Contracts § 2, Fall 2003. Professor Dennis Colson.

I. Contract

A. Formation

1. Bargain

a) Intent to be bound

(1) Theory

(a) Subjective theory: there should be a meeting of the minds, i.e. actual intent or will; otherwise, you may impute to the parties intentions they didn't have at all.

(b) Objective theory: a K has nothing to do with the personal, individual intent of the parties -- the proper ritual to create a K creates a K, period.

Comment: "If it were proved by twenty bishops that either party intended something else than the usual meaning which the law imposes upon them, he would still be held." Learned Hand, Hotchkiss v. National City Bank of NY (1911).

(2) Intent to contract, generally

(a) *Lucy v. Zehmer* (VA 1954, high as a Georgia pine): "we must look to the outward expression of a person, rather than to his secret and unexpressed intention . . . mental assent of the parties is not requisite for the formation of a K."

i) Evidence of intent to K

a. For

1) Writing: signed by both sellers, but not by the buyer.

2) Long conversation, about the deal.

b. Against

1) Refuses to seal the deal: buyer offers $5 to seal the deal but seller refuses -- no matter, says the court, because there had already been an offer and an acceptance by that point.

2) Jest: joking wasn't mentioned until after the execution and delivery of the K -- and then only in secret between the sellers -- it would be a binding contract whether the acceptance was serious or secretly in jest.

3) Seller lays the instrument on the table: perhaps less strong as evidence than if seller had handed it to buyer, but the K had been executed and delivered, says the court.

4) Intoxication: seller was "high as a Georgia pine"; but seller was able testify in detail about what took place, and drive buyer home -- he was not unable to comprehend to consequences of the deal. (See "Policing: Capacity.")

ii) Problems with the decision

a. It is an extreme, perhaps debilitating, use of formalism.

b. The appeals court is more or less deciding questions of fact.

c. The court is not concerned with the seller's intention, whereas they cite the buyer's seriousness and his post-acceptance acts (inspecting the title, raising money, &c.). See "Intent to be bound," and "Offer" below).

iii) *Leonard v. Pepsico* (NY 1999, harrier): no K where, considering circumstances and the ad's content, Pepsi's intent was not to actually offer a harrier.

iv) *Keller v. Holderman* (MI 1863, $15 watch sold for $300): no K where seller

wasn't expecting to sell and buyer wasn't intending to buy.

(b) Intent to be bound:

i) *Sullivan v. O'Connor* (face surgery): "patients may transform such statements into firm promises in their own minds."

a. *Hawkins v. McGee* (NH 1929, the hairy hand):

(c) Gentlemen's agreements

(d) >>>formal contract contemplated

i) open terms

ii) tribune I/tribune II Ks

b) Offer

Comment: "An offer is an act whereby one person confers upon another the power to create contractual relations between them. It must be an expression of will or intention. It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him." Corbin, 26 Yale L.J. 169 (1917).

"An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement 2d @ 24.

(1) *Owen v. Tunison* (ME 1932, store property improvements): where seller indicates no express intention to sell to the buyer in question, the would-be offer is only an intent to open negotiations.

(a) Timeline

i) "Will you sell me your store property . . . for $6,000?" An offer, that is rejected by the seller.

ii) "It would not be possible for me to sell unless I got $16,000." No offer: the language is too general -- it does not show an intent to be bound.

(b) *Nebraska Seed Co. v. Harsh*: "I want $2.25 per cwt. for this seed f.o.b. Lowell" isn't an offer because the language is too general -- it's like a circular.

(c) *Sellers v. Warren*: "would not consider less than half" isn't an offer to sell for one-half.

(d) *Southworth v. Oliver* (OR 1978, ranch sale to four neighbors): no offer where some terms are still open to negotiation (the sale date). Also, possibly no offer where there is no express "offer to sell" (see *Owen*).

i) price, terms are in letter -- but sale date still open to negotiation

(2) *Harvey v. Facey* (Jam. 1893, Bumper Hall Pen): "lowest price" alone is not an offer.

(a) Timeline

i) "Will you sell us Bumper Hall Pen?": no offer -- no price is specified, so it is an invitation to negotiate.

ii) "Lowest price for BHP £ 900.": no offer -- seller does not answer the "will you sell" question, only the lowest price. He may be bound by the lowest price he's quoted, but not to any offer to sell to this buyer.

a. N.b., the seller knows there are other interested buyers, but the court doesn't rest it's decision on that.

(3) *Fairmount Glass v. Crunden-Martin* (KY 1989, Mason jars): seller's quote with "for immediate acceptance" is an offer, buyer's order an acceptance

(a) Timeline

i) "Please advise us the lowest price for ten car loads.": no offer -- this is like *Harvey*, it is simply and inquiry.

ii) "Replying to you, we quote you [these prices] for immediate acceptance.": offer -- normally, quotes aren't offers, but "the true meaning of the correspondence must be determined by reading it as a whole": this isn't a quote because it answered the buyer's inquiry specifically and esp. since "for immediate acceptance" must mean the seller was making a proposition.

a. N.b., this is more than a quote, and not just an advertisement, because it is not just for anybody -- it is for this specific buyer and for his immediate acceptance.

(b) quote here is not an advert. -- it is intended esp. for buyer

(c) quotes gen'ly not offers -- ct. has to explain away "quote"

(d) "jars of first quality" term in buyer's order doesn't invalidate -- seller responded before seeing this term

(4) *Barker v. Allied Supermarket* (exploding Dr. Pepper): merchant using self-service sale method makes offer to shopper for sale of goods stocked on shelves

(5) Advertisements

Comment: Advertisements are usually not offers, but only invitations to a large group of buyers to make an offer to purchase.

(a) *Lefkowitz v. Great Minneapolis Surplus* (MN 1957, lapin stole): advertisement is an offer where it is clear, definite, explicit.

i) Ad: "Saturday 9 A.M. . . . 1 black lapin stole, worth $139.50 for $1.00, first come first served." Offer -- it is clear, definite, and explicit: it indicates a time and place and who the offeree is (the first person to arrive that day).

ii) House rule against selling to men: seller can impose restrictions on the offer before, but not after it is accepted.

a. N.b., that the buyer already knew the rule is not important -- a reasonable person standard is employed here, because it could have been anyone who arrived first that day.

iii) ad describes item, price, quantity (only one), says "first come, first served"

iv) "house rule" of seller not to sell to men not important

a. not in advert.

b. seller can't change terms of offer after an acceptance

c. it doesn't matter that buyer already knew about the house rule -- we are concerned with the "rsnbl. pers."

(b) *Moulton v. Kershaw* (WI 1884, rupture in the salt trade): letter from seller -- "we can offer salt in full car lots of 80 to 95 barrels" -- "is not such as a business man would use in making an offer to sell a definite amount of property."

(c) *Leonard v. Pepsico* (harrier): no offer b/c indefinite -- didn't identify who could accept, or how to accept, instead it referred to a catalog and details on pkgs.

(d) *Steinberg v. Chicago Medical School* (med school admission also based on family donations): med school catalog claiming admission based on scholarship was invitation to make offer on those terms (see *Lefkowitz*). Ct. found constructive K.

(e) *Mesaros v. U.S.* (limited run coins): order form -- "YES, please accept my order...all sales final...verification of my order will be made..." -- is only an invitation to make an offer

c) Termination and varying acceptance

(1) Lapse of offers

(a) *Akers v. Sedberry, Inc.* (f2f resignation): generally, an offer made in a face-to-face conversation continues only to the end of the conversation -- it can't be accepted afterwards.

(b) *Newman v. Schiff* (tax rebel offers reward for cites): rebroadcast of tax rebel's offer was not a renewal of the offer -- it was only information to viewers that the offer had been made.

(2) Revocation of offers

(a) Broken mirrors

i) *Dickinson v. Dodds* (mtg. at the train): offer revoked when buyer made aware that seller was negotiating with another buyer -- broken mirror.

a. Hypo: if buyer hadn't heard seller was negotiating w/ someone else, then buyer's letter left at seller's mom's WAS VALID acceptance and notice

b. Hypo: if seller wasn't negotiating w/ another buyer, buyer's acceptance after deadline would prob. not be acceptance -- b/c lapse

c. seller's memo an offer, but buyer gave no consid. for promise to hold offer open

ii) Restatement 2d @ 43: revocation where the offeree has "reliable information" that the offeror is acting inconsistent with the offer. "Reliable" means that the offeree knew or should have known it was reliable (per a reasonable person standard).

(b) Advertisements and public offers

i) offeror may be req'd to give revocation notice of same/similar publicity as offer

(c) Firm offers and options

i) *Ragosta v. Wilder* (the fork shop): no consid. for firm offer, no option b/c buyer financing not invited and only prep. for perf., no equitable estop b/c everybody knew the facts, but maybe prom. estop b/c seller should expect his prom. to induce buyer's actions

a. prom. to keep offer open unenforcable b/c

1) seller refused buyer's check down payment, which would have been consid.

2) buyer's detriments in seeking financing not consid. b/c it wasn't bargained for and wasn't exchanged

b. buyer's financing was mere prep. for perf., not "invited" perf. as acceptance under Rest. K s 45

c. no equitable estop. b/c buyer and seller working from the same set of facts -- seller didn't misstate facts

ii) *Dickinson v. Dodds* (mtg. at the train): good consideration must be given for a promise to hold an offer open.

iii) UCC 2-205: a merchant can make an irrevocable offer by a signed writing.

(d) Drennan

(3) Death or incapacity

(a) rest K s 48: offeree loses power to accept when either offeror or offeree dies or loses legal capacity to enter into the K

(b) options are NOT terminated by offeror's death/incapacity

(c) *Earle v. Angell* (come to my funeral): valid bilateral K -- any variation in terms assented to on the spot of f2f conversation

(4) Rejection / Acceptance varying offer

(a) Mirror-image rule

i) gen'ly acceptance must mirror the offer -- offeror has freedom from K except on terms of his offer

ii) but, add'l terms in acceptance can be found to have been implied (see Fairmount Glass, implied term "jars to be of first-quality")

iii) or but, rest K s 61: add'l terms in acceptance can be seen as requests (K then is still only on terms of offer) -- acceptance invalid only if acceptance made to depend on assent to changed terms

iv) **Battle of the forms**

- **a.** *Minn. & St. L. Ry. v. Columbus Rolling-Mill* (rail order too small): acceptance not matching offer's terms is a rejection, and offeree cannot resuscitate power to accept after that rejection.
  - **1)** offeror reqs. notice -- "expect to be notified by Dec. 20" -- offeror master of offer.
  - **2)** buyer's order is an acceptance itc (usu. order is an offer)
  - **3)** buyer's acceptance not on terms of offer, so it is a rejection -- buyer cannot resuscitate power to accept after a rejection

(b) UCC 2-207

i) *Itoh, Inc. v. Jordan Int'l*: arbitration clause not binding under 2-207(3) b/c writings didn't show agreement and arbitration clause not a UCC gap-filler

- **a.** no K under 2-207(1) b/c seller's ack. form expressly cond'l on buyer's assent
- **b.** arbitration clause not binding under 2-207(3) b/c writings didn't show agreement and arbitration clause not a UCC gap-filler
  - **1)** doesn't prejudice a/g seller making expressly cond'l ack b/c
- **c.** seller can still walk away from the deal unless buyer has expressly assented
- **d.** if seller really wants terms to be assented to, he can just not ship goods until he gets the assent (but if he does ship, he risks not getting his terms b/c of 2-207(3))

ii) **2-207(1)**: (abandons mirror image rule) acceptance varying terms of offer is valid unless expressly made condn'l to assent to add'l or diff. terms

- **a.** *Dorton v. Collins & Aikman Corp* (The Carpet Mart): K found under 2-207(1) b/c seller's acceptance too broadly cond'l, so valid K unless terms materially altered basic agreement
  - **1)** K under 2-207(1): seller's acceptances not expressly cond'l b/c the allowed assents are too broad -- they violate the purpose of 2-207(1) in ending mirror-image req.
  - **2)** K will be valid unless add'l terms materially alter under 2-207(2)(b)
- **b.** *Koehring Co. v. Glowacki*: no K even under 2-207(1) where response differs radically from offer (and so 2-207(2)(b) not reached)
- **c.** *Step-Saver v. Wyse Tech.* (box-top non warranty): no K under 2-207(1) b/c seller didn't clearly express unwillingness to proceed w/o buyer's assent to add'l terms
  - **1)** does UCC 2-207 really apply? the box may not be either an acceptance or a confirmation, so lang. of 2-207 doesn't -- but the purpose of 2-207 certainly does
  - **2)** no K under 2-207(1) b/c seller didn't clearly express unwillingness to proceed w/o buyer's assent to add'l terms
  - **3)** even if K under 2-207(1), seller's box-top terms would materially alter the agreement
  - **4)** K under 2-207(3) b/c of conduct of parties
  - **5)** seller repeatedly sent copies but didn't get buyer's assent to box-top

terms

6) seller spent lots of effort helping buyer solve probs. (despite box-top non-warranty)
7) distinguish from rest K s 61 (acceptance requesting change in offer's terms not invalid unless it reqs. assent to changed terms) -- in rest K, there is no analog to 2-207(2): so add'l terms in acceptance don't become part of K -- they are mere requests (precatory terms)
8) does UCC 2-207 really apply? the box may not be either an acceptance or a confirmation, so lang. of 2-207 doesn't -- but the purpose of 2-207 certainly does
9) no K under 2-207(1) b/c seller didn't clearly express unwillingness to proceed w/o buyer's assent to add'l terms
10) even if K under 2-207(1), seller's box-top terms would materially alter the agreement
11) K under 2-207(3) b/c of conduct of parties
12) seller repeatedly sent copies but didn't get buyer's assent to box-top terms
13) seller spent lots of effort helping buyer solve probs. (despite box-top non-warranty)

iii) **2-207(2)**: (abandons last shot analysis) if 2-207(1) gives you a valid K, proceed to analyze under this subsec:

a. **2-207(2)(a)**: if offer expressly limits acceptance to terms of offer, then add'l terms in acceptance don't become part of the K
b. **2-207(2)(b)**: if add'l terms in materially alter K, then they don't become part of the K
   1) *Step-Saver v. Wyse Tech.* (box-top non warranty): box-top license disclaiming all warranties materially alters agreement
   2) *Union Carbide v. Oscar-Mayer* (sausage casings tax evasion): alteration is material if consent cannot be presumed; also, hardship is not relevant, since it's a consequence, not a criterion
   3) materially altering terms can be assented to -- silence won't work, though, unless proposing party could rsnbly. infer consent (e.g. from prior dealings)
   4) typical materially altering clauses (cmt. 4) -- where change would cause "surprise or hardship" when no express knowledge
   5) typical NON materially altering clauses (cmt. 5) (rsnbl. changes, gen'ly)
c. *Pervel Industries v. TM Wallcovering*: arbitration clause assented to where buyer rcvd. std. confirmation form w/ clause many times before and where aribtration is customary term in textile industry
   1) negate std. warranties that normally attach
   2) require 90%+ delivery where custom allows more leeway
   3) seller reserving rgt. to cancel if buyer doesn't meet invoice when due
   4) require complaints be made in shorter time than rsnbl. or customary
   5) setting forth exemption for seller when something happens beyond his control
   6) fixing rsnbl. formula for prorating
   7) fixing rsnbl. time for complaints
   8) providing for inspection by sub-purchaser
   9) providing for interest on overdue invoices
   10) setting rsnbl. or customary credit terms
   11) limiting rgt. to reject for defects w/in customary trade tolerance

d. **2-207(2)(c)**: if notification of rejection of add'l terms given in reasonable time, then they don't become part of the K

iv) **2-207(3)**: if 2-207(1) (with (2)) doesn't give you a valid K, look to conduct of parties -- K will consist of terms on which writings agree PLUS gap-fillers

a. *Step-Saver v. Wyse Tech.* (box-top non-warranty): no K under 2-207(3) b/c seller tried to get buyer's consent but didn't, and b/c seller spent effort helping buyer w/ probs. despite box-top non-warranty

1) does UCC 2-207 really apply? the box may not be either an acceptance or a confirmation, so lang. of 2-207 doesn't -- but the purpose of 2-207 certainly does

2) no K under 2-207(1) b/c seller didn't clearly express unwillingness to proceed w/o buyer's assent to add'l terms

3) even if K under 2-207(1), seller's box-top terms would materially alter the agreement

4) no K under 2-207(3) b/c of conduct of parties

(c) Options

i) Restatement 2d @ 37: the power to accept an option K isn't terminated by rejection, counteroffer, revocation, death, or incapacity.

d) Acceptance

Comment: "An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer. The offeror has, in the beginning, full power to determine the acts that are to constitute acceptance." Corbin, 26 Yale L.J. 169 (1927).

"Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement 2d @ 50.

(1) Power of acceptance

(a) Offer generally can only be accepted by it's intended offerree(s)

i) *Boulton v. Jones* (store changes hands, new owner doesn't notify buyer of change): K made where "personality" of contracting party important, no other party can step in for that party.

(2) Act manifesting acceptance

(a) *Allied Steel v. Ford Motor* (6th cir. 1960, indemnity clause): offeror's suggestion of a method of acceptance does not necessarily preclude other methods.

i) Part performance in accordance with the offer may serve as an acceptance: Allied didn't have to accept by executing the agreement -- they accepted when they began performance with Ford's consent.

(b) *Ever-Tite Roofing v. Green* (LA 1955, roofing K): buyer's offer (on seller's terms) specified acceptance could be by commencement of perf. Acceptance occurred then when seller's roofers put materials on truck with intent to go to buyer's home

i) "This agreement shall become binding only on written acceptance or upon commencing performance.": <u>offer</u> -- the words the seller puts in the the buyer's mouth as his offer. The offer was accepted when seller put it's material on the truck to begin the buyer's job.

ii) <u>Notice</u>: offeror effectively waived notice in the terms of the offer.

(c) *White v. Corlies & Tift* (NY 1871, carpenter gets stuff): seller's purchase and preparation of materials for carpentry job is not an acceptance of buyer's offer to pay for carpentry work.

i) <u>Timeline</u>

a. Buyers furnish carpenter with specs and request and estimate: <u>no offer</u> -

- an invitation to make an offer.

b. Carpenter leaves his estimate with buyers: offer.

c. Buyers change the specs: no offer -- an invitation to make a second offer.

d. Carpenter's assent: offer -- this is his second offer.

e. "Upon an agreement to finish, you can begin at once. The writer will call again.": counteroffer. The court, says Colson, treats this an offer for creation of a unilateral K.

1) N.b., the court seems to ignore the "upon an agreement" language, reading the note as, essentially, "you can begin at once."

ii) Act manifesting acceptance

a. Carpenter buys his stuff is not sufficient to manifest his acceptance.

1) When offeror and offeree are not together, the offeree must manifest acceptance with an appropriate act. Mental determination alone is not sufficient.

2) Notice: the offeror may become bound before he receives notice of the acceptance, but will not be bound if notice is not given in a way that would give the offeror notice within a reasonable time. (Unless the offeror has waived notice. See *Int'l Filter*).

iii) First estimate is the first offer

iv) Assent to changes is second offer -- "upon an agreement to finish...you can begin at once."

v) Ct. analyzes as a unilateral K, and carpenter did not begin perf. by buying stuff

a. but doesn't "upon an agreement" suggest an offer for a bilateral K? hmm...

(d) Shipment of goods as manifest acceptance

i) *Corinthian Parmaceutical v. Lederle Labs* (IN 1989, price hike): shipment of non-conforming goods is not an acceptances if the seller notifies the buyer that it's just an accommodation (UCC 2-206).

a. Timeline

1) Seller sends out pricelists: no offer.

2) Buyer obtains seller's internal memo: no offer.

3) Seller sends out letter to its customers: no offer.

4) Buyer places telephone order: offer.

5) Telephone order system receives buyer's order: not acceptance -- an automated or ministerial act can't be an acceptance; itc., this is simply the assignment of a tracking number to the order/offer.

6) Seller ships an accommodation: counteroffer -- just as at common law, since seller satisfied UCC 2-206 by notifying buyer of the accommodation.

7) Buyer receives the accommodation: acceptance of seller's counteroffer -- so buyer is stuck with it.

ii) *Doll & Smith v. Sanitary Dairy* (buyer cancels order after seller has paid agent): effective revocation since seller had not sent an acceptance to buyer, nor were goods delivered before revocation.

(e) Silence as manifest acceptance

i) *Hobbs v. Massasoit Whip* (eelskins retained): acceptance found in silence where seller retained goods for unreasonable time, and buyer and seller have dealt 4-5 times before.

ii) *American Bronze v. Streamway* (buyer called in orders for 20 yrs): orders filled as regular practice was acceptance absent a notice of rejection from

seller.

iii) *City of Calhoun v. N. Georgia Electric* (elec. co. won't pay tax): silence not acceptance where city req'd express acceptance and elec. co. gave express rejection.

(3) Moment of acceptance

(a) Options: acceptance not operative until received by offeror.

(b) Mailbox rule

i) dispatch of acceptance is the moment of acceptance: offeror can't revoke, offeree can't reject

ii) resk K s 63: acceptance made as soon as acceptance is out of offeree's possession (if acceptance made in an invited manner)

iii) offeror holds the transmission risks (e.g. acceptance lost in the mail)

(4) Notice of acceptance

Comment: The conventional rule is that an offeror who is not notified of acceptance within a reasonable time is discharged of his duty to perform.

Restatement 2d @ 54: where an offer invites an offeree to accept by rendering performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification. (But) if an oferee who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless (the offeree exercised reasonable diligence, the offeror learns of the performance, or the offer waives notice).

UCC 2-206(2): an offeror who is not notified of acceptance in a reasonable time can treat his offer as having lapsed.

(a) *Bishop v. Eaton* (MA 1894, letter of credit): where performance in unilateral K is such that promisor won't quickly have knowledge of it, promisee must give notice within a reasonable time after acceptance.

(b) Options: acceptance not operative until received by offeror.

(c) Waiver of notice

i) *Int'l Filter v. Conroe Gin, Ice & Light* (TX 1925, water purifier): notice may be waived impliedly by the offeror.

a. Visit by seller's travelling salesman: no offer -- these are just negotiations.

b. Salesman: "We propose to furnish [the product] at [price] . . . this proposal becomes a contract when accepted by the purchaser and approved by an executive. This proposal submitted for prompt acceptance.": no offer -- this is just a proposal, since it reserves a right in the seller to disapprove. Cf. *Owen* (store property), *Fairmount Glass* (mason jars), and *Moulton* (salt trade).

c. Buyer: "Accepted Feb. 10": offer -- the buyer offers on the terms set out in the seller's proposal.

d. Seller's executive: "O.K. Feb. 13": acceptance -- the terms of the offer (which are the term's of the seller's proposal) permit acceptance as soon as the seller's executive approves. "The paper then became a 'contract.'"

1) N.b., notice of acceptance was waived by the buyer in his offer. But, n.b., the "notice" that seller does send to buyer, asking for a water sample -- doesn't this suggest that perhaps seller has not yet even accepted buyer's offer (i.e., couldn't they argue their way out of the contract at this point, since they've yet to get a water sample)?

ii) *Carlill v. Carbolic Smoke Ball* (Eng. 1893, reward for catching the flu): offeror can dispense with notice -- offeree who performs condition under such circumstances has given sufficient notice.

2. Consideration

Comment: Restatement (first): Consideration for a promise is: (a) and act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise.

Restatement 2d: (1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

a) Benefit and detriment theory

Comment: N.b., distinguish detriments "in law" from those "in fact" -- the courts don't care if it's really a detriment (i.e., in fact).

(1) Taxonomy

(a) Acts other than promises

Comment: Unilateral contract: a contract in which one one party makes a promise or undertakes a performance. Black's.

i) **Past acts**

Comment: Almost always, past actions fail as consideration because they can neither be bargained for nor given in exchange.

a. *Feinberg v. Pfeiffer Co.* (MO 1959, pension promise): "many years of long and faithful service" is not good consideration for a promise to give a pension. Also, continuation of work itc. can not serve as consideration because it was not bargained for and given in exchange.

b. *Webb v. McGowin* (AL 1935, boss's fall): moral consideration can be good consideration if the promisor makes an express promise based on his own moral obligation for material benefits received.

Comment: "We agree that if the benefit be material and substantial, and was to the person of the promisor, he has the privilege of recognizing a compensating. The reason is emphasized when the compensation is not only for the benefits received, but also for the injuries to the property or person of the promisee by reason of the service rendered." Cert. denied. opinion.

1) N.b., the court presumes an earlier bargain for the services rendered.

2) But see *Harrington v. Taylor* (NC 1945, averted axe): "however much the Df. should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."

c. *Mills v. Wyman* (MA 1825, father's promise to pay son's doctor): father's promise to pay for a doctor's medical care of his son is not supported by the doctor's acts in the past -- The father received no material benefit. Although the father might should feel a moral obligation to make good on his promise, he has no legal obligation.

(b) Forbearances of legal rights

i) *Hamer v. Sidway* (NY 1891, don't drink): forbearance from smoking, drinking, and gambling is good consideration.

a. Family Ks: at older common law gifts or services provided by on family

member for another were usu. assumed to be gifts motivated by altruism. Now, esp. with Williston's holistic approach to K in the first Restatement, family Ks not a special category as much.

b. Gratuitous promises: a promise to make a gift can not be clothed in consideration, and so generally are no good.

1) Peppercorns: if A wants to give B something, and gives A something trivial for it as a mere pretense, there is no consideration to be found in the deal.

c. Sufficiency of consideration: while court at law do not inquire into the adequacy of consideration, they used to inquire into the sufficiency of it -- but this is abandoned in the 2d Restatement: now there just has to be (good) consideration.

ii) *Fiege v. Boehm* (MD 1956, paternity): forbearance to assert a claim is consideration if the forbearer thinks it's a good, *bona fide* claim, and the claim is, objectively viewed, be a reasonable one.

(c) Modifications of legal relations

(d) Return promises

Comment: Bilateral contract: a contract in which each party promises a performance, so that each party is an obligor on that party's own promise and an obligee on the other's promise. Black's.

i) Illusory promises

a. *Strong v. Sheffield* (NY 1895, promissory note): promise is illusory where promisor is free to perform or not, at his pleasure.

1) "I will keep it until such time as I want it.": an illusory promise -- the promisor isn't bound to do anything; he could have immediately demanded on the note.

2) But, is "I will not pay that note away" another, good promise? No -- promisor suffers no detriment in making this promise, as he has, at the time of the promise, no legal right to pay the note away since he doesn't have the note yet.

b. *Mattei v. Hopper* (CA 1958, satisfaction K): a satisfaction clause does not make for an illusory promise where satisfaction depends on more than the arbitrary choice of the promisor.

1) Satisfaction of fancy: (like itc.) promisor determines on his own judgment whether he is satisfied -- promisor gives as consideration his duty to exercise his judgment in good faith. E.g., antiques purchase Ks.

2) Satisfaction of fitness: satisfaction of commercial value is determined objectively, using a reasonable person standard.

c. *Eastern Air Lines v. Gulf Oil* (FL 1975, requirements K): a requirements clause does not make for an illusory promise or an indefinite K where there are objective means for calculating price and as long as requirements do not vary unreasonably.

1) Judging requirements clauses: look at (a) past purchases and sales, (b) estimates of requirements, and (c) established limits on requirements.

ii) Promises implied in fact

a. *Wood v. Lucy, Lady Duff-Gordon* (NY 1917, the creator of fashions): under the circumstances of the K here, a promise is "fairly to be implied" that the agent would make reasonable efforts.

1) N.b., the promisor's explicit promises are the basis and evidence for the implied promises -- but the implied promises furnish the consideration.

2) N.b., all the circumstances -- rather than a single fact -- determine whether a promise may be implied.

b) Bargain theory

(1) *Kirksey v. Kirksey* (AL 1845, come down and see me): promise to give sister land is an altruistic, family promise, and not supported by consideration.

(a) Gratuitous promise: promise itc. is made without self-interest -- the promisor insists on nothing in return.

i) But, n.b., "I have more land than I can tend": isn't this evidence of possible self-interest?

(b) Family promise: further doubt is cast on this agreement since the parties are related.

(2) *Central Adjustment Bureau v. Ingram* (TN 1984, noncompete agreement): an employer gives good consideration for an employee's noncompete promise where the employee's noncompete promise is made before or soon after employment, and employer continues to employ the employee for a reasonable length of time, and the employer does not discharge employee capriciously or in bad faith. Later promotions and raises are also evidence of consideration given.

(a) DISSENT: by the time the noncompete agreements were presented to the employees, they had already quit their jobs in reliance on the employer's promises to employ -- continued employment could not have been freely bargained for (duress). Also, there is nothing to indicate the promotions and raises were bargained for or given in exchange for the employees' noncompete promises.

(3) *Bankey v. Storer Broadcasting* (MI 1989, employee handbook revision): employer can unilaterally change its policies from discharge for cause to employment at will as long as it gives employees notice of the change.

(4) Past acts

Comment: Almost always, past actions fail as consideration because they can neither be bargained for nor given in exchange.

(a) *Feinberg v. Pfeiffer Co.* (MO 1959, pension promise): "many years of long and faithful service" is not good consideration for a promise to give a pension. Also, continuation of work itc. can not serve as consideration because it was not bargained for and given in exchange.

(b) *Webb v. McGowin* (AL 1935, boss's fall): moral consideration can be good consideration if the promisor makes an express promise based on his own moral obligation for material benefits received.

Comment: "We agree that if the benefit be material and substantial, and was to the person of the promisor, he has the privilege of recognizing a compensating. The reason is emphasized when the compensation is not only for the benefits received, but also for the injuries to the property or person of the promisee by reason of the service rendered." Cert. denied. opinion.

i) N.b., the court presumes an earlier bargain for the services rendered.

ii) But see *Harrington v. Taylor* (NC 1945, averted axe): "however much the Df. should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."

(c) *Mills v. Wyman* (MA 1825, father's promise to pay son's doctor): father's promise to pay for a doctor's medical care of his son is not supported by the doctor's acts in the past -- The father received no material benefit.

Although the father might should feel a moral obligation to make good on his promise, he has no legal obligation.

(5) Pre-existing duties

(a) *Alaska Packers' Ass'n v. Domenico* (9th cir. 1902, renegotiation far from home): where there was no voluntary waiver of an original K, a second K for the same performance is unenforceable unless there is new consideration given.

i) N.b., beneath the pre-existing duty rule, there are policing concerns, e.g., duress and undue influence.

(b) *Schwartzreich v. Bauman-Basch, Inc.* (NY 1921, torn off signatures): where parties tear off their signatures from a prior K and enter into a new K for the same performance, the new K is valid.

(c) *Watkins & Son v. Carrig* (NH 1941, cellar excavation): intent to rescind a prior K may be found in the assent to a new K.

i) Two interpretations of the decision.

a. Since there was no duress -- the Df. could have K'd with someone else to do the job (cf. *Alaska Packers*) -- it is possible to infer a rescinding K from the Df's. assent to the new K.

1) N.b., a party may have to demonstrate a sufficient amount of temerity in face of the duress-causing threats.

b. A change in the law: a pre-existing duty rule is inapplicable -- all that's needed is proof that the Df. intended to make the new K.

(d) *De Cicco v. Schweizer* (NY 1917, promise to stay engaged): even though "a promise by A to B to induce him not to break his K with C is void," here the K is viewed as a promise by A to induce B to forbear deciding with C to break the engagement.

3. The statute of frauds

Comment: In analyzing a potential statute of frauds problem, consider:
1. Does the statute apply?
2. Is the statute satisfied?
3. If not, is there a reason to excuse satisfaction?

a) Statutory requirements

Comment: This course will use the Connecticut statute of frauds.

(1) Certain types of agreements must be in writing.

(a) Special promises by executors or administrators to pay damages from their own property.

(b) Special promises to answer for the debt, default, or miscarriage of another.

(c) Agreements made on consideration of marriage (e.g., prenuptial agreements).

(d) Agreements for the sale of real property or interests in real property.

(e) Agreements not to be performed within one year from the making of the agreement.

Comment: This does not apply to an agreement that is capable of performance within a year, even if a longer period of performance is probable. The agreements covered are those that "really cannot" be performed within a year.

(f) Agreements for loans of more than $50,000 in value.

(2) But, the statute doesn't apply to leases of less than one year for real property or interests in real property where the lessee is actually occupied the

property.

(3)

b) Statutory application and interpretation

(1) Does the statute apply?

Comment: Courts interpret the statute narrowly.

(a) *Power Entertainment v. NFL Properties* (5th cir. 1998, license agreement): main purpose doctrine excludes suretyship contracts based on "original," as opposed to "collateral" promises to pay a debt.

i) Main purpose doctrine: the statute does not include suretyship agreements where:

Comment: "The doctrine applies when the pecuniary interests of a promisor in a commercial contract context replace the gratuitous elements often present in suretyship." (From another case.)

a. The promisor intended to become primarily liable for the debt, in effect making it his original obligation, rather than to become a surety for another, and,

b. There was consideration for the promise, and,

c. The receipt of the consideration was the promisor's main purpose or leading object in making the promise -- i.e. the consideration was primarily for the promisor's own use and benefit.

ii) The purpose of the statute, w/r/t to suretyship agreements, is to protect those who are alleged to have guaranteed the debt of another.

iii) *Langman v. Alumni Ass'n of UVA* (VA 1994, Ferdinand's arcade): the statute doesn't apply to original undertakings -- including a grantee who assumes an existing mortgage.

a. "A grantee who assumed an existing mortgage is not a surety. The grantee makes no promise to the mortgagee to pay the debt of another, but promises the grantor to pay the mortgagee the debt the grantee owes to the grantor. This is an original undertaking. . . . A collateral undertaking is one in which the promisor is merely a surety or guarantor, receives no direct benefit, and is liable only if the debtor defaults."

(2) Is the statute satisfied?

Comment: Courts interpret satisfaction of the statute leniently.

"To satisfy the statute of frauds, a writing must contain the essential terms of the agreement it memorializes." Janus v. Sproul (1995).

(a) Writings

i) There need not be a single memorandum -- it can be pieced together out of separate writings. Parol evidence must connect the papers.

ii) Only the signature of the party to be charged is required. A signature may be "most any scratch" by an individual, or a stamped name or letterhead of an entity.

(b) *In re Abritration between Acadia Co. & Irving Edlitz* (NY 1960, K renewal): oral renewal of a written agreement incorporates the written agreement and so satisfies the statute (otherwise, "oral renewal" would be meaningless).

(3) Can the agreement be taken out of the statute?

(a) *Johnson Farms v. McEnroe* (ND 1997, reneged farm sale): part performance may excuse a real estate agreement from the statute. Further, restitution theory may allow recovery of excess payments.

i) Excusal from the statute by part performance of a real estate agreement: part performance serves as evidence of a K -- "the most important question

is whether part performance is consistent only with the existence of the alleged oral K."

a. Payment of the K price.

b. Taking possession of the property.

c. Making improvements to the property.

(b) *Monarco v. Lo Greco* (CA 1950, reneged will promise): a party may be estopped from relying on the statute if the estoppel would prevent fraud, and there has been unjust enrichment or detrimental reliance.

i) Reliance: promisee gave up his own opportunities in reliance on the promise that he'd receive the family farm.

ii) Unjust enrichment: promisee's labor inured to the benefits of the promisor.

iii) Estoppel of reliance on the statute does not require incorrect representations about the requirements of the statute by the promisor.

B. Policing

1. Status of the parties

Comment: "This method of policing disqualifies certain classes of persons from committing themselves by contract."

a) The intoxicated

Comment: "To render a transaction voidable on account of the drunkenness of a party to it, the drunkenness must have been such as to have drowned reason, memory, and judgment, and to have impaired the mental faculties to such an extent as to render the party non compos mentis for the time being." Martin v. Harsh, 83 N.E. 164 (Ill. 1907).

(1) *Lucy v. Zehmer* (1954, diner receipt K): despite his claim to have been "high as a Georgia pine," Zehmer could not void the K for status because he "was not intoxicated to the extent of being unable to comprehend the nature or consequences of the instrument he executed."

(2) Drunks briefly sober: "A deed executed in a sober interval by one who is addicted to the excessive use of liquor, but who has not been adjudicated incompetent and has not suffered a permanent impairment of mind as a result of his excessive indulgence, will stand, at least in the absence of undue influence or fraud." *Olsen v. Hawkins*, 408 P.2d 462, 466 (Idaho 1965).

b) Infants

Comment: "The general rule is that "the contract of a minor, other than for necessaries, is either void or voidable at his option." (N.b., voidable is, nowadays, more correct.) However, "the minor is not entitled to be put in a position superior to such a one he would have occupied if he had never entered into his voidable transaction."

(1) *Kiefer v. Fred Howe Motors* (1968, Willys station wagon): 20y.o. can avoid his K to buy a car, even though he represented in the instrument that he was 21.

(a) The legislature is the proper venue for Df. to seek a change in a 20yo's capacity to K.

(b) Pf. sued on restitution theory for recovery of the price. N.b., since he won, he has to return the car.

(c) Df. would also counterclaim in tort for fraud, because Pf. signed to claim he was 21.

i) But, n.b., equitable estoppel is not available for public policy reasons.

(d) DISSENT: 21-year age limit is no longer magical. Also, a car was a necessity for this Pf., and so he may K for it.

(2) Necessaries

(a) Generally, minors can K for necessaries. "An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards." *Gastonia Personnel Corp. v. Rogers*, 172 S.E.2d 19 (N.C. 1970).

(b) Housing: minors who could live with their parents can void their K for housing. "If a minor is living with a parent or guardian who is able and willing to furnish the minor with housing, housing is not a necessary and a contract entered into by the minor for housing will not be binding." *Rivera v. Reading Housing Authority*, 819 F. Supp. 1323, 1332-34 (E.D.Pa. 1993).

(3) N.b., minors can disaffirm their K both while a minor and for a reasonable time after they reach majority (usu. a few months, or set by statute).

(4) N.b., minors generally must seek restitution after voiding their K. If there is nothing to return (e.g., in a K for services), the minor may not have to return anything (this furthers the policy against adults contracting with infants -- "he who deals with a minor does so at his own peril").

c) Incompetents

Comment: Restatement 2d @ 15: a person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition."

(1) Restatement 2d § 15: voidable K duties only when mental illness or defect in some cases. (N.b., bring in the psychiatrists for this one.)

(a) Contractor was unable to understand in a reasonable manner the nature and consequences of the transaction; or,

(b) Contractor was unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

(c) But, if the K was made on fair terms and the other party didn't know about the mental illness or defect, then the K isn't avoidable when either it's been at least partially performed or it would be unjust to void it. Still, the court can decide to grant equitable relief.

(2) *Ortelere v. Teachers' Retirement Bd.* (1969, psychotic with arteriosclerosis): K is voided through application of a cognitive test (*M'Naughten*). Freedom from K.

(3) *Cundick v. Broadbent* (1967, arteriosclerosis sale at half price): K is upheld despite contractor's defects and low, low price because Pf. would not have been incapable of contracting and his family not know about it. Freedom to K.

(a) There is a line between "lunatics," who can't K, and the "weakminded," who can. But, weakmindedness is relevant to overreaching and fraud.

d) Duress

(1) Pre-existing duties

(a) *Alaska Packers' Ass'n v. Domenico* (9th cir. 1902, renegotiation far from home): where there was no voluntary waiver of an original K, a second K for the same performance is unenforceable unless there is new consideration given.

i) N.b., beneath the pre-existing duty rule, there are policing concerns, e.g., duress and undue influence.

(b) *Watkins & Son v. Carrig* (NH 1941, cellar excavation): intent to rescind a prior K may be found in the assent to a new K.

i) Two interpretations of the decision.

a. Since there was no duress -- the Df. could have K'd with someone else to do the job (cf. *Alaska Packers*) -- it is possible to infer a rescinding K from the Df's. assent to the new K.

1) N.b., a party may have to demonstrate a sufficient amount of temerity in face of the duress-causing threats.

b. A change in the law: a pre-existing duty rule is inapplicable -- all that's needed is proof that the Df. intended to make the new K.

e) Unconscionability

(1) Adhesion contracts

(a) *O'Callaghan v. Waller & Beckwith Realty* (IL 1958, exculpatory clause): generally exculpatory clauses are void as against public policy, but may be upheld considering the circumstances.

i) Reasons to uphold the exculpatory clause:

a. Shifting liability may benefit the tenant as well as the landlord.

b. Pf. made no showing of attempts to avoid the exculpatory clause through seeking another apartment or negotiating with the landlord.

c. Housing shortages may mean the K was contrary to public policy, but the legislature has passed remedial measures, and there are thousands of landlords in competition.

ii) DISSENT: housing shortages were so acute that Pf. would have risked losing the apartment if she negotiated, and would probably not have found a landlord offering a K without an exculpatory clause.

(b) *Henningsen v. Bloomfield Motors* (NJ 1960, warranty disclaimer):

2. Behavior of the parties

a) Economic duress

(1) *Austin Instrument v. Loral Corp.* (NY 1971, refuse to deliver parts): economic duress.

(a) Economic duress elements.

i) Deprived of free will: Pf. had to deliver to the government monthly, and so would both be liable for breach damages and could jeopardize future business if it did not deliver.

ii) No alternatives: Pf. contacted other vendors, who could not deliver the parts in time for Pf. to meet it's obligations, nor in a reasonable time. Asking for an extension was not an alternative because vendors could not promise delivery dates, plus Pf. would jeopardize future business.

(b) Remedies.

i) At law: normally, Pf's remedy would be money damages, but this is inadequate under these circumstances, where Pf. needs to produce in a limited time.

ii) At equity: here, specific performance is appropriate.

iii) Delay: Pf. waited to sue until after deliveries because it feared another stoppage -- this was reasonable in light of Df's. prior conduct, so the delay was justified.

a. *Astley v. Reynolds* (Eng. 1732): overpayment then later suit is ok where "Pf. might have had such an immediate want of his goods that an action of trover would not do his business."

(2) *Odorizzi v. Bloomfield SD* (CA 1966, homosexual): undue influence.

(a) Patterns in undue influence.

i) Discussion of the transaction at an unusual of inappropriate time.

ii) Consummation of the transaction in an unusual place.

iii) Insistent demand that the business be finished at once.

iv) Extreme emphasis on the untoward consequences of delay.

v) Multiple persuaders versus a single servient party.

vi) Absence of third-party advisers to the servient party.

vii) Statements that there is not time to seek financial or legal advice.

(b) Special relationships.

i) Where there is a confidential relationship between the parties, the claimant usu. must show that the bargain was "fair, conscientious, and beyond the reach of suspicion."

ii) Ordinarily special relationships.

a. Guardian/ward.

b. Principal/agent.

c. Attorney/client.

b) Misrepresentation

Comment: Misrepresentation elements:
1. Intentional (required only for tort, not for K)
2. misrepresentation
3. of material
4. fact
5. reasonably
6. relied upon.

(1) *Swinton v. Whitinsville Sav. Bank* (MA 1942, termites): bare nondisclosure is not fraud.

(a) Nondisclosure is not sufficient.

i) No allegations of false statements or half-truths.

ii) No evidence that Df. prevented Pf. from acquiring information.

iii) No special relationship between the parties -- bargaining at arm's length.

(b) N.b., Pf. could have brought case in K, as well as in tort for fraud (as they did).

(2) *Kannavos v. Annino* (MA 1969, zoning problem): some disclosure requires full disclosure.

(a) Nature of the disclosure: Df. knew that Pf. was investing in the property to rent it out, but failed to disclose zoning and building violations.

(b) Nature of the defect: unlike in *Swinton*, Pf. could have discovered the defect on his own. However, lack of due diligence is not a bar to recovery where Pf. has relied on fraudulent representations.

(3) *Vokes v. Arthur Murray, Inc.* (FL 1968, dancing lessons): superior knowledge by one party -- where the parties are not at arm's length -- can turn an opinion into a fact.

(a) N.b., the relationship of the parties also suggests an undue influence argument, which the court recognizes as valid.

3. Substance of the bargain

a) *McKinnon v. Benedict* (WI 1968, land use restrictions): inadequate consideration where Df. gave up the right to freely used their land for a $5,000 secured loan and Pf's. unsuccessful attempts to help the Dfs. But, n.b., the court is not saying that the K is unenforceable, just that Pf. can not recover at equity because the

consideration is too inadequate.

(1) Retrospective approach: the court seems to view the K retrospectively -- finding that the Df. didn't really benefit. Cf. *Tuckwiller*.

(2) Remedies.

(a) At law: Pf. is entitled to money damages to put him in the position he would have been -- but these damages would be difficult to prove (based on depreciation of his own property).

(b) At equity: Pf. seeks to enjoin Dfs. from development against the agreement, but the court says consideration is too inadequate for Pf. to invoke the court's equity powers. In doing so, the court evaluates each promise and finds that the total value of all of them is not enough to support an injunction.

(3) Other policing factors.

(a) Public policy: restrictions against land use are not favored.

(b) Status: necessitous men aren't free men (re: wealth).

(c) Status: Df. was outmatched in business.

b) *Tuckwiller v. Tuckwiller* (MO 1967, caretaking K): adequacy of consideration and fairness are determined on a prospective view of the agreement.

(1) Substance: in determining fairness and adequacy of consideration, the transaction should be viewed prospectively (cf. *McKinnon*). As such, Pf. undertook a possibly burdensome obligation, and it doesn't matter that it only lasted six weeks.

(2) Remedies: Pf. seeks specific performance in conveyance of real property -- where the K is fair, a court at equity should grant specific performance when the K involves real property.

c) *Black Industries v. Bush* (NJ 1953, government K): "relative values in consideration in Ks between businessmen dealing at arm's length will not affect the validity of the K."

(1) Substance: the court will not inquire into the reasonability of a middleman's profit because is doesn't want to assume price regulatory functions -- there are better ways of regulating price than through the courts.

(a) Policy

i) Efficient K administration means court shouldn't set prices.

ii) Ks should not be enforced based on vague terms like "fair" or "reasonable."

iii) Sane, mature people should have freedom to K.

(2) Other policing factors.

(a) Public policy: certain contracts may be void as against public policy on the basis of recognized legal principles. This case does not fit under any such category.

i) Ks to pay a party to induce a public official to act in a certain way.

ii) Ks to do an illegal act.

iii) Ks contemplating collusive biddding on a public K.

4. Public policy

5. Unilateral Mistake

a) Offeror not bound if offeree knows or has reason to know of offeror's mistake

b) *Elsinore School Dist v. Kastorff* (clerical error in bid): acceptance made

before error was found.

(1) Rescission for unilateral mistake of fact.

(a) Mistake must be material to the K.

(b) Mistake can not be the result of neglect of a legal duty.

(c) Enforcement of the K must be unconscionable.

(d) It must be possible to place the other party in his original position.

(e) Party seeking relief must give prompt notice of his decision to rescind.

(f) Party seeking relief must give back everything he got from the other party.

c) *Kemper Const. v. City of L.A.* (cited in Elsinore; clerical error in bid): error found early, no acceptance made.

C. Remedies

1. Legal Remedies

a) Expectation measure

b) Restitution measure

c) Reliance measure

d) Disgorgement (not recoverable)

2. Equitable Remedies

a) Inadequate remedy at law

II. Reliance Theory

Comment: Reliance to the detriment of a party may be an alternative basis to consideration as a basis for enforcing a promise.

A. Promissory Estoppel

Comment: Restatement 2d @ 90: 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 induct 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.

1. *Ricketts v. Scothorn* (NE 1898, you don't have to work): a promise may be enforceable where promisee gave no consideration, but promisor contemplated her future action in reliance. Here promissory and equitable estoppel are both crammed under K theory.

a) "I have fixed out something that you have not got to work any more." A promise looking to induce an act? The promisee did not promise to do anything, for sure.

(1) Bargain and exchange: the court says the promisor "made no condition, requirement, or request," the promisee could remain idle or work, at her choosing -- and so this promise is gratuitous.

(2) Reliance: whether promisor wanted promisee to quit work or not, he surely contemplated that she would quit. Since he induced her to quit, "it would be grossly inequitable to permit the promisor to resist payment on the grounds of no consideration."

(3) N.b., the is a familial promise. See *Hamer* and *Kirksey*.

2. *Feinberg v. Pfieffer* (MO 1959, pension promise): promisor induced the promisee's retirement in reliance. Here promissory estoppel emerges from K.

3. *Cohen v. Cowles Media Co.* (MN 1992, confidentiality promise): even though parties were not thinking in terms of a binding K, promisor's promise was

enforceable because of promisee's reliance.

4. **Remedies**
   - **a)** *D & G Stout v. Bacardi Imports* (7th cir. 1991, distributorship): promissory estoppel will not support expectation damages in an at-will relationship.
     - **(1)** Bacardi's assurances to D & G were not promises, says Colson, they were statements of fact only -- "we have no intention of taking our line elsewhere."
     - **(2)** Promise to stay with promisee was not a meaningless restatement of an at-will relationship because promisor knew promisee "stood at a crossroads" -- promisee's reliance was not unreasonable.
5. **Equitable Estoppel**
6. **Hoffman v Red Owl Stores:**

III. Restitution

Comment: Where there has been no promise at all, a "contract" may still be enforceable if it will prevent unjust enrichment.

A. Promises implied in law

Comment: Unlike promises implied in fact, where explicit promises are evidence of other, unstated promises that complete the bargain, promises implied in law are pure legal fictions, invented and used for the purpose of granting a remedy.

1. *Cotnam v. Wisdom* (AR 1907, streetcar fall): unconscious person may be liable to services rendered in good faith even though there couldn't have been a bargain.
   - **a)** Whereas the patient's wealth may have been a factor had a real K been negotiated, in finding a remedy for a quasi-K, the doctors are entitled only to fair compensation for their services.
2. *Callano v. Oakwood Park Homes* (NJ 1966, shrubbery): for alternative remedy through restitution theory, the Pf. must have had a direct relationship with the Df. under which Df. was unjustly enriched. Further, it is not injustice to leave an inattentive Pf. (who could have sued the right person) remediless.
   - **a)** N.b., the problem could have been solved with a mechanics lien, where a contractor may file a lien for the value of his work.
3. *Pyeatte v. Pyeatte* (AZ 1982, put wife through school): recovery on restitution may be appropriate where promises were too indefinite to enforce in K.

IV. Other theories

A. Tort

B. Copyright