can make promises that change his own will, but not changes to someone else's will!

Estoppel – a representation was made, and F&C relied → recovery of losses

A by P

- Notice of intent to perform needed?
    - Depends on the position of the offeror – does he need notice?
- Once you start performing, how long to finish?
    - "reasonable time"
    - once you start, get to finish → flagpole hypo!

RoC §45 – implied contract

CROOK V. COWAN (THE CARPETBAGGER/CARPET PROBLEM)

RoC §54 –

- If an offeror offers acceptance by performance, no notice needed unless the offeror asks for it
- If offeree accepts by performance, but has reason to believe that offeror has no reasonable way of learning of performance in reasonable time, THEN CONTRACT IS DISCHARGED UNLESS

    - Offeree uses reasonable effort to notify
    - Offeror learns of performance in reasonable time
    - Offer indicates that notification is not required

RoC §62

- When an offer invites offeree to choose btw acceptance by promise and acceptance by performance the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance
- Such an acceptance operates as a promise to render complete performance