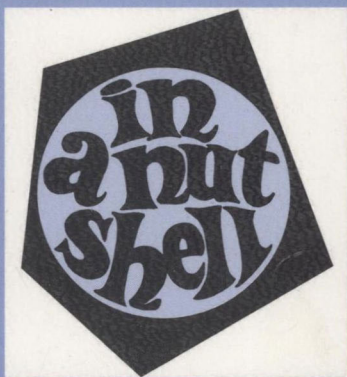


Contracts



®

CLAUDE D. ROHWER
ANTHONY M. SKROKI

CONTRACTS

IN A NUTSHELL

FIFTH EDITION

By

CLAUDE D. ROHWER

Professor of Law

McGeorge School of Law

University of the Pacific

ANTHONY M. SKROCKI

Professor of Law

McGeorge School of Law

University of the Pacific



ST. PAUL, MINN.
2000

Nutshell Series, In a Nutshell, the Nutshell Logo and the West Group symbol are registered trademarks used herein under license.

COPYRIGHT © 1975, 1984, 1990, 1997 WEST PUBLISHING CO.

COPYRIGHT © 2000 By WEST GROUP

610 Opperman Drive

P.O. Box 64526

St. Paul, MN 55164-0526

1-800-328-9352

All rights reserved

Printed in the United States of America

ISBN 0-314-23814-X



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



WEST'S LAW SCHOOL ADVISORY BOARD

JESSE H. CHOPER

Professor of Law,
University of California, Berkeley

DAVID P. CURRIE

Professor of Law, University of Chicago

YALE KAMISAR

Professor of Law, University of Michigan

MARY KAY KANE

Dean and Professor of Law, University of California,
Hastings College of the Law

WAYNE R. LaFAVE

Professor of Law, University of Illinois

ARTHUR R. MILLER

Professor of Law, Harvard University

GRANT S. NELSON

Professor of Law, University of California, Los Angeles

JAMES J. WHITE

Professor of Law, University of Michigan

CHARLES ALAN WRIGHT

Charles Alan Wright Chair in Federal Courts
The University of Texas

In memory of Gordon Duane Schaber
(1927–1997)
Lawyer, Professor, Dean, Community Leader,
Judge, Adviser, Scholar and Friend

*

PREFACE

PURPOSE

This Nutshell is intended to assist those who are attempting to learn and understand the basic principles of the law of Contracts and of Sales of Goods in the United States. The reader should appreciate that a work of this type is intended only as an additional supplemental resource to aid in the organization and understanding of the substantive law. As such, it could be used to acquire a preliminary overview of a specific area, or it could be used after one believes he or she has already acquired an understanding of the basics. It could also be used simultaneously and continually with other sources during the entire learning process. Whichever choice is made as to its use, we again emphasize that the materials as presented here are not intended as the primary source of acquisition of the knowledge and understanding of the substantive law and their underlying policies.

METHOD

There are no “quick and easy” methods or formulae for acquiring the knowledge and understanding of the policies of the law, nor for acquiring the ability to apply the law to the facts of a particular prob-

PREFACE

lem to reason to a logical conclusion. You will not “learn the law” from any one source, or even from any combination of sources, and “learning the law” is not the purpose of law school. You will acquire an ability to understand the law and the ability to explain and apply it only by your own consistent and persistent dedication of time and effort. Acquiring this ability of “self-learning” is a goal of law school because it is the basic requisite for the practice of law.

SEQUENCE

The sequence of materials as presented here may differ from the order or approach that the reader is utilizing for the study of the law of Contracts. For example, some Contracts courses may start with “Consideration”, and others may start with “Remedies”. Recognizing the diversity in approach, most chapters of this Nutshell have been written to be comprehensible regardless of the order of study. Therefore, the student should be able to focus upon individual chapters without immediate concern about continuity.

Issues related to modification of contracts have been presented as a separate body of material. Although this is not ordinarily done, contract modification raises a rather standard clutch of issues that we think can efficiently be taught and understood as a package.

PREFACE

Chapter 14 consists of questions and analyses that are intended to give the reader an opportunity for self-evaluation.

The last chapter consists of a short outline entitled "A Framework for Review". This is meant to be used after the study of the entire Contracts course is completed. It may assist in developing a manageable approach to the application of the extensive materials covered in the course. A student would be well-advised to self-test his or her own understanding of the course by evaluating why this "Framework" was put together as it was and whether the student could make improvements in it.

ACKNOWLEDGMENTS

The authors gratefully acknowledge the very capable assistance of Kim Horiuchi, class of 2001, and other student researchers who have made contributions to this and the prior four editions, as well as that of Professor Charles D. Kelso and Professor Phillip H. Wile.

Special acknowledgment and thanks are also given to our most efficient and patient administrative assistant, R.K. Van Every. Without her, this Nutshell would still be sitting amidst the piles of other papers on the desks of the authors.

*

TABLE OF CASES

References are to Pages

Applied Data Processing, Inc. v. Burroughs Corp., 394 F.Supp.
504 (D.Conn.1975), 451

Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., 6 Cal.Rptr.2d 467, 826 P.2d 710 (Cal.1992), 267, 271
Central London Property Trust v. High Trees House, 1 K.B. 130 (KBD 1947), 184

Channel Home Centers, Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291 (3rd Cir.1986), 189, 432

C. Itoh & Co. (America) Inc. v. Jordan Intern. Co., 552 F.2d 1228 (7th Cir.1977), 96

Drennan v. Star Paving Co., 51 Cal.2d 409, 333 P.2d 757 (Cal. 1958), 186, 187

Foakes v. Beer, 9 A.C. 605 (H.L.1884), 145, 146, 149, 537

Foley v. Interactive Data Corp., 254 Cal.Rptr. 211, 765 P.2d 373 (Cal.1988), 271

Hadley v. Baxendale, 156 Eng.Rep. 145 (1854), 429, 447, 452, 619
Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (Wis.1965), 188, 432

Hopper v. Lennen & Mitchell, 146 F.2d 364 (9th Cir.1944), 200

Hotchkiss v. National City Bank of New York, 200 F. 287 (S.D.N.Y.1911), 230

Hurst v. W.J. Lake & Co., 141 Or. 306, 16 P.2d 627 (Or.1932), 583

Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y.1921), 392

TABLE OF CASES

- James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2nd Cir.1933), 185
- Kingston v. Preston, Lofft 194, 98 Eng.Rep. 606, 2 Doug. 689, 99 Eng.Rep. 437 (K.B.1773), 379
- Krell v. Henry, 2 K.B. 740 (Eng.1904), 342
- Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (Mich.1982), 291, 297
- Mahoney v. Delaware McDonald's Corp., 770 F.2d 123 (8th Cir.1985), 189
- Masterson v. Sine, 68 Cal.2d 222, 65 Cal.Rptr. 545, 436 P.2d 561 (Cal.1968), 581
- National Historic Shrines Foundation, Inc. v. Dali, 4 UCC Rep. Serv. 71 (N.Y.Sup.1967), 579
- New York Trust Co. v. Island Oil & Transport Corp., 34 F.2d 649 (2d Cir.1929), 230
- Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (Cal.1968), 254
- Parker v. Twentieth Century-Fox Film Corp., 89 Cal.Rptr. 737, 474 P.2d 689 (Cal.1970), 456
- Rye v. Phillips, 203 Minn. 567, 282 N.W. 459 (Minn.1938), 149
- Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (Conn.1980), 283
- Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (Mich.1887), 290
- Smith v. Wilson, 3 B. & Ad. 728 (K.B.1832), 583
- Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 690 A.2d 575 (N.J.1997), 270, 271
- Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (Idaho 1977), 96
- Steiner v. Mobil Oil Corp., 141 Cal.Rptr. 157, 569 P.2d 751 (Cal.1977), 93
- Tunkl v. Regents of University of Cal., 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (Cal.1963), 330

TABLE OF CASES

Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C.Cir.1984), 270

Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir.1986), 364

Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (N.Y.1917), 161, 269

Zigas v. Superior Court, 120 Cal.App.3d 827, 174 Cal.Rptr. 806 (Cal.App. 1 Dist.1981), 501

*

CONTRACTS

IN A NUTSHELL

FIFTH EDITION

*

OUTLINE

	Page
PREFACE	v
TABLE OF CASES.....	xxvii

CONTRACTS

CHAPTER 1. INTRODUCTION

§ 1.1	Scope of this Nutshell—Contract Law and Sales Law	1
§ 1.2	Basis for Enforcement of Promises ...	3
§ 1.2.1	Enforcement of Promises Not Made as Part of a Bargain	4
§ 1.2.2	Quasi-Contract—Unjust Enrichment—Restitution	6
§ 1.3	Sale of Goods and the Uniform Commercial Code.....	8
§ 1.3.1	Defining Goods	10
§ 1.3.2	Merchants: Special Duties; Good Faith	13
§ 1.4	Contracts Which Constitute a Bargained Exchange	15

OUTLINE

CHAPTER 2. CONTRACTS FORMATION

A. MUTUAL ASSENT TO A BARGAIN

1. OFFER	17
§ 2.1 Manifestation of Assent to Be Bound	17
§ 2.1.1 Subjective and Objective Intent	19
§ 2.1.2 Agreements That Contemplate a Future Writing	22
§ 2.1.3 Letters of Intent	23
§ 2.2 Certainty of Terms in the Offer	25
§ 2.2.1 Certainty of Terms Under the U.C.C.	30
§ 2.2.2 Effect on Intent To Be Bound if There is a Failure of External Standards Used to Establish Terms.....	32
§ 2.3 Advertisements, Mass Mailings, and Price Quotations	33
§ 2.4 Receipt of the Offer	37
§ 2.4.1 Communication in the Intended Manner.....	38
§ 2.4.2 Assignment of Offers; Who May Accept an Offer	39
§ 2.5 Duration of an Offer	41
§ 2.5.1 Termination of the Offer by Death or Insanity	43
§ 2.5.2 Termination of the Offer by Death or Destruction of a Person or Thing Essential to Performance.....	44
§ 2.5.3 Termination by Rejection by the Offeree.....	45
§ 2.5.4 Termination by Counter-offer	45
§ 2.5.5 Termination by Revocation.....	46

OUTLINE

	Page
§ 2.5.6 Revocation by Indirect Communication of Facts Inconsistent With Intent to Be Bound	47
§ 2.5.7 Time When Revocation Is Effective...	48
§ 2.6 Irrevocability of Offers	49
§ 2.6.1 Irrevocability by Virtue of Option Contracts	49
§ 2.6.2 Irrevocability Due to Reliance on Promise Not to Revoke.....	50
§ 2.6.3 Irrevocability by Statute.....	51
§ 2.6.4 Irrevocability of Offers for Unilateral Contracts	52
2. ACCEPTANCE	55
§ 2.7 Offeror's Control Over Manner and Medium of Acceptance	55
§ 2.8 Medium of Acceptance: Electronic Communications	58
§ 2.9 Manner of Acceptance (by Promise or by Conduct): Alternative Approaches	60
§ 2.9.1 The Traditional Approach: Bilateral and Unilateral Characterization	62
§ 2.9.2 Effect of Traditional Unilateral-Bilateral Determination Upon Attempted Acceptance.....	65
§ 2.9.3 Modern Approach to Manner of Acceptance.....	67
§ 2.10 Acceptance by Promise or by Performance; When the Parties Are Bound.....	68
§ 2.10.1 Notice of Acceptance.....	72
§ 2.11 Non-Promissory Offers (Reverse Unilateral Contracts).....	74

OUTLINE

	Page
§ 2.12 Common Law Requirement that an Acceptance Must Conform to the Terms of the Offer	75
§ 2.12.1 Acceptances Which Merely Suggest or Propose New Terms	76
§ 2.12.2 Impact of the U.C.C. Upon Acceptances that Contain Terms Additional or Different From Those Found in the Offer	78
§ 2.13 Contract Terms Following Acceptance with Additional or Different Terms	87
§ 2.13.1 Contract Terms if Offeree's "Different" Terms Are Not to be Analyzed Under 2-207(2).	94
§ 2.13.2 The "Knock-Out" Rule	95
§ 2.14 Effect of Confirming Memoranda Sent After an Informal Contract is Formed	101
§ 2.15 Application of U.C.C. Section 2-207(3)	103
§ 2.16 Acceptance by Conduct under U.C.C. Section 2-206	108
§ 2.17 Impact of U.C.C. Upon Common Law Rules of Contract Formation	111
§ 2.18 Prospective Amendments to U.C.C. Article 2: Focus Upon 2-206 and 2-207	114
§ 2.19 Time When Communications Are Effective	115
§ 2.20 What Constitutes "Receipt" of Communications	121

OUTLINE

	Page
§ 2.21 Acceptance by Silence	122
§ 2.22 Acceptance by Exercise of Dominion and Control Over Goods or by Re- ceipt of Benefits or Services	123
§ 2.23 Auctions: Finding the Offer and Ac- ceptance.....	125
3. CONSIDERATION	129
§ 2.24 Consideration: An Introduction	129
§ 2.25 Requirement of a Bargained Ex- change	132
§ 2.25.1 Detriment, Benefit and Preexisting Legal Duty	136
§ 2.26 Compromise of Disputed Claims	142
§ 2.27 Partial Payment in Exchange for a Discharge (Payment or Promise to Pay a Lesser Sum In Discharge of a Claim to a Greater Sum).....	144
§ 2.28 Condition to Gift and Bargained Ex- change Compared	149
§ 2.29 Alternative Promises; Multiple Promises	152
§ 2.30 Illusory Promises	154
§ 2.30.1 Promises Subject to a Condition That Cannot Occur.....	158
§ 2.30.2 Voidable and Unenforceable Prom- ises.....	159
§ 2.31 Implied Promise to Use Best Efforts or to Act in Good Faith	160
§ 2.32 Requirements Contracts and Output Contracts	162
§ 2.33 To Whom and From Whom Consider- ation Must Be Given	164
§ 2.34 Adequacy of Consideration	165