

CONTRACTS
Santa Barbara College of Law
Mid-Term Examination
Fall 1994
Instructor: Craig Smith

Time Allotted - Two Hours (Essay Portion)

An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem.

Unless a question expressly asks for California law, it should be answered according to legal theories and principles of general application.

QUESTION 1

(You are the justice of a state appellate court, and the following is the beginning of an opinion which you are to complete for submission to your colleagues.)

This is an appeal from a judgment entered in the Superior Court, after a jury trial in which the plaintiff, Oliver Ajax, received a verdict for \$35,000 in a breach of contract action against the defendant, James Bond.

On February 15, Ajax and Bond entered into a written contract whereby the former, a professional entertainer, was to perform at Bond's resort hotel for the week of July 1-7 for \$20,000. In late spring, Ajax had a hit record which virtually overnight made him a star who could command at least \$50,00 for a one-week engagement. In early June he contacted Bond to renegotiate their contract, demanding \$50,000 for the July 1-7 period. Initially, Bond refused to renegotiate, but when Ajax said he would not appear, Bond relented. After discussion Bond dictated a new contract to his stenographer, in the exact words of the first contract and running for the same period with the compensation changed to \$35,000. As they signed the new contract they tore up the old one. Thereafter, Ajax kept the engagement, but Bond refused to pay more than \$20,000. Whereupon Ajax filed the instant suit for \$35,000.

Over defendant's objection, the trial judge instructed the jury as follows: "If you find that the '\$20,000 contract' was prior to or at the time of the execution of the '\$35,000 contract' cancelled and revoked by the parties by their mutual consent, then it is your duty to find there was consideration for the making of the contract in suit and, in that event, the plaintiff is entitled to your verdict in the amount of \$35,000." On this appeal, the defendant contends that the giving of this instruction constituted reversible error.

QUESTION 2

Moe, representing Triplet Industries, and Curly, representing Stooge International, negotiated an oral agreement for the sale by Triplet of certain textiles to Stooge for \$103,300. One week later Curly sent a "purchase order" to the Triplet office. It contained a description of the goods, the price and other essential terms. It also contained the handwritten words: "As presented by Moe," and was signed by an authorized representative of Stooge.

Triplet received the order and made no objections to its content. However, it refuses to deliver the goods and Stooge contemplates suit. If litigation ensues how would you expect a court to rule? Explain.

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QUESTION 1

The problem here is similar to that in the much-criticized New York case, Schwarzreich v. Bauman-Basch, Inc. (casebook, p. 319) , where the court stretched consideration theory to reach what it believed to be a desirable result. The "stretching" is in finding that rescission of old and making of new could occur at the same time. If the two take place simultaneously, there is a modification of the old, for there is never a point in time when neither is bound contractually to the other. Hence under strict analysis the case raises a **pre-existing duty** issue, and the trial court's instruction is objectionable. But was the giving of the instruction reversible error here? The debate will center upon (1) the desirability of shifting focus from "**consideration**" to "**duress**" a la UCC and Restatement Second and (2) whether this particular **modification**, responsive to unanticipated circumstances (but not unanticipated "difficulties") was "fair and equitable." A close question.

QUESTION 2

The facts of this question are taken from Bazak International Corp. v. Mast Industries Inc., (1989) 538 N.Y.S.2d 503, 535 N.E.2d 633. The oral agreement to sell goods raises a **statute of frauds** issue. That case presents an extensive analysis of UCC 2-201(2) with a long dissent. The court held that the writing was a **confirmation** rather than an **offer** and that the "**nonobjecting merchant rule** of 2-201(2) applied.