

2020

Law of Contract 1-

Cases & Commentaries

This document is a guide to quickly find the authorities you are looking for. Make sure to pay attention to the footnotes and index.

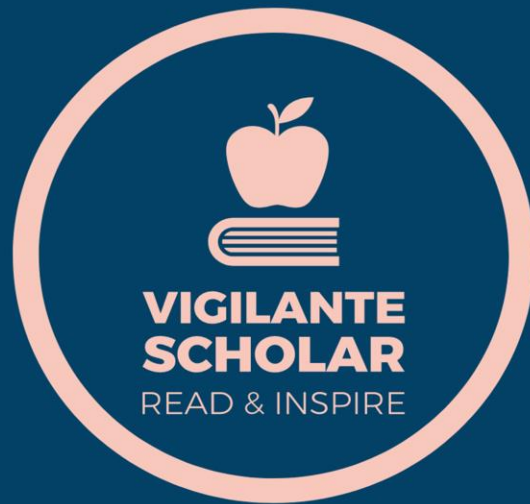


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OFFER

Unilateral Offer¹

Carlil v Carbolic Smoke Ball co

Facts

The defendant, the Carbolic Smoke Ball Company, placed an advertisement in a newspaper for their products, stating that any person who purchased and used their product but still contracted influenza despite properly following the instructions would be entitled to a £100 reward. The advert further stated that the company had demonstrated its sincerity by placing £1000 in a bank account to act as the reward. The claimant, Mrs Carlill, thus purchased some smoke balls and, despite proper use, contracted influenza and attempted to claim the £100 reward from the defendants. The defendants contended that they could not be bound by the advert as it was an invitation to treat rather than an offer on the grounds that the advert was: mere ‘puff’ and lacking true intent; that an offer could not be made ‘to the world’; the claimant had not technically provided acceptance; the wording of the advert was insufficiently precise; and, that there was no consideration, as necessary for the creation of a binding contract in law.

Issue

Whether the advert in question constituted an offer or an invitation to treat?

Held

The Court of Appeal found for the claimant, determining that **the advert amounted to the offer for a unilateral contract by the defendants**. In completing the conditions stipulated by the advert, Mrs Carlill provided acceptance. The Court further found that: the advert’s own claim to sincerity negated the company’s assertion of lacking intent; an offer could indeed be made to the world; wording need only be reasonably clear to imply terms rather than entirely clear; and consideration was identifiable in the use of the balls.

¹ See also the *dahlia* case; it is a unilateral offer case. Under *Revocation of an offer...*

Bowerman v Association of British Travel Agents Ltd

Held

The ABTA notice displayed in the travel agent's offices created a contract between ABTA and the client. The advert 'ABTA arranges re-imbusement' constituted a unilateral offer to contract in this context. The notice would be seen to create legal relations, and satisfied the criterion in Carlill. The promises covered ABTA tour operators against any failure of ABTA travel agents who had taken money from the public and not passed it on to the tour operator.

Invitation to Treat

Gibson v Manchester City Council-

Facts

The defendant City Council had adopted a policy of selling council houses to its tenants. The claimant was a tenant of such a council house, who had applied for details of the house he was renting and applicable mortgage terms, using the printed form designated and supplied by the defendant for this purpose. In February 1971, the city treasurer responded to this application stating that 'The [council] may be prepared to sell you the house at the purchase price...', and providing details of the mortgage. This letter also stated that it did not amount to a 'firm offer' of a mortgage, and invited the claimant to make a formal application using an enclosed form. In March 1971, the claimant returned the completed form to the defendant.

Following local elections in May of the same year, control of the Council passed from the Conservatives to Labour. The new Labour Council policy was that council houses would not be sold under the previous Conservative policy unless a legally binding contract was already in place. The defendant refused to sell to the claimant, who brought an action against them in

breach of contract. This action was successful at first instance and the Court of Appeal, upon which the defendant appealed to the House of Lords.

Issue

The issue on appeal was whether the defendant's letter of February 1971 was properly construed as an offer or as an invitation to treat.

Held

The House of Lords held that there was no concluded contract and the defendant was not legally bound to sell the property, as the council's letter did not state the price and was not an offer but an invitation to treat.

Payne v Cave

Declaration of Intention

Harris v Nickerson

Facts

The defendant was an auctioneer who had advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him by auction at Bury St. Edmunds over a period of three specified days. The plaintiff was a commission broker in London, who attended the sale on the final day (on which it had been advertised that the office furniture, which he had commission to purchase, would be sold). However, on that day, all the lots of furniture were withdrawn by the defendant. The claimant sought to recover his expenses and the time which he had wasted in attending the auction from the defendant, arguing that the withdrawal of the lots was a breach of contract which had been formed by the offer made by the defendant in the advertisement, and accepted by the claimant in attending the auction.

Issue

The issue was whether the advertisement placed by the defendant was a legally binding offer of sale, which had been accepted by the claimant's attendance at the auction, forming a completed contract.

Held

The court held, dismissing the claimant's case, **that the advertisement was merely a declaration to inform potential purchasers that the sale was taking place**. It was not an offer to contract with anyone who might act upon it by attending the auction, nor was it a warranty that all the articles advertised would be put on sale. As such, it did not legally bind the defendant to auction the items in question on any particular day.

Barry v Heathcote Ball

Display of Goods

Fisher v Bell-

Facts

The defendant shopkeeper displayed in his shop window a flick knife accompanied by a price ticket displayed just behind it. He was charged with offering for sale a flick knife, contrary to s. 1 (1) of the **Restriction of Offensive Weapons Act 1959**.

Issue

The issue was whether the display of the knife constituted an offer for sale (in which case the defendant was guilty) or an invitation to treat (in which case he was not).

Held

The court held that in accordance with the general principles of contract law, the display of the knife was not an offer of sale but merely an invitation to treat, and as such the defendant had not offered the knife for sale within the meaning of s1(1) of the Act. **Although it was acknowledged**

that in ordinary language a layman might consider the knife to be offered for sale, in legal terms its position in the window was inviting customers to offer to buy it. The statute must be construed in accordance with the legal meaning, as

“...any statute must be looked at in light of the general law of the country, for Parliament must be taken to know the general law” (per Lord Parker C.J. at para. 4).

It is well established in contract law that the display of an item in a shop window is an invitation to potential customers to treat. The defendant was therefore not guilty of the offence with which he had been charged.

Pharmaceutical Society of Great Britain v Boots Cash Chemist-

Facts

The defendant ran a self-service shop in which non-prescription drugs and medicines, many of which were listed in the Poisons List provided in the **Pharmacy and Poisons Act 1933**, were sold. These items were displayed in open shelves from which they could be selected by the customer, placed in a shopping basket, and taken to the till where they would be paid for. The till was operated by a registered pharmacist. However, the claimant brought proceedings against the defendant for breach of section 18(1) of the **Pharmacy and Poisons Act 1933**, which requires the supervision of a registered pharmacist for the sale of any item in the Poisons List.

Issue

The question was whether the contract of sale was concluded when the customer selected the product from the shelves (in which case the defendant was in breach of the Act due to the lack of supervision at this point) or when the items were paid for (in which case there was no breach due to the presence of the pharmacist at the till).

Held

The Court of Appeal held that the defendant was not in breach of the Act, as the contract was completed on payment under the supervision of the pharmacist. **The display of the goods on the shelves were not an offer which was accepted when the customer selected the item**; rather, the proper construction was that the customer made an offer to the cashier upon arriving at the till, which was accepted when payment was taken. This analysis was supported by the fact that the customer would have been free to return any of the items to the shelves before a payment had been made.

Partridge v Crittenden

Facts

The defendant advertised for sale a number of Bramblefinch cocks and hens, stating that the price was to be 25 shillings for each. Under the Protection of Birds Act 1954, it was unlawful to offer for sale any wild live bird. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) brought a prosecution against the defendant under the Act. At his trial, the defendant was found guilty of the offence by the magistrates; he appealed this conviction.

Issue

The issue on appeal was whether the advertisement was properly construed as an offer of sale (in which case the defendant was guilty) or an invitation to treat (in which case he had committed no offence). A further issue was whether it was appropriate to adopt a different interpretation of the phrase 'offer for sale' in the context of criminal law than was accepted in the context of contract law.

Held

The court held that the advertisement was not an offer but an invitation to treat, and as such the defendant was not guilty.

The court also rejected the suggestion that the court should adopt a stricter interpretation of the phrase 'offer for sale' in the criminal context compared to the contractual context, reasoning that

to do so would usurp the legislative function. The legislature had chosen the phrase ‘offer for sale’ based on its existing understanding, and to alter this understanding under the pretext of ‘interpretation’ was not the proper role of the court.

Advertisements in a Catalogue

Grainger v Gough

Facts

The defendant wine merchant circulated a catalogue which contained a price list for its products. The claimant ordered a number of bottles of wine from the catalogue and, when the defendant refused to deliver these at the stated price, alleged that a contract had been formed.

Issue

The issue was whether the price list constituted an offer to sell wine at a certain price (in which case the contract was fully formed and the claimant had a valid claim), or an invitation to treat (in which case no contract had been formed).

Held

Rejecting the claim, the House of Lords held that the price list must be construed not as an offer, but as an invitation to treat. In reaching this conclusion, it reasoned **that to interpret the list as an offer would mean that in theory the defendant would be obliged to deliver an unlimited quantity of wine at the stated price, upon receipt of an order.** This would be unreasonable, and would not reflect the intentions of the parties as the merchant’s stock is necessarily limited, and it would not be possible for him to carry out such an order. Both reasonableness and objective intention are key to distinguishing between an offer and an invitation to treat. On this basis, the list was interpreted an invitation to customers to offer to buy wine at the stated price, which the merchant may then accept or reject. In this case, the defendant was not bound to deliver the wine ordered by the claimant.

Request for Information

Harvey v Facey-

Facts

Mr. Harvey, the appellant, was interested in purchasing a piece of property in Jamaica belonging to Mr. Facey. At that time Facey was also negotiating with the Mayor and Council of Kingston. Harvey sent Facey a telegram which stated “Will you sell us Bumper Hall Pen? Telegraph lowest cash price-answer paid” In the same day Facey replied “Lowest price for Bumper Hall Pen £900.” Harvey responded by stating that “We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession.” Facey then refused to sell. Harvey sued Facey. He claimed that a contract existed between him and Harvey given that the telegram was an offer and that he had accepted it.

Issue

Whether Harvey telegram stating that the lowest price is £900 is an offer subject to acceptance?

Held

The Privy Council held that there was no contract concluded between the parties. Facey had not directly answered the first question as to whether they would sell and the lowest price stated was merely responding to a request for information not an offer. There was thus no evidence of an intention that the telegram sent by Facey was to be an offer. The Privy Council held that no contract existed between Mr. Harvey and Mr Facey. It was concluded that the first telegram sent by Facey was merely a request for information , at no point in time did Facey make an explicit offer that could have been accepted by Facey.

Stevenson Jacques & Co v Mc lean-

Facts

The defendant, Mclean, offered to sell iron to the complainant, Stevenson Jaques & Co. This was for the price of 40s and the offer would remain open until Monday. The complainant sent a telegram to the defendant, asking whether he would accept a payment of 40 over a two-month period, or what his longest limit would be for payment. McLean did not respond to this telegram. The defendant sold the iron to another party, but did not inform the complainant of this action. On Monday morning, the complaint sent a telegram to accept the offer, unaware it had been sold.

Issues

The complainant sued the defendant for non-delivery of the iron and that this was a breach of contract. The issue in the case was whether there was binding contract between the parties and if the telegram sent by the complainant was an inquiry for information or a counter offer.

Held

The court **heard the complainant was only inquiring for more information about whether the terms of the offer could be changed; there was no specific wording to indicate that it was a counter offer or rejection.** This was in contrast to *Hyde v Wrench*. This meant that the offer made by the defendant was still valid and the second telegram by the complaint formed a binding contract. While the promise of the offer remaining open until Monday was not itself binding and an offeror can revoke this at any time, there had been no revocation communicated to the complainant in this case

Bigg v Boyd Gibbins [1971] 2 All ER 183

Contract law – Sale of land – Offer and acceptance

Facts

As part of the negotiation for the sale of property by the plaintiffs, the plaintiffs wrote to the defendants stating that for a quick sale of the property, they would accept £26,000 on the basis that the initial offer was low and this would cover the plaintiff's costs of sale. The defendants accepted the offer and requested that the plaintiffs contact the solicitors of the defendant regarding the sale. The plaintiffs acknowledged this and stated that they were pleased that the

defendants were purchasing the property. The plaintiff requested a summary judgment and it was found that the letters had constructed a contract between the parties and ordered specific performance. The defendant appealed the decision.

Issue

The key issue for the court was whether the communication between the parties was enough to construct a contractual agreement. A particular matter for the court was the fact that there was little communication between the parties. If a contractual agreement could be constructed, then the court also had to decide whether an order of specific performance was appropriate in the circumstances.

Held

The court dismissed the defendant's appeal against the order for specific performance and supplemented the decision given by Pennycuik V.C. at the initial hearing. The communication between the parties was deemed to be a binding contract for the purchase of the property and therefore specific performance could be ordered. Having read the letters, the court believed the parties would regard themselves as having struck a bargain for the sale and purchase of the property.

TENDERS

Blackpool and Fylde Aero Club v Blackpool BC [1990] 3 All ER 25

Contract law – Offer and acceptance – Formation of contract

Facts

The defendants were a local authority that managed the local airport as its owners. They had granted the plaintiffs, who were a flight club, a concession to operate casual flights out of the airport. The concession came up for renewal and the tender invitation was released to the plaintiff and six other companies. The tender had a clause stating that tenders would not be considered if they missed the time and date deadline stipulated. The town's clerk failed to empty the letterbox on time and as such, the plaintiff's tender missed the deadline and the defendant accepted a lower proposal. The plaintiffs brought an action for damages against the defendant for

negligence and for breaching their contract. At an initial hearing, the judge held that the request for tenders by the defendant required them to consider all the tenders received and on this basis, they were liable to the plaintiff. The defendants appealed this decision.

Issue

The issue for the court was whether the invitation to submit a bid for tender could be considered to establish the intent to create a contract between the parties. It is important to note that contracts were not to be readily implied by the courts which made this deliberation particularly important.

Held

The court dismissed the defendant's appeal. **They found that the invitation to submit a tender was usually no more than an offer to receive bids but in this circumstance, examining the behaviour of the parties created clear intention to create a contract and therefore the failure to consider the plaintiff's application made them liable.**

TERMINATION OF AN OFFER

REVOCAION²

Dickinson v Dodds (1875) 2 Ch D 463

Contract – Offer – Acceptance – Promise – Third Party

Facts

The defendant, Mr Dodds, wrote to the complainant, Mr Dickinson, with an offer to sell his house to him for £800. He promised that he would keep this offer open to him until Friday. However, on the Thursday Mr Dodds accepted an offer from a third party and sold his house to them. It was claimed that Mr Dickinson was going to accept this offer, but had not said anything

² Note: An offer can be revoked by the offeror at any time before it is accepted. However, it must be brought to the attention of the offeree.

See *Stevenson v Mc Lean*,

to Mr Dodds because he understood that he had until Friday. Mr Dodds communicated that the offer had been withdrawn through a friend to the complainant. After hearing this, Mr Dickinson went to find the defendant, explaining his acceptance of the offer. The complainant brought an action for specific performance and breach of contract against the defendant.

Issues

The issue in this case was whether the defendant's promise to keep the offer open until Friday morning was a binding contract between the parties and if he was allowed to revoke this offer and sell to a third party.

Held

The court held that the statement made by Mr Dodds was nothing more than a promise; there was no binding contract formed. **He had communicated an offer for buying his house to the complainant and this offer can be revoked any time before there is acceptance.** There was no deposit to change this situation. Thus, as there was no obligation to keep the offer open, there could be no 'meeting of the minds' between the parties. In addition, the court stated that a communication by a friend or other party that an offer had been withdrawn was valid and would be treated as if it came from the person themselves.³

Dahlia v Four Millbank Nominees [1978] Ch 231

Contract – Unilateral Contract – Performance – Offer – Revocation – Land of Property Act 1925

Facts

This case concerns selling property. The complainant, Dahlia, wanted to purchase property from the defendants, Four Millbank Nominees. The parties had agreed terms orally, but there was no written contract between them. Four Millbank Nominees promised the complainant that if a banker's draft was arranged for the deposit and this was completed before 10am on the

³ *This shows that there is no requirement that the offeror himself must be the one to bring the withdrawal to the notice of the offeree. See also **Shuey v USA***

22nd December, a written contract would be drawn up. Dahlia proceeded to fulfil this request, but the defendants refused to complete the sale of the property.

Issues

The courts initially dismissed the complainant's claim, as it did not comply with section 40(1) of the Land of Property Act 1925. However, this decision was appealed. The complainant argued that a unilateral contract existed between the parties and that the defendants were therefore bound to complete the written contract for the property. The issue in this case was whether there was a unilateral contract and if the offer could be revoked after performance began.

Held

It was held that a unilateral contract did exist, but this could not be effective as it did not comply with section 40(1) of the Land of Property Act 1925; the appeal was dismissed. **The court stated that until performance, an offeror can revoke the offer he has made at any time. There would be no binding contract between the two parties.** However, once the offeree has begun performance, **the offer comes into effect and it can no longer be revoked by the offeror to the contract.**

Revocation of Unilateral Contracts **Errington v Errington**

Facts

A father-in-law purchased a house for his son and daughter-in-law to live in. The house was put in the father's name alone. He paid the deposit as a wedding gift and promised the couple that if they paid the mortgage instalments, the father would transfer the house to them. The father then became ill and died. The mother inherited the house. After the father's death the son went to live with his mother but the wife refused to live with the mother and continued to pay the mortgage instalments. The mother brought an action to remove the wife from the house.

Held

The wife was entitled to remain in the house. The father had made the couple a unilateral offer.

The wife was in course of performing the acceptance of the offer by continuing to meet the mortgage payments. **Under normal contract principles an offer may be revoked at any time before acceptance takes place, however, with unilateral contracts acceptance takes place only on full performance.** Lord Denning held that once performance had commenced the Mother was estopped from revoking the offer since it would be unconscionable for her to do so. Furthermore there was an intention to create legal relations despite it being a family agreement.⁴

Shuey v USA

Facts

On 20 April 1865, the Secretary of War published in the public newspapers and issued a proclamation, announcing that liberal rewards will be paid for any information that leads to the arrest of certain named criminals. The proclamation was not limited in terms to any specific period. On 24 November 1865, the President issued an order revoking the offer of the reward. In 1866 the claimant discovered and identified one of the named persons, and informed the authorities. He was, at all times, unaware that the offer of the reward had been revoked.

Held

The claimant's petition was dismissed. It was held that the offer of a reward was revoked on 24 November and notice of the revocation was published. It was withdrawn through the same channel in which it was made. It was immaterial that the claimant was ignorant of the withdrawal. **The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.**

⁴ *This case shows that A unilateral contract cannot be revoked once the offeree has commenced performance*

Lapse of Time

---*reasonable time* **Ramsgate Victoria Hotel ltd v Montefiore** –

Facts

The defendant, Mr Montefiore, wanted to purchase shares in the complainant's hotel. He put in his offer to the complainant and paid a deposit to his bank account to buy them in June. This was for a certain price. He did not hear anything until six months later, when the offer was accepted and he received a letter of acceptance from the complainant. By this time, the value of shares had dropped and the defendant was no longer interested. Mr Montefiore had not withdrawn his offer, but he did not go through with the sale.

Issues

The complainant brought an action for specific performance of the contract against the defendant. The issue was whether there was a contract between the parties after the acceptance of the original offer six months after it was made.

Held

The court held that the Ramsgate Victoria Hotel's action for specific performance was unsuccessful. The offer that the defendant had made back in June was no longer valid to form a contract. A reasonable period of time had passed and the offer had lapsed. The court stated that **what would be classed as reasonable time for an offer to lapse would depend on the subject matter. In this case, it was decided that six months was the reasonable time before automatic expiration of the offer for shares.** Yet, for other property, this would be decided by the court in the individual cases.

Failure of a Pre-condition

Financing Ltd v Stimson

Facts

The case regarded a hire purchase transaction, in which the dealer was an agent of the finance company. The hirer paid a deposit of £70 to a dealer and agreed to purchase a motor car from the plaintiff, a finance company, for £414. The agreement held that it would become binding once the finance company had signed the document, which signalled acceptance. The company did not sign the contract until March 25, 1961. The hirer had taken the car away on March 18 and returned the car on March 20, stating he did not wish to continue with the purchase, offering to lose his deposit in order to exit the agreement. Both the dealer and hirer thought that the finance company had signed the document and had therefore accepted the agreement. On the night of March 24, the dealer's shop was broken into and the motor vehicle was stolen. The finance company sought to recover the price of the motor car from the hirer.

Issue

The key issue for the court was whether the dealer had the authority to complete the contract with the hirer and importantly, whether a contract had been constructed.

Held

The court found that the dealer had the authority to receive acceptance and revocation from the purchaser. On this basis, when the hirer returned the car and revoked his offer, there was no longer a contract for the motor car. Further to this, the hirer was owed the car in the same condition as when the offer was made and **when the finance company signed the agreement and accepted the contract on March 25, the car was not in the same condition and therefore there was no contract.**

Death of Offeror

Bradbury v Morgan

Facts

Leigh requested that Bradbury provide credit to his brother to the value of £100. Leigh guaranteed the account owned by his brother to this effect. Accordingly, Bradbury credited Leigh's brother's account and continued selling goods to Leigh in their usual manner. Unfortunately, Leigh died and Bradbury continued to supply his brother with goods on the credit which had been previously agreed. Bradbury had no knowledge or notice of the death of Leigh. Morgan, who was an executor on behalf of Leigh, did not pay Bradbury for the goods and refused to do so on the basis that the debts were contracted after Leigh's death and as a result, Leigh was not liable for the payment. Bradbury brought an action for the payment that was due for the goods.

Issue

In this case, the court had to decide whether the agreement between the parties was a contract or simply a request which could be concluded upon the death of Leigh. If it was deemed that this was a contract, then the court would have to understand whether Morgan, as an executor of Leigh, was still liable to pay for the goods that were being received.

Held

The court found in favor of Bradbury. The court held that if the situation was dealing with an implied contract which had arisen out of a request, then it would be stopped by the death of a party. However, in this circumstance, there was no notice provided of the death of Leigh, and therefore there was no attempt to end the contract.

The death of the offeror did not terminate the offer unless the offeree had notice of the offeror's death.

WITHDRAWAL OF OFFER

Byrne & Co v Leon Van Tien Hoven & Co [1880] 5 CPD 344

Contract – Sale of goods – Offer and acceptance

Facts

The defendants wrote a letter, on October 1, to the plaintiffs offering the sale of 1000 boxes of tin plates. The defendant was based in Cardiff and the plaintiff was based in New York, and letters took around 10-11 days to be delivered. The plaintiffs received this letter on October 11 and accepted it on the same day by telegram, as well as by letter on October 15. However, on October 8, the defendant sent a letter to the plaintiffs which withdrew their offer and this arrived with the plaintiff on October 20. The plaintiffs claimed for damages for the non-delivery of the tin plates.

Issue

The court was required to establish whether the withdrawal of the offer for the sale of goods was acceptable. The court would have to consider whether the contract had been agreed by the acceptance by the plaintiffs of the letter of October 1, or whether the defendants had successfully withdrawn their offer by issuing the withdrawal by letter on October 8.

Held

The court held **that the withdrawal of the offer was ineffective as a contract had been constructed between the parties on October 11 when the plaintiffs accepted the offer in the letter dated October 1.** On this basis, it was held that an offer for the sale of goods cannot be withdrawn by simply posting a secondary letter which does not arrive until after the first letter had been responded to and accepted. The court gave judgment for the plaintiff and awarded that the defendant paid their costs.

ACCEPTANCE

Must be unconditional & accept precise terms of offer

Cross Offers

Tin v Hoffman-

Facts

The defendant, Mr Hoffman wrote to the complainant, Mr Tinn with an offer to sell him 800 tons of iron for the price of 69s per ton. He requested a reply to this offer by post. On the same day, without knowing of this offer, Mr Tin also wrote to Mr Hoffman. He offered to buy the iron on similar terms. This case concerned the validity of these two cross offers.

Issues

The issue in this case was whether there was a valid contract between Mr Tinn and Mr Hoffman for the sale of the iron. There was also the issue if acceptance had to be by post for it to be valid, as this was specified in the offer.

Held

It was held in this case that there was no contract between Mr Tinn and Mr Hoffman for the iron. The cross offers were made simultaneously and without knowledge of one another; this was not a contract that would bind the parties for the iron. **There is a difference between a cross offer and a counter offer. In order to form a valid contract, there must be communication that consists of an offer and acceptance.** There was no acceptance by post, as had been stated in the offer. The court also said that while post had been indicated in the offer, another equally fast method would have been successful, such as a telegram or verbal message.

Contract Concluded by Conduct

Percy Trentham Ltd v Archital Luxfer Ltd

Held

A contract could be concluded by conduct.

Brogden v Metropolitan Railway Co-

Facts

The complainants, Brogden, were suppliers of coal to the defendant, Metropolitan Railway. They completed business dealings regarding the coal frequently for a number of years, on an informal basis. There was no written contract between the complainant and the defendant. However, the parties decided that it would be best for a formal contract to be written for their future business dealings. The Metropolitan Railway made a draft contract and sent this to Brogden to review. The complainant made some minor amendments to this draft and filled in some blanks that were left. He sent this amended document back to the defendant. Metropolitan Railway filed this document, but they never communicated their acceptance of this amended contract to the complainants. During this time, business deals continued and Brogden continued to supply coal to the Metropolitan Railway.

Issues

When a dispute arose, the issue in this case was whether there was a contract between Brogden and the Metropolitan Railway and if the written agreement they had was valid.

Held

The House of Lords held that there was a valid contract between suppliers, Brogden and the Metropolitan Railway. The draft contract that was amended constituted a counter offer, which was accepted by the conduct of the parties. The prices agreed in the draft contract were paid and coal was delivered. Although there had been no communication of acceptance, performing the

contract without any objections was enough. *This case is instructive in that there was no express acceptance of the terms of the contract but the parties continued to operate as if the contract had been formalized and the court held that the contract had been impliedly accepted.*⁵

Reasonableness Test

Smith v Hughes : ‘if, whatever a man’s real intention may be, he so conduct himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man therefore conducting himself would be equally bound as if he had intended to agree to the other party’s term.’

COUNTER OFFER

Hyde v Wrench-

Facts

The defendant, Mr Wrench, offered to sell the farm he owned to the complainant, Mr Hyde. He offered to sell the property for £1,200, but this was declined by Mr Hyde. The defendant decided to write to the complainant with another offer; this time to sell the farm to him for £1,000. He made it clear that this would be his final offer regarding the property. In response, Mr Hyde offered £950 for the farm in his letter. This was refused by Mr Wrench and he confirmed this with the complainant. Mr Hyde then agreed to buy the farm for £1,000, which was the sum that had previously been offered. However, Mr Wrench refused to sell his farm.

Issues

The complainant brought an action for specific performance, claiming that as Mr Wrench refused to sell the farm, this was a breach of contract. The issue in this case was whether there was a valid contract between the parties and if a counter offer was made in discussions, whether the original offer would still remain open.

Held

⁵ See also *Re Selectmove Ltd.*

The court dismissed the claims and held that there was no binding contract for the farm between Mr Hyde and Mr Wrench. **It was stated that when a counter offer is made, this supersedes and destroys the original offer.** This original offer is no longer available or on the table. In this case, when Mr Hyde offered £950, he cancelled the £1,000 offer and could not back track and accept.

KNOWLEDGE OF THE OFFER

R v Clarke

Facts

The claimant, under investigation for the murder of 2 police officers, gave evidence which led to the conviction of another person, the actual murderer. There had been a reward of £1000 to anyone who gave such evidence.

Issue

Could the claimant claim the reward, given that he had said in his interview that he was cooperating “exclusively in order to clear his name”

Held

Clarke had seen the offer indeed but it was not present in his mind- he had forgotten it and gave no consideration to it. This was due to the fact that he admitted that not only had he acted solely to save his own skin but that at the time when he gave the information, the question of the reward had not passed out of his mind. Therefore, **there cannot be assent without knowledge of the offer and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing it.**

Williams v Carwardine

Facts

The defendant offered a reward for information leading to the conviction of a murderer. The plaintiff was aware of the offer but provided the information after she thought that she did not have long to live and as such wished to clear her conscience.

Held

The motive was not material and it would appear that where the offeree's acceptance is only partly influenced by some extraneous factor, it may still be effective

COMMUNICATION OF ACCEPTANCE i.e. The Communication Rule

Powell v Lee

Facts

The plaintiff had applied to the managers of a school to become the principal. They considered his application and by a narrow vote had decided to appoint him as principal. After the vote an unauthorized person had contacted the plaintiff by telegram to inform of the outcome of the vote. But the managers had later come together and decided to retract their former decision and appoint someone else

Held

The form of communication of the acceptance was not an effective way to communicate the acceptance. Furthermore, it was given to him by someone who was not authorized and consequently there was no valid acceptance or breach of contract.

*Acceptance must be communicated to the offeror by the offeree or someone authorized by the offeree.*⁶

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MODES OF ACCEPTANCE

Entores Ltd v Miles Far East Corp

Facts

The complainants, Entores, were a company that was based in London. They had sent an offer to purchase 100 tons of copper cathodes to the defendants, Miles Far East Corp. Their company was based in Amsterdam and this offer was communicated by Telex, a form of instantaneous communication. The Dutch company sent an acceptance of this offer by Telex to the

⁶ *In this case the acceptance was communicated by someone who was not authorized to communicate it.*

complainants. When the contract was not fulfilled, the complainants tried to sue the defendants for damages.

Issues

In order to decide whether the action for damages should arise in English or Dutch law, the court had to decide the moment of acceptance of the contract. If it was when the contract acceptance was sent, damages would be dealt with under Dutch law. If acceptance was when it was received, then it would be under English law.

Held

The court held that the contract and damages were to be decided by English law. It was stated that the postal rule did not apply for instantaneous communications. Since Telex was a form of instant messaging, the normal postal rule of acceptance would not apply and instead, **acceptance would be when the message by Telex was received. Thus, the contract was created in London. This general principle on acceptance was held to apply to all forms of instantaneous communication methods.** Acceptance via these forms of communication had to be clear before any contract is created.

In cases of instantaneous communication such as telephone and telex, the acceptance takes place at the moment the acceptance is received by the offeror and at the place at which the offeror happens to be.⁷

SILENCE & ACCEPTANCE

Felthouse v Bindley

Facts

⁷ What this means is that the acceptance takes place instantaneously.

The complainant, Paul Felthouse, had a conversation with his nephew, John Felthouse, about buying his horse. After their discussion, the uncle replied by letter stating that if he didn't hear any more from his nephew concerning the horse, he would consider acceptance of the order done and he would own the horse. His nephew did not reply to this letter and was busy at auctions. The defendant, Mr Bindley, ran the auctions and the nephew advised him not to sell the horse. However, by accident he ended up selling the horse to someone else.

Issues

Paul Felthouse sued Mr Bindley in the tort of conversion, with it necessary to show that the horse was his property, in order to prove there was a valid contract. Mr Bindley argued there was no valid contract for the horse, since the nephew had not communicated his acceptance of the complainant's offer. The issue in this case was whether silence or a failure to reject an offer amount to acceptance.

Held

It was held that there was no contract for the horse between the complainant and his nephew. There had not been an acceptance of the offer; **silence did not amount to acceptance and an obligation cannot be imposed by another.** Any acceptance of an offer must be communicated clearly. Although the nephew had intended to sell the horse to the complainant and showed this interest, there was no contract of sale. Thus, the nephew's failure to respond to the complainant did not amount to an acceptance of his offer.⁸

Galaunia Farms v National Milling

Facts

By writ of summons filed in the Principal Registry on the 23rd February, 1999, the plaintiff, Galunia Farms Limited sought an order for damages and consequent loss arising from the

⁸ *This case establishes that silence cannot amount to acceptance.*

agreement to purchase wheat from it. The evidence of the plaintiff showed that tender document had been circulated and the 1st defendant responded with an offer to purchase that year's wheat. The tender document was extensively amended by the 1st defendant. All the amendments were initialed for. On receipt of the amended tender document the plaintiff the offer of the amended and counter signed it. In view of the amendments the plaintiff thought it necessary to produce a cleaned "up document" by re-engrossing a fresh document in order to eliminate the alterations. The "cleaned-up contract" was forwarded to the 1st defendant for it to sign. Up to the time of trial the cleaned up contract had not been signed. The plaintiff insisted that although the "cleaned up contract was not signed, the 1st defendant was still bound because of the verbal agreement between the representative of the plaintiff and a senior employee of the 1st defendant with authority to sign the contract. The validity of the contract was thus vigorously contested by the parties.

Held

If the acceptance varies the terms of the offer it is a counter offer and not an acceptance of the original offer. **Mere silence on the part of the offeror on receipt of a counter offer will not usually operate as an acceptance but it might do so in the case of late acceptance of an offer without definite time or where the offer or only objects to some of the additional terms in the counter offer.** The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct.

Re Selectmove ltd

Held- An acceptance by silence could be sufficient if it was the offeree who suggested that their silence would be sufficient.

EXCEPTIONS TO THE COMMUNICATION RULE

FIRST: TERMS OF OFFER

Carlil v Carbollic smoke ball co⁹

One of the exceptions to the communication rule would be the terms of the offer. If the terms impliedly or explicitly waive the communication, then acceptance need not be communicated to the offeror. This cited is a good example. There was no need for the claimants to communicate their acceptance as it was a unilateral contract.

SECOND: CONDUCT OF THE OFFEROR

*Where the offeror's conduct is so grossly inattentive to the acceptance, the communicated rule can be waived.*¹⁰

The Birmnes -

Acceptance was sent by telex during business hours but they simply did not read it.

THIRD: THE POSTAL RULE

Adams v Lindsell¹¹

Facts

The defendant wrote to the claimant offering to sell them some wool and asking for a reply 'in the course of post'. The letter was delayed in the post. On receiving the letter the claimant posted a letter of acceptance the same day. However, due to the delay the defendant's had assumed the claimant was not interested in the wool and sold it on to a third party. The claimant sued for breach of contract.

Held

There was a valid contract which came in to existence the moment the letter of acceptance was placed in the post box. This case established the postal rule. This applies where post is the agreed form of communication between the parties and the letter of acceptance is correctly addressed

⁹ In **Carlil v Carbollic Smoke Ball Co**, the unilateral offer implied that acceptance need not be communicated. So the terms impliedly excluded the communication rule in **Powell v Lee**.

¹⁰ Here, being inattentive to the acceptance of an offer could not suffice to say that a valid contract was not made.

¹¹ This case establishes the Postal Rule.

and carries the right postage stamp. The acceptance then becomes effective when the letter is posted.

APPLICATION OF THE POSTAL RULE

Section 5 of the Interpretation and General Provisions Act provides that, “Where any written law authorizes or requires any document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.”

Exception to postal acceptance: Not posted properly

Re London and Northern Rhodesia Bank-

Facts

The letter of acceptance was given to a postman who was authorized to only deliver mail and not to collect it.

Held

The court held that since the letter of acceptance was not posted properly, it could not amount to acceptance of the offer.

Exception to Postal Acceptance: Not properly addressed

Korbetis v Transgrain Shipping BV

Facts

This case concerned a demurrage claim and the appointment of an arbitrator. In April 2004, the complainant, LJ Korbetis sent a fax to the defendants, Transgrain Shipping BV, that accepted one of the three nominated arbitrators. This message asked for their confirmation. The complainant did not receive a response to the first fax and proceeded to send another acceptance by fax in August 2004. It was not until December 2004 that the complainant realised the fax had been sent to the wrong number. As a result, LJ Korbetis sent the acceptance to the correct number and appointed the arbitrator after the expiration.

Issues

The complainant argued that the appointment of the arbitrator was accepted when the fax was sent in April 2004. However, the defendants argued that they had never received the initial faxes and rejected the acceptance they received from the complainant, due to being too late. They argued that the appointment was void. The issue in this case was whether there was a contract between the two parties regarding the appointment and if the postal rule applied.

Held

The court held that the postal rule would not apply when a letter of acceptance was sent to the wrong number or address. As a result of sending the acceptance to the wrong fax number, there had been no communication between the parties and the complainant should have checked that the defendants had received the acceptance; it had been a number of months. They cannot be bound by this, as it was the fault of the complainant that it was never received.

Exception to Postal Acceptance: Express terms of offer exclude postal rule.

Howell Securities v Hughes

Facts

The defendant, Dr Hughes, gave the complainants, Holwell Securities, the option to purchase his house for £45,000. It was stated that this option was exercisable 'by notice in writing' within six months. The complainants posted a letter agreeing to this option by Dr Hughes and this was done five days before the six-month expiry. However, this agreement letter was lost in the post and it never reached Dr Hughes.

Issues

Holwell Securities claimed specific performance of the contract when Dr Hughes refused to complete the sale of his house. This claim was originally dismissed by the court. But, it was appealed. The issue in the appeal concerned whether the postal rule applied and if there were any

exceptions to this rule. The complainants tried to argue that the postal rule meant that acceptance was in effect when the letter was posted, which was before the six-month expiration date.

Held

This appeal was dismissed. It was stated by the court that the postal rule does not automatically apply in every case, despite the post being an acceptable means of communication in transactions or business proposals. It is important to look at all the circumstances of the case to see what the parties intended, which may mean a binding agreement does not apply until it is communicated. In this case, **Dr Hughes stated the option was exercisable 'by notice in writing' within six months, which meant that he would have to receive the communication in writing before a valid contract would be created.** This specification meant that the postal rule did not apply.

By requiring 'notice in writing', Dr Hughes had specified that he had to actually receive the communication and had therefore excluded the postal rule.

EFFECT OF THE POSTAL RULE

Postal acceptance can take effect when it is posted even if it gets lost and never reaches the offeror

Household fire Insurance v Grant

Facts

The defendant, Mr Grant, applied for shares in the complainant's company, the Household Fire Insurance. The complainants allotted shares to Mr Grant and they completed this contract by posting him a letter with notice of the allotment. However, this letter never reached Mr Grant and it was lost in the post. Mr Grant never paid for the shares as a consequence. When the Household Fire Insurance company went bankrupt, the liquidator asked the defendant for payment of the shares. Mr grant refused to pay, as he did not believe he was a shareholder nor was there a binding contract in his mind.

Issues

The court held that the liquidator was entitled to recover this money, as there was a binding contract between Mr Grant and the Household Fire Insurance company. This decision was appealed. The issue in the appeal concerned whether there had been an acceptance of the share offer and if there was a legally binding contract.

Held

The appeal was dismissed and it was held that there was a valid contract between the parties for the shares. **The postal rule was affirmed, which states that acceptance is effective when it is mailed, as long as the parties consider the post as an acceptable way of communicating. This rule is true even though the letter never arrived to Mr Grant.** Lord Justice Thesiger stated that posting acceptance creates a 'meeting of minds', which created a binding contract. Lord Justice Bramwell dissented, arguing that the postal rule can hinder transactions and that acceptance should only be effective once the letter arrives.

Byrne & Co v Van Tien hoven & Co – Repeat...

Facts

The defendants wrote a letter, on October 1, to the plaintiffs offering the sale of 1000 boxes of tin plates. The defendant was based in Cardiff and the plaintiff was based in New York, and letters took around 10-11 days to be delivered. The plaintiffs received this letter on October 11 and accepted it on the same day by telegram, as well as by letter on October 15. However, on October 8, the defendant sent a letter to the plaintiffs which withdrew their offer and this arrived with the plaintiff on October 20. The plaintiffs claimed for damages for the non-delivery of the tin plates.

Issue

The court was required to establish whether the withdrawal of the offer for the sale of goods was acceptable. The court would have to consider whether the contract had been agreed by the

acceptance by the plaintiffs of the letter of October 1, or whether the defendants had successfully withdrawn their offer by issuing the withdrawal by letter on October 8.

Held

The court held that the withdrawal of the offer was ineffective as a contract had been constructed between the parties on October 11 when the plaintiffs accepted the offer in the letter dated October 1. On this basis, it was held that an offer for the sale of goods cannot be withdrawn by simply posting a secondary letter which does not arrive until after the first letter had been responded to and accepted. The court gave judgment for the plaintiff and awarded that the defendant paid their costs.

Where acceptance is posted after the offeror posts revocation of the offer but before the revocation has been received, the acceptance will be binding. In other words, revocation of an offer by post only takes place when it is received. The difference between acceptance of an offer and revocation of an offer is that in the former, acceptance takes place when a letter is posted, while in the latter, revocation takes place when the letter is received.

CERTAINTY

Vagueness

Scammell and Nephew Ltd v Ouston

Facts

Ouston agreed to purchase a new motor van from Scammell but stipulated that the purchase price should be set up on a hire-purchase basis over a period of two years, with some of the figure being part-paid by a van that Ouston already owned. Before the hire purchase terms had been agreed, Scammell refused to proceed with the sale and as a result of this, Ouston brought a claim for breaching the contract for the supply of the vehicle. Scammell claimed that the hire-purchase agreement had not been implemented and therefore neither party was bound and the agreement was void on the basis of uncertainty. The trial judge awarded Ouston damages as it was believed that the contract had been wrongly repudiated. Scammell appealed to the Court of Appeal who dismissed his action. Scammell re-appealed the decision of the trial judge to the House of Lords.

Issue

The court was required to establish whether the parties had agreed and constructed a contract. Specifically the court was required to consider the phrase ‘on hire purchase terms’ and whether this could satisfy the law and bind the parties. Scammell argued that the term was too vague to be binding. Ouston argued that there was clearly contractual intention and this was enough to constitute the agreement between the parties.

Held

The court found that **the clause regarding the hire-purchase terms was so vague that there could not be a precise meaning derived from it.** As a result of this finding, there was no enforceable contract between the parties and the appeal was dismissed.

Viscount Maugham stated, “In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain unless this can be done.... Consensus as idem would be a matter of mere conjecture.”

Incompleteness

Agreement to Agree Cases

May & Butcher v R

Facts

After the end of the First World War, the Government had a surplus of tents which were no longer required by the army. As a result, the Government’s disposal’s board was set up to sell these tents. They agreed to sell tents to May and Butcher Ltd who left £1,000 as a security deposit for their purchases. According to the written agreement between the disposals board and the company, the price for the tents, and the dates on which payment was to be made were to be agreed between the parties, as and when the tents became available. In 1923 a new disposal’s board took over and refused to sell the tents. They stated that they no longer considered

themselves bound by the contract. May and Butcher sued but were unsuccessful. They appealed to the House of Lords.

Issues

Were the terms of the agreement sufficiently certain to constitute a legally binding agreement between the parties?

Held

There was no agreement between the parties. A contract for the sale of the tents had never in fact been concluded. This was because a fundamental term of the agreement that was necessary for the sale to be completed had not been agreed. As such, there could not be a contract. Whilst **s8 Sale of Goods Act 1893** provided that a price could be fixed in the future, **s9 Sale of Goods Act 1893** also provided that if that price could not be fixed by a third party, then no agreement could be made. No third party could set the price for the tents, and the court could not imply a price into the agreement. Therefore, no agreement had been made. **The agreement between the claimants and defendant therefore was simply an agreement to agree, and not enforceable.**

This case is a classic example of the Principle of Agreement to Agree...

Lord Buckmaster said, "An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left out is no contract at all"

Hillas v Arcos

Facts

Hillas bought some timber from the timber merchants Arcos Ltd. They purchased 22,000 units of timber, and the agreement also contained an option that they would be able to buy up to 100,000 units the next year at a discounted rate of 5%. The next year, Arcos refused to sell them the timber at this rate and Hillas sued for breach of contract. Arcos claimed that the agreement could not be valid because it required further agreement in the future.

Issues

Whether or not the agreement to enter into another agreement was an enforceable term of the first agreement. Whether or not the contract to enter into a future contract was valid?

Held

There was a valid and enforceable agreement that allowed Hillas to purchase 100,000 staves of wood for at a reduced rate. This was more than a mere 'agreement to agree' because the only thing necessary for the agreement to be brought into existence was for the buyers to decide to exercise their option to purchase the wood. Whilst the price had yet to be agreed, this was only because it naturally fluctuated as a commodity depending on market conditions. Where the issue was in the balance, as here, it was held that the court should try to interpret the words of the agreement in such a way as to preserve the subject matter of the agreement rather than destroying it, and contracts made between merchants in this way should be upheld where the court can interpret the terms in order to do so.

The court held in this case that the words could be given a reasonable meaning and therefore the option was binding.

Walford v Miles

Facts

The claimant and the defendant entered into an agreement for the purchase of Defendant's company. The claimant promised to provide a letter of comfort from their bank which confirmed that they had financial resources to pay for the company. In return, the defendant agreed to deal exclusively with the claimant and to terminate all other negotiations with other people. The claimants complied with their side of the deal but the defendant sold the company to a third party. The claimant sought to recover damages.

Held

The court held in favor of the defendant and stated that both the lock out agreement and the lock in agreement were too uncertain and thus did not create a contract. **The lock out agreement (to prevent the defendant from dealing with any other 3rd party) was not certain enough as it was not limited to ascertain period of time.** The lock in agreement (so that the defendant would negotiate exclusively with the claimant) **was not certain enough as it was held an agreement to negotiate or an agreement to agree was too uncertain to be a valid contract.**¹²

Restitutionary Approach

British Steel Corp v Cleveland Bridge and Engineering Co Ltd

Facts

The parties entered into negotiations for the manufacture by the claimants of steel nodes for the defendants. The defendants sent the claimants a letter of intent which stated their intention to place an order for the steel nodes and proposed that the contract be on the defendants' standard terms. The claimants refused to contract on these terms. Detailed negotiations then took place over the specifications of the steel nodes, but no agreement was reached on matters such as progress payments and liability for loss arising from late delivery, and no formal contract was ever concluded. After the final node had been delivered the defendants refused to pay for them. The claimants brought an action against the defendants, who counterclaimed for damages for late delivery or delivery of the nodes out of sequence.

Held

The court held that the claimants could recover in a restitutionary action for the reasonable value of the work which they had done. This was because **the defendants had requested the claimants to deliver the nodes, they had received a benefit at the expense of the claimants and that it was unjust that they retain that benefit without recompensing the claimants for the reasonable value of the nodes.**

Instead of liberalizing the rules relating to certainty (or possibly in addition to such liberalization), an alternative approach would be to hold that no contract was concluded and

¹² Another example of an agreement to agree case.

look to the law of restitution for a solution. In other words, where a contract is not concluded because it is uncertain, one of parties can claim for a restitutionary action for expenses incurred.

INTENTIONS TO CREATE LEGAL RELATIONS

Domestic and Social Agreements

General Rule- Not Legally Binding

Statement Not Seriously Meant

Weeks v Tybald

Facts

The plaintiff alleged that the defendant spoke with the father of the plaintiff and the plaintiff was given liberty to come to the house of the defendant to “woo” his daughter.” There was an alleged “communication of marriage” between the plaintiff and the daughter of the defendant. Furthermore, at the purported meeting at the house of the defendant, the defendant is purported to have immediately affirmed and made it known that he would give the plaintiff 100 and would allow the plaintiff to marry his daughter with his consent.

Held

The Court held that it was unreasonable that the defendant should be bound by such general words which may be “spoken to excite suitors.” Accordingly, the plaintiff’s case was dismissed.

HUSBAND AND WIFE

Balfour v Balfour

The general rule is that agreements between husband and wife are not legally binding.

Facts

A wife sought to enforce a promise by her husband to pay her £30 per month while he worked abroad.

Held

The wife had not provided any consideration for the promise of her husband and because it was held that the parties did not intend their agreement to 'be attended by legal consequences'

Atkin LJ said, the common law does not regulate the form of agreements between spouses ... The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.

PARENTS AND CHILDREN

Jones v Padavatton

General Rule is that these types of agreements are not binding.

Facts

A mother and daughter came to an arrangement whereby the mother agreed to maintain her daughter if she agreed to study for the bar. The daughter commenced her studies and the mother paid her an allowance. The arrangement was later altered and the mother agreed to provide a house in which her daughter could reside whilst she studied. Mother and daughter fell into dispute as to the occupancy of the house, and the mother sought possession. It was held the daughter was entitled to remain in possession and the mother appealed.

Issues

The daughter argued the agreement between herself and her mother amounted to a legally binding contract and, as such, she should be entitled to remain in occupation of the house. She claimed there had been an intention to create legal relations and she had provided consideration for her mother's maintenance by studying for the bar. The mother argued there was merely an informal family arrangement, there had been no intention to create legal relations and she was, therefore, entitled to recover possession of the house. Even if there was an enforceable contract, she asserted the terms of the arrangement were too vague for the court to enforce.

Held

The mother's appeal was successful and she was awarded possession. **There is a presumption that family arrangements are based on mutual trust, family ties and affection, and that there is no**

intention to create legally binding contracts capable of enforcement in the courts. This presumption can be rebutted, but the lack of formality regarding the agreement between mother and daughter strongly indicated there was no such intention and the daughter had no defense to her mother's claim for the house.

Exception one: Spouses not living in Amity

Merit v Merit

Facts

Mr and Mrs Merritt married in 1941. They held their matrimonial home in joint names. In 1966 Mr Merritt left the family home to live with another woman. Mr Merritt agreed to pay Mrs Merritt £40 per month. At Mrs Merritt's request, he signed a document confirming that when she had repaid the balance on the mortgage, he would transfer the matrimonial home into her sole name. Mrs Merritt paid off the mortgage and successfully acquired a declaration that the house belonged to her. Mr Merritt appealed.

Issues

Mr Merritt contended the agreement was a domestic arrangement between husband and wife and there was no intention to create legal relations and, as such, there was no enforceable contract. He also argued the purported contract was insufficiently certain to be enforceable by the court, and that Mrs Merritt had failed to provide consideration for his promise. Mrs Merritt argued that given they were in the process of separating, the presumption of there being no intention to create legal relations did not apply. She claimed there was every intention of creating legal relations, and her having paid off all the expenses on the home and finishing off the mortgage payments amounted to consideration.

Held

Mr Merritt's appeal was unsuccessful. When parties are in the process of separating, or are separated, the presumption of there being no intention to create legal relations does not apply. The arrangement was sufficiently certain to be enforceable, and the paying of the mortgage was ample consideration for Mr. Merritt's promise. Mrs Merritt was entitled to the matrimonial home entirely.¹³

Exception two: Social Agreements has Consequences

Parker v Clarke

Facts

The Clarks were an elderly married couple. Mrs Parker was Mrs Clark's niece, and Mr Clark suggested she and her husband move into their home with them. Mr Parker supported the idea but expressed concern that it would mean their selling their own house. Mr Clark wrote to Mr Parker stating the Clarks would bequeath their home to Mrs Parker, her sister and her daughter on their death. The Parkers sold their home and moved in with the Clarks. The Clarks told the Parkers the arrangement was not working, and they would have to move out. The Parkers brought an action for breach of contract.

Issues

The Parkers argued the agreement was contractual in nature, and was intended to be legally binding. In reliance on it being a legally binding agreement, the Parkers sold their home and shared the running costs of the Clarks' home. They contended the Clarks were in breach of this agreement by wrongfully giving them notice to quit. The Clarks denied the existence of any agreement. Even if there had been an agreement, it was insufficient to satisfy **s40(1) Law of Property Act 1925** because it was not in writing. They also claimed the terms of the purported agreement were too vague to form a valid contract.

¹³ See **Combe v Combe** and *compare*. It seems that in this case, consideration was present not only because persons not living in amity are presumed to create their legal relations but also that the woman was paying the mortgage in reliance to what Mr. Merritt promised.

Held

The Parkers were successful in their claim. **The language used in the letters and the surrounding circumstances indicated that both parties intended the agreement to have legal force.** Mr Clark's letter was sufficient to satisfy **s 40(1) Law of Property Act 1925** and amounted to a contractual offer. **The Parkers were entitled to damages for the loss of the prospect of inheritance and the loss of the value of the benefit of living in the house.**

The exchange of letters signified that the two couples were serious and the agreement was intended to be legally binding. The parkers sold their own home and Mr Clarke changed his will thus the Parkers were entitled to damages.

Tanner v Tanner

Facts

A man had promised a woman (whom he was not married to) that the house in which they lived together should be available for her and their children.

Held

The promise had contractual force owing to the fact that in reliance on it of this promise the woman moved out of her flat.

Exception three: The presence of a Stranger in the house

Simpkins v Pays

Facts

The defendant, her granddaughter and a paying lodger shared the house. They had all contributed a one-third stake in entering a competition in the defendant's name. One week a prize of 750 pounds was won but the defendant refused to share with the plaintiff. The plaintiff sued

Held

The presence of the plaintiff who was essentially an outsider rebutted the presumption that the agreement was not intended to be binding.

Business and Commercial Agreements

General Rule- Legally Binding

Edwards v Skyways

Facts

An airline company in financial difficulties was making a number of its pilots redundant. The airline company agreed with the British Airline Pilots Association to pay each pilot an 'ex gratia payment' equivalent to the company's contribution to the pension fund, upon being made redundant. This was initially the subject of a resolution of the company's Board, and agreed upon at a meeting between the company's representatives and the Association's representatives. The claimant opted to leave the company and claim the payment of his contributions to the pension fund. The company conceded that there was consideration, yet held that there was no legally enforceable obligation, but a mere 'moral' one.

Issue

The issue arose as to whether there was an intention to create legal relations and obligations in the agreement between the airplane company and the Association to pay employee contributions.

Held

The Court held that where an agreement is reached in the course of a business affairs, and not in a domestic or social context, **the presumption is that the parties have intended to create legal relations and that their legal relations should be affected.** The onus is on the party rebutting this presumption to show that they expressly intended to create a mere 'moral' agreement and not a legal obligation. The company's use of the words "ex gratia" in the promise to pay do not show nor imply that the agreement is without legal effect. Thus, the company's agreement, reached in a business setting with authorized representatives and conceded consideration, was an intention to create a legal obligation with legal consequences to that effect.

Exception one: Clause explicitly ousts the jurisdiction of the courts

Rose and Frank Co v Crompton Bros Ltd

Facts

An agreement between the two parties was done in a business context and it read, this arrangement is not entered into as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts but is only a definite expression and record of the purpose and intention of the parties concerned to which they each honorably pledge themselves.

Issue

Whether there was a legally binding agreement between the two parties notwithstanding the clause the ousted the court's jurisdiction in the matter?

Held

The court held that this agreement was not a legally binding contract because it was not intended that it would have such an effect. The courts interpret such clauses restrictively and clear words must be used to create such an honor clause.

In comparison to the Skyways case, the words here were not ambiguous. They were plain and clear that the contract was not to have legal effect. In the Skyways case, the words 'Ex Gratia' were not enough to grant the contract that same status.

Exception two: Letters of Comfort or Intent

Kleinwort Benson v Malaysia Mining Corp

Facts

A company incorporated in Malaysia, acquired a cash loan from merchant bankers for the purposes of funding its subsidiary trading company in London. The Malaysian company wrote the bank a 'comfort letter' asserting that its policy is to ensure that the subsidiary company is in a position to meet its liabilities to the bank. The bank granted a £5 million facility initially, and, following a second identical letter, the bank raised the facility to £10 million. When the subsidiary company went into liquidation, the merchant bankers relied upon these letters to order the company to pay the subsidiary's outstanding sums. The Malaysian company claimed that the letters were not intended, nor understood, by both parties to create legal obligations.

Issue

The issue arose as to whether the assertion in the letters were intended to create legal relations in respect of future payment as a legally-binding contract.

Held

The Court held that, in the absence of an expressly stated intention to create legal relations in respect of the payment, the Court must determine whether the statement within its context was intended and understood by the parties, as a binding legal promise as to future conduct. On the facts, **the Court held the express words used were not in the form of a contractual promise and were a mere statement of fact concerning the bank's present "policy;" and not a promise that this "policy" will remain in the future.** Further, when placed within the context of the letter itself and bank documentation, the assertion does not evidence an intention to create a legal obligation as to future conduct. The words were merely of comfort and of moral responsibility, and did not have the meaning nor effect of creating a legal promise of future conduct with legally-binding effect.

Exception three; Free Gifts: Minority Judgment Esso Petroleum Case
Esso Petroleum Co Ltd v Customs and Excise Commissioners

Facts

Esso supplied garages with World Cup Coins in 1970, instructing the garages to give away one coin with every four gallons of petrol sold. It was sought to subject these coins to a purchase tax on the ground that they had been sold. On the facts, it was held that the coins were not supplied under a contract of sale.

Held

Viscount Dilhorne said, "true it is that the respondents are engaged in business. True it is that they hope to promote sale of petrol but **it does not seem to me necessarily to follow or to be inferred that there was an intention on their parts that their dealers should enter into legally binding contracts with regard to the coins.**"

*The House of Lords was divided in case were divided on the issue of whether or not there was an intention to create legal relations. From the minority judgment's view point, **there was no***

intention on the part of the dealers that Esso Petroleum sold its gasoline when giving away the coins.

CONSIDERATION

Lush J definition:

“Some interest, right, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”

This definition was extracted from the Currie v Misa Case.

General Rule: Past Consideration

General Rule is that past consideration is not binding.

Re McArdle [1951]

Facts

A wife and her grown up children lived together in a house. The wife of one of her children did some decorating and the children later promised to pay 488 pounds for the work done. They had even signed a document to this effect. After the testator’s widow died, Mrs McArdle asked for payment. However, the other four sons refused to pay her. She tried to enforce her interest in the property in court.

Held

The court held that the promise was not enforceable owing to the fact that all the work had been done before the promise was made and was therefore past consideration.

Roscola v Thomas

Facts

The defendant promised the plaintiff that a horse which had been bought by him was sound and free from vice.

Held

It was held that, since this promise was made after the sale had been completed, there was no consideration for it and it could not be enforced.

Exception One: Previous Request by the Promisor

Pao On v Lau Yiu Long

Facts

The plaintiffs (P) owned the shares of a private company which owned a building that the defendants (D) wanted to buy. The defendants were majority shareholders in a public company. P agreed to sell their shares in the private company to D so that D could acquire the building. In return P would get shares in the public company. Fearing a drop in share value of the public company would result, P and D made another agreement that P would not sell their shares for a while. However, P realized that D might profit from this agreement and demanded that this second agreement be replaced with one in which P was indemnified for any fall in share value but might also benefit from any rise in share value. Fearing that not agreeing to this would delay the main contract, D agreed. The share value did drop, and P sought to rely on the indemnity contract. D refused to comply with this, and the case reached the Privy Council

Held

Lord Scarman delivered the judgment and said that, “an act done before the giving of a promise to make a payment or to confer some other benefit **can sometimes be consideration for the promise. The act must have been done at the promisors’ request:** the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit and payment or the conferment of a benefit must have been legally enforceable had it been promised in advance.”

Lampleigh v Braithwaite

Facts:

The defendant, Braithwaite, killed a man. He asked the plaintiff, Lampleigh to secure him a pardon from the king. The plaintiff spent many days doing this, riding and journeying at his own cost across the country to where the King was and back again. Afterwards, the defendant promised to pay the plaintiff £100 in gratitude. He later failed to pay the money. The plaintiff sued.

Issues:

The defendant argued that the plaintiff had acted before any promise to pay was given by the defendant. Therefore, he had only provided past consideration for a promise given in the future. The court considered whether this past consideration was sufficient to create a valid contract.

Held:

The court found in favor of the plaintiff. The promise was indeed given after the plaintiff had acted. However, **the plaintiff had acted upon a request made by the defendant. The court considered that the original request by the defendant contained an implied promise to pay the plaintiff for his efforts.** Bowen LJ said: 'A mere voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind'. Consequently, the court held that if A does something for B at their request and afterward B promises to pay A for their trouble, then that promise is good consideration. The later promise was considered to be part of the same single transaction and was, therefore, enforceable.

Braithwaite's promise to pay could be linked to his earlier request and be treated as one agreement.

Exception Two: Business Context

Re Casey's Patent**Facts**

A and B owned a patent and C was the manager who had worked on it for two years and because of this help in developing the patent, A and B then promised C a one third share in the invention. The patents were transferred to C. However, A and B later claimed their return.

Held

The court held that C could rely on the agreement. Although C's consideration was past, it had nevertheless been done in a business context and at the request of A and B. Moreover, it had been understood by both sides that C would be paid and the subsequent promise to pay merely fixed the amount.

Adequacy of Consideration

The first rule of consideration states that it need not be adequate but it needs to be sufficient.

Needs to be sufficient means the court will not enforce a promise unless something of value is given in exchange for that promise. See *Insufficiency of Consideration*

Needs not be adequate means that the courts do not ask whether adequate value has been given in return for the promise or whether the agreement is harsh or one-sided.

Chappell & Co v Nestlé'

Facts

The plaintiffs owned the copyright in a dance tune called 'Rockin' Shoes.' The Hardy Co made records of the tune which they sold to the defendants for 4d each and the defendant offered them to the public for 1s 6d each but required in addition to the money, three wrappers of their six penny bars of chocolate. When they received the wrappers, they threw them away. Their main object was to advertise their chocolate but they also made profit on the sale of the records. The defendants sued for infringement of copyright.

Held

The House of Lords held that the wrappers themselves, although of very trivial economic value, were nevertheless part of the consideration. This was so even though Nestlé threw away the wrappers. As Lord Somervell said: 'a contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.'

Thomas v Thomas

Facts

A testator, shortly before he died, expressed the desire that his widow should have the house for the rest of her life. After his death, his executors promised to carry out the testator's desire provided that the widow paid £1 per annum towards the ground rent and kept the house in repair.

Held

The court declined to be influenced by the husband's wishes but accepted that the plaintiff's promise to pay the 1 pound a year as affording consideration for the defendant's promise.

Consideration must move from the Promisee

This is the second maxim of consideration. It must move from the promisee to the promisor.

Price v Easton

Facts

The defendant promised X that if X did certain work for him, he would pay the plaintiff a sum of money. The work was done but the defendant did not pay the money.

Issue

The court was required to establish whether the plaintiff had provided any consideration for the agreement between the defendant and X for the work that was carried out. If this could be established, the plaintiff would be able to sue the defendant for the money that would have been paid to the plaintiff as a result of X's work to clear the debt that was owed from their separate agreement.

Held

It was found that X performed his part of the agreement with the defendant but the plaintiff was a stranger to the contract between the parties and therefore could not sue for the sum owed by the defendant. This was despite the fact that the money owed would have been paid to the plaintiff to clear the previous debt. The court found this on the basis that the plaintiff had not provided any

consideration for the promise between the parties. The plaintiff's claim was dismissed by the court.

Viscount Haldane said "Only a person who is party to a contract can sue on it". Also "Only a person who has given consideration may enforce a contract under seal". This case should be contrasted with that Coulls v Bagot's Executor Co Ltd and Mc Voy v Belfast Banking Ltd

Coulls v Bagot's Executor and Trustee Co Ltd

Facts

C agreed to grant to the O'Neil Construction Co Ltd the exclusive right to quarry on his land in return for a minimum royalty of 12 pounds a week for a period of 10 years. C also authorised the company to pay all money arising from this agreement to himself and his wife jointly. The agreement was in writing (not under seal) and was signed by C, by his wife and by the company. 18 months later, C died.

Issue

Whether the wife could provide consideration despite the fact that she was only party to the contract and whether the company was bound or entitled to make such payment to her.

Held

The promise was made to them collectively. It must, of course be supported by consideration, but that does not mean by consideration furnished by them separately. It means consideration given on behalf of them both and therefore moving from both of them. In such a case the promise of the promisor is not gratuitous and as between him and the joint promisees, it matters not how they were able to provide the price of his promise to him.

McEvoy v Belfast Banking Co Ltd

Facts

A father who had 10,000 pounds on deposit with the Belfast Bank, transferred it to a deposit account in the names of himself and his infant son and soon afterwards died. The executors were

allowed by the bank to withdraw the money and put it into an account in their own names. The money was in fact lost in attempts to keep the family business alive and the son sued the bank. The bank argued that no rights accrued to the son over the deposit as he furnished no consideration.

Held

The argument by the bank was rejected by court because they considered that the contract was made by the father on behalf on the son and on his own behalf as well and that consideration supported such a contract.

Forbearance to Sue is Good Consideration.

Cook v Wright

Facts

The claimant honestly believed that the defendant was under a statutory obligation to reimburse them in respect of certain expenditure which they incurred in work on a street adjoining the house in which the defendant was residing. The defendant denied that he was under such an obligation but he eventually promised to pay a reduced sum after he was threatened with litigation if he did not pay. When he discovered that he was under no such duty to pay he refused to honor the promise. He maintained that his promise was not supported by consideration and that he was not liable to pay

Held

The court held that the promise was supported by consideration and that he was liable to pay the sum promised. This was because the bank had showed forbearance to sue, which could be regarded as consideration.

Alliance Bank v Broom

Facts

The defendant owed £22,000 to the claimant bank. The bank demanded some security for the loan and this was promised by the defendant. The defendant failed to honor his promise and,

when the bank sought to enforce it, he argued that his promise was not supported by consideration and was therefore unenforceable.

Issue

Whether there was sufficient consideration in this case to enforce the agreement

Held

The court held that the promise was enforceable because, as a result of the defendant's promise, the claimants had refrained from suing him to recover the debt and the defendant had therefore received 'the benefit of some degree of forbearance'.

Insufficiency of Consideration One: PUBLIC DUTY

Consideration is deemed to be insufficient if it is imposed by public duty to act. For example in the Collins case, a subpoena was a public duty to act and could not afford consideration.

Collins v Godefroy

Facts

The plaintiff had attended on subpoena to give evidence on the defendant's behalf in a case in which the defendant was a litigant and he alleged that the defendant had promised to pay him six guineas for his trouble.

Held

The court held that there was no consideration for this promise because it was his duty to appear on subpoena by the court.

See and compare with England v Davidson. It seems that were the defendant acted in a way that goes beyond what they have been imposed on by public duty, consideration is sufficient.

England v Davidson

Facts

The defendant offered a reward to anyone who should give information leading to the conviction of a felon. The plaintiff, a police constable gave such information and the defendant pleaded not only that the plaintiff had merely done his duty but that the contract was against public policy.

Held

The court rejected this argument by the defendant stating that , “I think there may be services which the constable is not bound to render and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding are very clear.”

Ward v Byham –

Facts

A man and a woman though not married lived together from 1949 to 1954. in 1950 a child was born to them. In 1954, the man turned the woman out of the house but kept the child. Some months later the woman asked for the child and the defendant wrote offering to let her have the child and to pay a pound a week for its maintenance provided (a) the woman could prove that she will be well looked after and happy and (b) ‘that she is allowed to decide for herself whether she wishes to live with you.’ the plaintiff then took the child but later married another man after 7 months and the man stopped making payments. The plaintiff sued for breach

Held

Although Section 42 of the National Assistance Act statutorily imposes a duty on a mother to take care of her child, the court was of the view that she went beyond that duty when she complied to the requests of the defendant’s letter to keep the child happy and to look after it well.

Public duty imposed by statute- **Section 42 of the National Assistance Act 1948**

Insufficiency of Consideration two: Bound by existing contractual obligations

General Rule: Bound by Existing Contractual Obligations

Stilk v Myrick

Facts

A seaman sued for wages alleged to have been earned on a voyage from London to the Baltic and back. In the course of the voyage two sailors had deserted and as the captain could not find

any substitute, he promised the rest of the crew extra wages if they would work the ship home short-handed.

Issue

Whether there was sufficient consideration in this case to constitute a legally binding contract?

Held

The court held that the action could not lie because **the crew were already bound by their contract to meet the normal emergencies of the voyage and were doing no more than their duty in working the ship home.**

*Compare to the case of **Hartely v Ponsonby***

Hartley v Ponsonby

Facts

Seventeen of a crew of thirty-six deserted and only four or five of the remaining crew were able seamen. The desertion of such a large portion of the crew rendered it unsafe to continue the voyage and would have entitled the remaining seamen to abandon the voyage. The seamen agreed to continue the voyage on being promised extra pay on its completion. The master refused to honor his word and the seamen sued.

Issue

Whether there was sufficient consideration in this case that entitled the seamen to what their master had promised.

Held

The court held that the seamen were entitled to enforce the master's promise because in agreeing to continue with the voyage when they were not obliged by the terms of their contract to do so, they had provided consideration.

The whole gist of consideration under contract law is that where one goes beyond what his contract stipulates, then there is sufficient consideration.

Exception to General Rule

See also *Hartley v Ponsonby* above.

Williams v Roffey Bros & Nicholls (Contractors) Ltd

Facts:

The appellants Roffey Bros, were builders who were contracted to refurbish 27 flats belonging to a housing corporation. The contract had a penalty clause for late completion. The appellants subcontracted some work to Williams, a carpenter. When Williams fell behind with his work the appellants offered him bonus payment to finish on time. Williams carried on working until the payments stopped. He sued the appellants for breach of contract.

Issues:

The appellants argued that the agreement to pay extra was unenforceable as Williams had provided no consideration; the appellants only received the practical benefit of avoiding the penalty clause. They did not receive any benefit in law. Williams was only agreeing to do what he was already bound to do. The appellants relied on *Stilk v Myrick (1809) 2 Camp 317* where it was held that performance of an existing duty was not good consideration.

Held:

The Court of Appeal held that the doctrine in *Stilk v Myrick* had been refined since then. Gildwell LJ said a promise to make bonus payments to complete work on time was enforceable if the promisor obtained a practical benefit and the promise was not given under duress or by fraud. It was the appellants' own idea to offer the extra payment. Therefore, there was no duress. **The appellants also gained a practical benefit by avoiding the penalty clause.** Russel LJ said (at 19) that the court would take 'a pragmatic approach to the true relationship between the parties'. Consequently, the promise for extra pay was enforceable.

This serves an official exception to Stilk v Myrick. If the promisor will get some kind of factual advantage as it was in this case, then consideration is deemed to be present.

Insufficiency of Consideration Three: Part payment of debt

General Rule i.e. Pinnel's Case:

The Pinnel's Case (1601)

Facts

The defendant, Cole, owed the plaintiff, Pinnel, the sum of £8 10s. Pinnel sued Cole for recovery of the debt. Cole had, at Pinnel's request, paid £5 2s 6d one month before the debt was due to be paid and stated that they had an agreement that this part payment would discharge the entire debt.

Issue

Whether part payment of the debt offered enough sufficient consideration to discharge the whole debt?

Held

The court confirmed **the general rule that part payment of a debt cannot be satisfaction for the whole**. Therefore, by paying some money early the defendant had provided the plaintiff with a further benefit and had not just repaid the money which he already owed. Consequently, this was good consideration, and the court found for the defendant.

Lord Coke said, 'payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judge that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.'

Shadwell v Shadwell

Facts

The defendant was the plaintiff's uncle. The uncle promised to pay his nephew £150 a year until the nephew's income reached 600 guineas provided the nephew married his fiancée. The uncle paid 12 instalments but then died, and the payments stopped. The nephew sued his uncle's estate for the remaining payments.

Issue

A marriage contract was legally enforceable at the time. However, the marriage contract was between the nephew and his fiancée, and was not made with the uncle. The defendants claimed that as a result the nephew had provided no consideration for the uncle's promise to pay him. This was a voluntary gift and could not be enforced. The nephew argued that his going through with the marriage was consideration.

Held:

Erle CJ said that performance of the marriage contract was consideration even though the contract was made with a third party to the agreement, as the uncle's promise was an inducement to the nephew to perform this contract. He said that the **plaintiff had, by getting married, made a material change in his position and had induced his wife to do the same. They may have incurred pecuniary liabilities that would be a loss to them if the promised income was withheld.** He recognised that marriage could be a benefit to interested relatives, and so the uncle did derive a benefit from the marriage. Therefore, the marriage was good consideration.

Jones v Waite

Facts

The defendant agreed to pay money to the plaintiff in return for the plaintiff's promise (a) to execute a separation deed and (b) to pay his (the plaintiff's) debts to a third party. The promise to execute the separation deed raised questions of public policy but was held good consideration.

Issue

Whether the promise to pay the debt owed to a third party constituted consideration?

Held

The promise to the debt to a third party did not provide consideration. Lord Abinger said, **'a man is under a moral and legal obligation to pay his just debts.** It cannot therefore be stated as an abstract proposition, that he suffers any detriment from the discharge of that duty; and the declaration does not show in what ways the defendant could have derived any advantage from the plaintiff paying his own debts. **The plea therefore shows the insufficiency of that part of the consideration.'**

Foakes v Beer

Facts

The respondent, Beer, loaned the appellant, Dr Foakes, £2090 19s. When he was unable to repay this loan she received a judgment in her favour to recover this amount. The pair then entered an agreement whereby 'in consideration' of an initial payment of £500 and 'on condition' of six-monthly payments of £250 until the whole amount was repaid, she would not enforce her judgment against him. Foakes made these regular payments until the entire amount was repaid. However, he had not paid any interest on the judgement debt, which Beer was entitled to under statute. This interest totalled £302 19s 6d.

Issue

Whether part payment of the debt afforded good consideration?

Held

The holding of the court was that a judgement debt bears interest as from the date of the judgment. Therefore, The House of Lords gave judgment in favor of Mrs Beer for the amount of interest.

Exception one to General Rule: Composition Agreements with Third Parties

Composition agreements occur when a debtor and a group of creditors agree to accept a percentage of the former's debt in full settlement.

Welby v Drake

Facts

The defendant had drawn a bill for £18, which had been returned unaccepted and which had come into the hands of the plaintiff. The defendant's father then made an agreement with the

plaintiff, whereby he promised to pay him £9 in return for the plaintiff's promise to receive it in full satisfaction of his claim. The money was duly paid, but the plaintiff still sued the defendant.

Issue

Can the rule in the Pinnel's case still apply notwithstanding that the father had paid a lesser amount of the debt in full satisfaction of the whole?

Held

Lord Tenterden said that, 'If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because, **by suing the son, he commits a fraud on the father**, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.'

*The reasoning here is that if a third party partly pays your debt and your creditor waives his rights to the full sum, he cannot rely on the rule established in the Pinnel's case. Because doing so would make him fraudulent towards the third-party to whom he promised to get part payment in full satisfaction of the whole. See the **Hirachand Punamchand v Temple** below.*

Hirachand Punamchand v Temple

Facts

Lieutenant Temple (the son and defendant) had borrowed money from the plaintiffs but the plaintiffs had cashed a draft for a smaller sum sent by the Lieutenant's father (the third party to the debt contract) in full satisfaction of his son's debt. The creditors went back on their word and demanded full satisfaction of the debt owed by the son.

Issue

Whether the rule in the Pinnel's case still applies notwithstanding that the father had paid a lesser amount of the debt in full satisfaction of the whole?

Held

The Court of Appeal held that the plaintiffs could not sue Lieutenant Temple for the balance. The debt was extinguished by the agreement with the third party (the father) to accept a smaller

sum and so could not be revived for the purposes of suing the debtor. It would be fraudulent of the creditor to go back on the word he promised the third party.

This is the first exception to the general rule established in the Pinnel's case that part payment of debt will not suffice for consideration.

Exception two to the General Rule: Promissory Estoppel

Hughes v Metropolitan Railway Co

Facts

In October 1874, a landlord gave his tenant six months' notice to repair the premises. If the tenant failed to comply with it, the lease could be forfeited. In November the landlord started negotiations with the tenant for the sale of the reversion (i.e. whether the landlord wished to purchase his interest in the premises for 3000 pounds), but these were broken off on 31 December. Meanwhile the tenant had done nothing to repair the premises. On the expiry of six months from the date of the original notice the landlord claimed to treat the lease as forfeited and brought an action of ejectment. The tenant sued.

Issue

Whether the landlord was estopped from forfeiting the lease in light of the fact that the negotiations could be treated as to have impliedly waived the requirement to repair the premises?

Held

The House of Lords held that the opening of negotiations amounted to a promise by the landlord that, as long as they continued, he would not enforce the notice, and it was in reliance upon this promise that the tenant had remained inactive. The six months allowed for repairs were to run, therefore, only from the failure of the negotiations and the consequent withdrawal of the promise, and the tenant was entitled in equity to be relieved against the forfeiture.¹⁴

*This is a clear example of a promissory estoppel case. The main difference between this case and the **Central London Property Trust Ltd v High Trees House Ltd** case is that in this case, the*

¹⁴ See Footnote 15 & 16

*landlord's right to enforce the repairing covenant was not extinguished. It was suspended and could be resurrected by his giving reasonable notice. But in **High Trees** case, the estoppel had the potential to have permanent effects. Denning J was of the view that the lessors would not have been entitled to demand the rent waived between 1940 and 1945.*

Central London Property Trust Ltd v High Trees House Ltd

Facts

In 1937, High Trees House Ltd leased a block of flats at the rate of 2,500 pounds per year from Central London Property Trust Ltd. It was 99-year lease. Due to the war; occupancy rates were drastically lower than normal. In January 1940, the parties agreed in writing to reduce the rent by half. Neither party stipulated the period for which this rent was to apply. High Trees paid the reduced rate for five years during the span of the world war and by 1945 the flats were full. Central London Property Trust sued for payment of the full rental costs from July 1945 onwards.

Issue

Whether the agreement to pay at a reduced rate applied to the whole term of the lease that is the 99 year span and whether the Central London Property Trust were estopped on that basis?

Held

Lord Denning took the view that the full rent was payable from the time that the flats became fully occupied in mid-1945.¹⁵ He also stated obiter that if Central London had tried to claim for rent from 1940 onwards, they would not have been able to do so. They would be estopped from reneging on the promise upon which the defendant's had relied as long as the circumstances which led to that promise continued.¹⁶

Lord Denning; Important Words:

**“where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied upon and to affect the legal*

¹⁵ This shows that promissory estoppel is supposed to only have a suspensory effect and not a permanent effect.

¹⁶ Unfortunately for **High Trees House Ltd**, the circumstances which led to the reduction in the yearly fees were no longer present: The War was over and people were soaring in London. Therefore, the suspensory period, which is so characteristic of promissory estoppel had ended.

relations between the parties and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.”*

The principles discussed in the **High Trees Case** (*supra*) bring to light five elements of Promissory Estoppel:

First Element of Promissory Estoppel

- There must be a **promise or representation as to the future conduct which is intended to affect the legal relations between the parties** and which indicates that the promisor will not insist on his strict legal rights against the promisee.¹⁷

Second Element of Promissory Estoppel

- **The promise must be relied upon by the promisee. This does not necessarily mean that the promisee should suffer some form of detriment.** It must be shown that the promisee was led to act differently from what he otherwise would have done or acted.¹⁸

Facts

This case concerns the sale of coffee beans between a Kenyan coffee business (A) and a Tanzanian based buyer (El Nasr), who then resold the product. The contracts (two) between the two parties were made for 250 tonnes of coffee beans, sold at 262 Kenyan shillings per cwt. The amounts were made payable on credit, the agreement of which was set up using amounts in sterling. This is the key discrepancy between the contract for sale and the credit agreement – however the other discrepancies were addressed prior to any exchange. The first shipment was accepted by El Nasr, who paid for this instalment in pounds sterling. When payment became due on the second instalment, the value of sterling had decreased. To avoid a loss A demanded payment in Kenyan Shillings, meaning that the sterling balance needed increasing/the balance was owing.

¹⁷ This promise or representation can also be implied from conduct as it was in **Hughes v Metropolitan Railway**

¹⁸ See **Alan Co Ltd v El Nasr Export & Import Co**.

Issue

Could the buyers rely on promissory estoppel, based on the original acceptance of the first payment in sterling and the lack of redress about the inclusion of sterling during the addressing of other issues?

Held

Lord Denning held that it is not enough for the promisee to suffer detriment; it must be shown that he was led act in different way than he would have acted or done. To rely on promissory estoppel, detrimental reliance is not a key requirement. You must only establish that the promisor has changed their position.

Third Element of Promissory Estoppel

- It should be unfair or inequitable for the promisor to go back on his word.

The Post Chaser [1981]

Facts

The sellers agreed to sell a quantity of palm-oil to the buyers who had contracted to sell this onto sub-buyers. A clause in the contract required the sellers to send a declaration of shipment to the buyers in writing as soon as possible after the ship set sail. The sellers gave the declaration a month after the ship had set sail and the buyers did not protest the time delay. The sellers also handed the documents directly to the sub-buyer at the request of the first buyer. It was then the sub-buyers that rejected the documents. The buyers followed this and the sellers sold the oil, less money, elsewhere. The sellers then brought an action claiming the difference in the money that was lost as damages.

Issue

The issue, in this case, was whether the buyer could reject the shipment sent by the seller. Specifically, the court had to look whether the buyer had waived their rights to claim against

the delay in the sending the declaration of shipping or whether it would be inequitable to the seller to allow them to do so.

Held

The seller's claim for damages was rejected. The court found that the declaration of the shipment was an essential step in this sale process, particularly with a view to the timings requested by the buyer. **However, the court found that they had waived their rights to claim against error/delay by requesting that the documents are submitted directly to the sub-buyers. On this basis, the buyers were not found to be inequitable in their actions in rejecting the documents.**

Fourth Element of Promissory Estoppel

- The fourth element of promissory estoppel is that it is generally suspensory. This attribute was elucidated upon on page 65 & 66. This, therefore, means that promissory estoppel will not apply to situations that have permanent effects. For example, in the **High Trees Case**, Lord Denning opined that if he had granted that the Central London Property Trust was also estopped post 1945 from receiving the full payments as initially agreed then it would be grossly unfair.

Fifth Element of Promissory Estoppel

- The fifth element of promissory estoppel is that it cannot be used as a cause of action but only a shield. It can only be used as a defence mechanism to protect someone who may suffer unjust enforcement of strict legal rights. This was propounded in the **High Trees** case as well.

Combe v Combe

Facts

During the divorce process, a husband promised to pay his wife a tax-free sum of £100 each year to represent a permanent maintenance payment. The wife was aware that the husband

was not in a good financial state and made no claim to this payment. Several years later, she brought an action to claim the arrears that were owed under their agreement.

Issue

This case was brought only four years after the landmark decision given in *Central London Property Trust Ltd v High Trees House Ltd*, which held that a party could not revert on an earlier promise made. Therefore, the court in this instance was required to consider whether the husband could withdraw from his earlier promise to pay the wife the sum of money. It was important for the court to understand whether the wife had given consideration in return for the husband's promise and whether the wife could claim for the sum of money that had been promised previously, despite the fact she had not claimed for the money for several years.

Held

The court held that the wife could only enforce her agreement for the payment which was promised by the husband if she had given consideration. **The court found that no consideration was given by the wife as she had not agreed to apply for the maintenance that was promised by the husband.** The husband did not request the wife to refrain from taking the maintenance payment and therefore the wife could not claim for the money.

*Another thing to note is that promissory estoppel¹⁹ in England cannot be used as a cause of action. The wife in this case brought it as cause of action. Furthermore, from the knowledge of intentions to create legal relations, people not living in amity are presumed to have their legal rights enforced as it was in **Merritt v Merritt**. However, as you can see, the process is not automatic.*

¹⁹ Compare with Estoppel by convention. See **Amalgamated Investment Co Ltd v Texas Commerce International Bank**.

Estoppel by Convention

Definition: “when the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.” -

Amalgamated Investment and Property Co Ltd v. Texas Commerce International Bank Ltd

Facts

The common assumption of the parties was that they had entered into a contract of guarantee under which the claimants had promised to guarantee loans made by a subsidiary of the defendants to a subsidiary of the claimants. In fact, the wording of the guarantee covered loans made by the defendants, but not loans made by the defendants’ subsidiary. When the claimants went into liquidation the defendants applied money which they owed to the claimants in discharge of the claimants’ alleged liability under the guarantee. The claimants sought a declaration that the defendants were not entitled to apply the money in such a way because the guarantee was not effective to cover the loans made by the subsidiary

Issue

Whether the guarantee which both parties initially agreed to covered the loans made by the subsidiary and if so, whether the defendants were estopped from reneging on what was agreed?

Held

The court held that the parties **had entered into the guarantee under the shared assumption that the guarantee did cover such loans, and the effect of the estoppel was to prevent the claimants from denying the efficacy of the guarantee.** Furthermore, the contract of guarantee was not enforceable. Only the estoppel could validate the contract and thereby render the guarantee enforceable. Hence, Judgment was given in favor of the claimants.²⁰

²⁰ This is the leading case in Estoppel by Convention.

Proprietary Estoppel

Thorner v Major

Facts

The claimant had worked on the defendant estate's farm for over a decade without pay, believing that he would inherit the land when the defendant died. While the defendant once gave the claimant a bonus stating that it was for his 'death duties', he never explicitly told the claimant he would inherit. Under the original will, the property would have passed to the claimant, but the defendant retracted this will and died intestate. The claimant argued he should inherit the property due to proprietary estoppel.

Issues

The issue in this case was whether proprietary estoppel can arise in the absence of an explicit representation of proprietary interest.

Held

The House of Lords held that the claimant had established proprietary estoppel. A person will have an inchoate 'equity' in land if they can establish proprietary estoppel: **that the land-owner made an unequivocal representation that the individual had an interest in the property, which that individual relied on to their detriment, such that it would be unconscionable for the land-owner to renege on his assurance.** The House of Lords held that it is possible for a representation to be made by conduct alone, so long as that conduct conveys the message to a reasonable person sufficiently clearly that the claimant was to have a proprietary interest in the land. This was to be determined by all relevant circumstances, including the context of any representations or conduct, the relationship between the parties and their understanding of the context.²¹

²¹ The three elements for proprietary estoppel are 1.) A representation or assurance made in relation to acquisition of the land 2.) Reliance on the Representation 3.) Detriment of the claimant

PRIVITY OF CONTRACT

GENERAL RULE ONE: Only a person who is a party to a contract can sue

Price v Easton- (Repeat)

Facts

The defendant promised X that if X did certain work for him, he would pay the plaintiff a sum of money. The work was done but the defendant did not pay the money.

Issue

The court was required to establish whether the plaintiff had provided any consideration for the agreement between the defendant and X for the work that was carried out. If this could be established, the plaintiff would be able to sue the defendant for the money that would have been paid to the plaintiff as a result of X's work to clear the debt that was owed from their separate agreement.

Held

It was found that X performed his part of the agreement with the defendant **but the plaintiff was a stranger to the contract between the parties and therefore could not sue for the sum owed by the defendant.** This was despite the fact that the money owed would have been paid to the plaintiff to clear the previous debt. The court found this on the basis that the plaintiff had not provided any consideration for the promise between the parties. The plaintiff's claim was dismissed by the court.²²

²² The plaintiff was not a party to the contract.

Tweddle v Atkinson

Facts

In this case John Tweddle and William Guy entered into an agreement under which each promised to pay a sum of money to William Tweddle on the occasion of William Tweddle's marriage to William Guy's daughter. The agreement between them further stated that 'it is hereby further agreed ... that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified'. However, William Guy failed to pay the promised sum and, on his death, William Tweddle sued the executor of William Guy for the promised amount.

Issue

Whether there was sufficient consideration of William Tweddle's part to grant him the rights to sue

Held

It was held that he could not maintain such a cause of action. Now there was one obvious reason why he could not sue; **he had provided no consideration for William Guy's promise. The consideration had been provided by John Tweddle. He was not privy to contract that was made between his father and William Guy (the deceased).**²³

GENERAL RULE TWO: Only a person who is a party to a contract can be sued

Dunlop Pneumatic Tyre Co Ltd v Selfridge & CO Ltd

Facts

In a contract dated October 12, 1911 Dew & Co, who were wholesalers, agreed to buy tyres from Dunlop, who were tyre manufacturers. They did so on an express undertaking in the contract that they would not sell the tyres below certain prices fixed by the manufacturers. Dew & Co also undertook to obtain the same price-fixing agreements from clients to whom they sold on. Dew & Co then sold tyres on to Selfridge on these terms. However, Selfridge broke the agreement and

²³ The claimant could not seek to enforce a contract to which he was not an actual party even though he was named in the contract as a potential beneficiary of the agreement.

sold the tyres at discount prices. Dunlop sued Selfridge, the third party, and sought an injunction.

Held

The petition for an injunction failed due to lack of privity. It was held that Dunlop could not sue Selfridge for breach of contract as they were not parties to the contract, nor had they given consideration to Selfridge.

Exception One: Statutory Exception

For example, **Road Traffic Act** – obliges a motorist to take out third party liability insurance. Another motorist who is involved in an accident with this motorist can then rely upon the statutory provision for recovery of compensation for damage or any loss. The insurance is enforceable despite the fact that the other motorist lacks any privity in the insurance contract.

Exception Two: Trust Law

A trust is a legal relationship, enforceable in equity, by which a person, the trustee, holds property on behalf of another, the beneficiary. **Where a trust has been created, the beneficiary under the trust can sue the trustees even if he was not a party to the original agreement.**²⁴

Gregory & Parker v Williams

Facts

Parker owed money to both Gregory and Williams. Since he could see no way of organizing settlement of his debts himself, he assigned all of his property to Williams on the understanding that Williams would then pay off the debt to Gregory. Williams failed to pay over the money to Gregory. Gregory, of course, was not a party to the agreement between Parker and Williams and as a result was unable to sue on it in contract law.

²⁴ In *Lloyd's v Harper*, *Lush LJ* said, "I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself."

Held

The court was prepared to accept Gregory's argument that a trust of the money had been created in Gregory's favor, which was then enforceable against Williams. There was never any intention that Williams should keep all of the money, a beneficial interest was created in Gregory's favor and Williams held the sum of the debt owed to Gregory by Parker only as a trustee. Williams was therefore bound to return this money to Gregory.

Exception Three: RESTRICTIVE COVENANTS

This is device or tool used by equity by which a party selling land retains certain rights over the use of land, such as preventing the use of the land for business or preventing building on the land.

Tulk v Moxhay

Facts

Tulk owned certain land in London that he sold with an express undertaking that it would never be used to build property on. The land was then resold on a number of occasions, each time subject to the same undertaking, until Moxhay eventually bought it. Moxhay bought it knowing of the limitation but nevertheless intended to build on it. Tulk sought an injunction to prevent this building from taking place and was successful.

Held

The court accepted that it would be against conscience for Moxhay to buy, knowing of the restriction, and it was prepared to grant the injunction and enforce the original agreement even though Moxhay had never been a party to it.

Now for the exams, I have excluded Assignments, Leases, Agency and Negotiable Instruments. Please read the notes on the module. I doubt if they will come though.

CAPACITY OF PARTIES

Minors

Minors can create three types of contracts: 1.) Those that are enforceable against the minor 2.) Those that are voidable by the minor. (Voidable in this context means contracts that are capable of being invalidated by the minor at any time.) (3.) Contracts that are unenforceable against the minor.

Enforceable Contracts against the minor

Contract for Necessaries

A contract to supply a minor with necessaries²⁵ is binding upon the minor where the contract as a whole is for the benefit of the minor. See Footnote below for definition of Necessaries.

The court takes into consideration a part two test to determine whether or not a contract qualifies as necessaries. 1.) It has to suit the minor's station in life²⁶ 2.) It has to be according to his actual requirements.²⁷ 3.) It has to be shown that he was in need of them at the time the contract was being formed and it must not be prejudicial towards the minor.²⁸

Chappel v Cooper

Facts

A minor whose husband had recently died contracted with the undertakers for his funeral. She later refused to pay the cost of the funeral, claiming her incapacity to contract.

Issue

Whether the minor's incapacity to contract prevented her from paying the bill?

Held

²⁵ Section 2 of the Sale of Goods Act 1893 defines 'necessaries' as goods **suitable to the condition in life** of such infant or minor or other person, and to his **actual requirements** at the time of the sale and delivery.

²⁶ See *Peters v Fleming*

²⁷ See *Nash v Inman*

²⁸ See *Fawcett v Smethurst*

The court held that she was liable to pay the bill. **The funeral was for her private benefit and was necessary as she had an obvious obligation to bury her dead husband.**

Nash v Inman

Facts

A Cambridge undergraduate, the son of an architect, was supplied with clothes to the value of 122 pounds by a Savile Row tailor. These included 11 'fancy waistcoats' priced at 2 guineas each. He refused to pay for them. The tailor sued.

Held

While the court was prepared to accept that the supply of such clothing could be appropriate to the station in life of the undergraduate, **the contract was still held to be unenforceable because facts showed that the minor was already adequately supplied with clothes.** Therefore those that the tailor supplied could not be classed as necessaries.

Peters v Fleming

Facts

The plaintiff sought a declaration as to goods sold. The defendant pleaded his infancy. The plaintiff pleaded that the goods were necessaries appropriate to the state and condition of the defendant.

Held

The minor was an undergraduate whose father was 'a gentleman of fortune and a Member of Parliament', rings, a breast pin and a watch chain were held to be necessaries because they suited his station in life.

Section 3 of the Sale of Goods Act: 'where necessaries are sold and delivered to a minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor'.²⁹

²⁹ The minor is only bound to pay a reasonable price of the goods that are actually supplied.

Fawcett v Smethurst

Facts

The minor hired a car in order to transport luggage. A term in the contract stated that a minor was to be held absolutely liable for any damage to the car regardless of how that damage was caused.

Held

The court held that the contract was too onerous and therefore unenforceable against the minor.

Beneficial contracts of service

Clements v London and North Western Railway Co

Facts

An infant, upon entering the service of a railway company as a porter, agreed to join the company's own insurance scheme and to relinquish his right of suing for personal injury under the Employers' Liability Act 1880. The scheme was more favorable to him than the Act since it covered more accidents for which compensation was payable, though on the other hand it fixed a lower scale of compensation.

Issue

Whether the contract was enforceable against the minor?

Held

It was held that the contract as a whole was beneficial to Clements. He was bound by it and could not claim under the 1880 Act.³⁰

³⁰ This shows that a minor is bound by a contract of employment if that contract is generally for his benefit. Analogous to this case is *Chaplin v Leslie Frewin (Publishers) It.*

Roberts v Gray

Facts

The defendant, a minor, with a view to becoming a professional billiards player, had entered an agreement with the plaintiff, himself a leading professional, to accompany the plaintiff on a world tour. The plaintiff spent time and money organising the tour, but following a dispute the defendant refused to go. The plaintiff sought damages of 6,000 pounds for breach of contract.

Held

The Court of Appeal held that the contract was for the defendant's benefit, being in the nature of a course of instruction in the game of billiards. The plaintiff was awarded 1,500 damages.³¹

De Francesco v Barnum

Facts

A 14 year old girl entered into a seven year apprenticeship with De Francesco, to be taught stage dancing. By the apprenticeship deed the girl agreed she would accept no professional engagements except with his express approval. He was under no obligation to maintain her or to employ her. In the event that he did employ her, the scales of pay were set extremely low. She was also obliged not to marry except with his permission. Finally, De Francesco was able to terminate their arrangement without notice whenever he wished. When the girl was set to accept other work, De Francesco's action to prevent it failed.

Held

The provisions of the apprenticeship deed were held to be unfair by the court and therefore unenforceable against her. They were not substantially for her benefit.

³¹ Now Contrast with the *De Francesco Case*.

Doyle v Whitecity Stadium

Facts

A minor who was a professional boxer entered into a contract with the British Boxing Board of Control. The contract provided that the minor would lose his 'purse' (the payment for the fight) if he were disqualified.

Held

The agreement was held to be binding on the minor since it was to encourage not only clean fighting but also proficiency in boxing, and was therefore for the benefit of the minor.

Chaplin v Leslie Frewin (Publishers) Ltd

Facts

The plaintiffs, an infant and his adult wife, entered into a contract with the defendants by which the latter agreed to publish the autobiography of the infant which was to be written by two journalists based on information furnished by the plaintiffs. The plaintiffs approved the final page proofs on 21 July, and the legal right to the copyright was assigned in writing to the defendants. Advance royalties of £600 were paid to the plaintiffs, who also knew that the defendants had contracted with third parties for the foreign publication of the work. On 26 August the plaintiffs repudiated the contract on the ground that the book contained libellous matter and attributed to the infant views that he did not hold. They commenced an action for an injunction restraining the publication of the book, and for an order restoring the copyright to them. They conceded that, as part of this equitable relief, they were obliged to repay the money they had received. Pending the trial of the action, they moved for an interlocutory injunction to prevent publication.

Held

The Court of Appeal was unanimous in holding that the contract was analogous to a service contract, which, as has been seen, is valid if it is substantially for the infant's benefit. The majority (Lord Denning MR dissenting) held that **the test of substantial benefit was satisfied,**

since the contract, viewed at the time of its making, would enable the infant to make a start in life as an author. The contract was valid and there was no room for the grant of equitable relief.

Contracts voidable by Minors

There are three types of contracts that are voidable by minors: 1.) To lease property 2.) To purchase shares in a company 3.) To enter a marriage settlement³² 4.) To enter into a partnership

Edwards v Carter

Facts

A marriage settlement was executed by which the father of the intended husband agreed to pay £1,500 a year to the trustees, who were to pay it to the husband for life and then to the wife and issue of the marriage. The intended husband, an infant at the time of the settlement, executed a deed binding him to vest in the trustees all property that he might acquire under the will of his father. A month later he came of age and three-and-a-half years later he became entitled to an interest under his father's will. More than a year after his father's death, that is about four and a half years after he came of age, he repudiated his agreement.

Held

The court held that his repudiation was too late in time to be reasonable.

Contracts void and unenforceable by minors

Infant Relief's Act 1874 provides that "All contracts, whether by speciality or by simple contract, henceforth entered into by minors for the repayment of money lent or to be lent, or for goods supplied or to be supplied, other than necessities, and all accounts stated with minors, shall be absolutely void".³³

³² See *Edwards v Carter*

³³ Unfortunately, I am unable to find cases to back this up. Just use the statutory provision and you will do just fine.

Persons with Mental Incapacity

Where necessaries are supplied to an insane person then Section 3 of the Sale of Goods Act will apply³⁴. He would be obliged to pay a reasonable price.

Imperial Loan Co v Stone

Facts

A person of unsound mind was sued on a promissory note. He had signed it as surety. The jury found that he was insane when he signed the note but there was no finding as to the creditor's knowledge of such insanity. The judge entered a verdict against the creditor, who appealed.

Issue

Whether a valid legal contract was formed under these circumstances?

Held

Lord Esher said that 'I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. **When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.**'

MAIN POINT: The contract will be voidable by the party with the mental disorder rather than void, provided also that the other party to the agreement was aware of the disability at the time at which the contract was formed.

Capacity and Drunkenness

³⁴ See page 81. Commentary.

- When a party who is drunk enters into a contract he is given certain protections. Provided that he does not know the quality of his actions at the time that the contract is formed, and provided also that his drunkenness is also evident to the other party to the contract, then the contract is voidable by the drunken person on his return to a sober state.

In *Gore v. Gibson* [1845] 13 M & W 621; 153 E.R. 260, it **was held that a contract made by a person so intoxicated as not to know the consequences of his act is not binding on him if his condition is known to the other party.**

- However, the party making the contract may later ratify such a contract. In *Matthews v. Baxter* (1873) LR 8 Ex. 132, **it was held that if the drunken party, upon coming to his senses, ratifies the contract, he is bound by it.**
- Where necessaries are supplied to a drunken party or person then section 3 of the Sale of Goods Act will apply.

Capacity of Corporations

Ultra Vires Doctrine

A company's articles of association is a document which sets down the objects, functions and purposes of the company. Any contract that is made outside the company's objects will be ultra vires and void. Ultra vires means beyond or outside the powers of the company. The doctrine of ultra vires is a means of preventing the company from doing anything that was not empowered by its objects clause. Any ultra vires act would be void and therefore unenforceable by either party to the transaction. The doctrine is intended to protect three classes of people namely, **the investors (shareholders), creditors of the company, and third parties entering transactions with the company.** In *Ashbury Railway carriage Co v. Riche* (1875) LR 7 HL 653: The objects of the appellant company, as stated in the memorandum of association, were 'to make, sell or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease and sell mines, minerals, land and buildings; to purchase and sell as merchants, timber, coal, metals or other materials, and to buy and sell any such materials on commission or as agents'. The directors agreed to assign to a Belgian company a concession which they had bought for the construction of a railway in Belgium. **It was held that this agreement, since it related to the construction of a railway, a subject matter not included in the memorandum, was ultra vires, and that not even the subsequent assent of the whole body of shareholders could make it binding. Thus an action brought by the Belgian company to recover damages for breach of the contract failed.**³⁵

³⁵ Copied and Pasted Exactly from the notes.

TERMS OF A CONTRACT

Representations

There are three types of representations: 1.) Trade Puffs 2.) Mere Opinions 3.) Mere Representations

Representations Type One: Trade-Puffs
Carlil v Carbolic Smoke Ball Co³⁶

It was disputed in this case that the promise it made was not a trade puff.

Representations Type Two: Mere Opinions

Bisset v Wilkinson

Facts

The defendant in this matter was the purchaser of land in New Zealand which was purchased by the claimant for the purpose of sheep farming. The appeal, to which this judgment relates, is on the defendant's counterclaim. During the purchase process, the claimant informed the defendant that the land being purchased was capable of sustaining 2000 sheep. However, after the purchase the defendant discovered that this was only possible if very careful land management was carried out, and that the land as it stood could not sustain this number of sheep. The defendant therefore sought to rescind the contract on the basis that the claimant's statement was a misrepresentation.

Issue

The issue in this circumstance was whether the statement made by the claimant could be considered a statement of fact in terms of being a representation, or whether it was simply an opinion held by the claimant.

Held

It was held that the claimant's statement **was nothing more than an opinion as to the capacity of the land, based on the claimant's knowledge of farming, together with the defendant's**

³⁶ See Table of Authorities to locate the case

knowledge of the current stock. The statement was not therefore held to be a representation. In any event, the defendant had not been able to demonstrate that the land was not capable of carrying the 2000 sheep that the claimant had stated, and therefore the claimant's appeal was allowed and the contract could not be rescinded.³⁷

Esso Petroleum Co Ltd v Marden

Facts

Esso acquired a site on which it proposed to build a petrol station. On the basis of professional estimates it represented to Marden, a person intending to take on the franchise, that the filling station would have a throughput of 200,000 gallons per year. Marden queried the throughput figure but Esso assured him it would be possible. Despite Marden's best efforts, sales only ever reached 78,000 gallons, he lost money and was unable to pay back a loan from Esso. Esso eventually sued for repossession of the site and Marden counter-claimed. One of Esso's arguments in defence was that the statement as to the likely throughput of petrol was a mere opinion

Held

The court rejected Esso Petroleum's argument because of Esso Petroleum had extensive expertise in the area. Marden was able to rely on the estimate as though it were a factual statement. Therefore, the statement could not be regarded as a mere statement.

Where a party to a contract has made a representation as to fact, which is intended to induce the other party to enter the contract, but which is not intended to form part of the contract, and it is in fact true, there can be no further contractual significance. This is known as a 'mere representation'.

³⁷ This case should be compared to the *Dick Bentley Productions Ltd* case and also the *Esso Petroleum* case.

EXPRESS TERMS

*If the statement is held to be a mere representation, the innocent party cannot claim that there has been a breach of contract because the statement was not a term of the contract. **The basic test for determining whether a statement made by a party to a contract is a term or mere representation depends on the intention.** The court implores the objective test to determine the intentions of the parties. In **Oscar Chess Ltd v Williams**³⁸, Lord Denning said, “It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended, that is a mistake... the question of whether a warranty was intended depends on the conduct of the parties, on their words and behavior rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended that would suffice”*

Factors affecting Incorporation of Express Terms

Importance of Statement³⁹

Birch v Paramount Estates (Liverpool) Ltd (1956)

Facts

A newly-wed couple bought a house from developers. They agreed to buy on the basis of a promise made to them that the house would be ‘as good as the show house’. In fact, the house was not as the show house.

Held

The court held that the statement was so central to the agreement that it had been incorporated into the contract as a term. The couple would have been unlikely to contract but for the statement upon which they relied.

³⁸ See Table of Authorities to locate the full case summary.

³⁹ A statement is likely to be a term of the contract where it is of such **importance to the person to whom it is made that, if it had not been made he would not have entered into the contract.**

Couchman v Hill

Facts

The plaintiff bought the defendant's heifer (a young female cow, usually one that has not yet had a calf) at an auction, but no warranty was given as to its condition. Before the sale, or prior to the making of the contract the plaintiff asked the both the auctioneer and defendant to confirm that the heifer was unserved (meaning not yet having been used for breeding), and they both assured him that it was. Relying on these assurances, he bought the heifer. However, approximately seven weeks after the purchase, he discovered that the heifer was having a calf, and suffered a miscarriage and died. The plaintiff brought an action for breach of contract.

Held

It was held that the statement that the heifer was not in calf was held to be a term of the contract because of the importance attached to the statement.

Bannerman v White

Facts

Brewers were refusing to use hops contaminated with sulfur. Bannerman offered hops to White, and White asked if any sulfur had been used in the growth or treatment of hops. Bannerman said "No" and White said that he would not even ask the price if sulfur had been used. A contract was made for the sale of hops. But later it was found that sulfur had in fact been used in growing a small portion of hops.

Held

It was held that it was a term of the contract that sulfur had not been used in growing of hops. **It had been clear to both parties that the question of the use of sulfur was very important to White**

and that he would not have contracted without the assurance that no sulfur had been used on **Bannerman's hops**. White was therefore, entitled to terminate the contract for breach.⁴⁰

Verification

Ecay v Godfrey

Facts

The claimant, Ecay, contracted to purchase a sail boat for £750 from the defendant, Godfrey, who had considerably more expertise in boats. The defendant asserted that the boat was in reasonable condition, however he did nonetheless suggest that the purchasing claimant may wish to survey the boat for a better overview. The transaction was completed and it subsequently transpired that the boat was heavily flawed. The claimant thus sought to bring an action against the defendant for sale of a flawed vessel.

Issue

Whether the defendant's remarks regarding the sound nature of the boat ought be considered definitive and thus an enforceable contractual term or whether his suggestion of a survey served to render his assessment merely a representation.

Held

The Court held that the defendant's remarks in regards to the boat's 'soundness' were mere representations rather than a binding part of the agreement as the statement had not proved sufficiently absolute or indicative of intent for it to qualify as a contractual term. This was further emphasized by the defendant's advice to the claimant that he ought have the sail boat properly surveyed prior to purchase, which would generally indicate to the reasonable objective person that his assessment of the ship's quality was not expert or definite, even where the person making the representation had a comparatively larger knowledge of ships than the other party.

⁴⁰ The more important a statement is to either party, then the more likely it is that it is a term of a contract.

NOTE: *If a term suggests verification*⁴¹, it is unlikely to be a term. *If it discourages verification*, e.g. 'If there was anything wrong with the horse, I would tell you', ⁴²it is more likely to be a term.

Schawel v Reade

Facts

The plaintiff wished to purchase a horse for stud purposes and went to the defendant's stables where he began examining a horse. While the plaintiff was inspecting a horse "Mallowman", the defendant said "You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I would tell you." The plaintiff ceased his inspection and three weeks later he bought "Mallowman".⁴³ The horse was found to be totally unfit for stud purposes because hereditary eye disease. The question in the case was whether the defendant's statement amounts to a term or a representation.

Held

The House of Lords held that the defendant's statement was a term of the contract, and as such the defendant was in breach of the contract.

Make sure to see the footnote below.

Hopkins v Tanqueray

Facts

The plaintiff purchased the defendant's horse at auction. One day prior, the defendant, finding the plaintiff buyer examining the horse's legs, declared "you need not examine his legs: you have nothing to look for. I assure you that he is perfectly sound in every respect." The plaintiff went back the following day and bought the horse. It turned out that the horse was not okay and it became lame. The plaintiff tried to argue that the defendant's assurance was a term of the contract.

Held

⁴¹ See *Ecay v Godfrey*.

⁴² See *Schawel v Reade*.

⁴³ This statement discourages verification; hence it is likely to be a term of the contract.

The court held that the defendant's statement was not a term of the contract. **This is because a horse or possibly any item sold at an auction is without a warranty. Therefore, it is on the person who is buying to verify.**⁴⁴

*This case is often contrasted with **Harling V Eddy** (page 127), if you are looking for the difference, please refer to the supplementary material section and read it from there. The index is also helpful.*

Special Knowledge or Skill of the Maker of the Statement.

Oscar Chess Ltd v Williams

Facts

In June 1955 the defendant sold a second hand Morris car to the plaintiffs, car dealers, for £290. The registration book which was examined by the plaintiffs' representative showed that the car was first registered in 1948, and the defendant honestly believed that it was a 1948 model. The purchase price was calculated on this basis. In January 1956, the plaintiffs discovered from the manufacturers that the car was a 1939 model, so the price was £175, and claimed for breach of warranty.

Held

It was held that the defendant was not liable to the plaintiffs in damages for breach of the term of the contract **because, as the plaintiffs knew, the defendant had no personal knowledge of the date of the manufacture of the car** and the plaintiffs were in at least as good a position to know this. The defendant had made an innocent misrepresentation, that is, non-fraudulent.

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd

Facts

The plaintiff, Dick Bentley, asked the defendants, Harold Smith Ltd, who were car dealers, to find him "a well vented" Bentley car. A car was found. The defendants informed the plaintiff that they were in a position to find out the history of cars and this car had been fitted with a

⁴⁴ Compare with the previous case.

replacement engine and gear box and had done only 20,000 miles since then when in fact the car had done 100,000 miles. The defendants relied on the odometer reading and had not checked the details. The plaintiff bought the car and discovered that this representation as to the mileage was untrue. The plaintiff sued the defendants seeking damages for breach of contract.

Held

It was held that the defendants' statement as to the car mileage was a term of the contract; and the defendants, being car dealers, were in a better position than the plaintiff to know their statement was true.

Note: Experts include shopping assistants.

Time between the making of the statement and Formation of the Contract

Routledge v McKay

Facts

A motor cycle had actually first been registered in 1939. However, on a new registration book being issued this was wrongly stated as 1941. In 1949 the current owner, who was unaware of this inaccuracy, was selling the motor cycle and in response to a prospective buyer's inquiry as to the age gave the age in the registration documents. The prospective buyer then bought the motor cycle a week later, in a written contract that made no mention of the age. When he discovered the true age and tried to sue for breach of a term, he failed.

Held

The court held that the lapse of time was too wide to create a binding relationship based on the statement. The statement was not incorporated.

Another thing worthy of note about this case is the weight attached to written documents over oral ones. In this circumstance, the actual age of the motor cycle was never incorporated in the written contract and hence the court had to take the view that the claim for breach of a term could not succeed.

Reducing the agreement, including the statement to writing

Written evidence is more powerful and more immediately convincing than the spoken word. Consequently, where a contract is made in a written document and a statement made orally between the parties is not then included in the written document, the court will generally infer that it was not intended to form part of the contract but is a mere representation. In *Routledge v. McKay* [1954] 1 WLR 615: Since the written agreement made no mention of the age of the motor cycle, **the court held that it had not been considered important enough to be a term.**⁴⁵

Parol Evidence Rule

Once contracting parties have elected to enshrine their contract in a written document, the courts have held that as a general rule, the parties cannot adduce extrinsic evidence to add to, vary or contradict the written document. The document is the sole repository of the terms of the contract.

Henderson v Arthur

Facts

The plaintiff and the defendant were parties to a lease which contained a covenant for the payment of rent quarterly in advance, although before the lease was drawn, the parties had agreed that the rent could in fact be paid in arrears. When the tenant was sued for not making the payments in advance, he pointed out this prior oral agreement.

Held

The court of appeal held that **the terms of a prior oral agreement could not be substituted for the terms of a later formal contract concerning the same transaction.** The written document effectively destroyed the previous oral agreement about the rent.

⁴⁵ Copied and pasted from the module

Exception One: Rectification

Where a document is intended to record a previous oral agreement but fails to do that accurately, evidence of the oral agreement will be admitted.

Exception Two: Partially Written Agreements

Where there is a written document but the parties clearly intended it to be qualified by other written or oral statements, the parol evidence rule is displaced.

In Couchman v Hill⁴⁶, the court of Appeal found that the plaintiff could recover damages for breach of contract because the documents (the catalogue and the usual conditions) were only part of the contract and the oral statements could be placed alongside them so that all together they formed one binding transaction.

Exception Three: Implied Terms

The parol evidence rule only applies where a party seeks to use extrinsic evidence to alter the express terms of the contract. Where a contract is of a type that is usually subject to terms implied by law, evidence may be given to support or to rebut the usual implication.

Exception Four: Operation of the Contract

The rule does not apply to extrinsic evidence which shows that the written contract was intended to come into operation or to cease to operate in the event of a particular circumstance.

Pym v Campbell

Facts

⁴⁶ See Table of Authorities to locate the full case summary

Implied terms are terms which, though not expressly stated, by the parties by words or conduct, are implied to give effect to the presumed intention of the parties.

The three ways through which terms may be implied into the contract are by: **(i) Custom (ii) Statute or (iii) Courts.** By custom we mean an established practice or usage in a trade, profession, locality, type of transaction, or between parties. It is a well settled principle of law that a contract may be subject to the terms that are sanctioned by custom though they have not been expressly stated or mentioned by the parties.

Baron Parke said: "It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to

The parties drew up a written agreement concerning the sale of a share in an invention. Evidence was admitted that one party had stipulated orally that the agreement should not become operative until an independent expert had approved the invention⁴⁷.

Exception Five: Proving Collateral Contracts.

City and Westminster Properties (1934) Ltd v Mudd

Facts

A lease was entered into by the parties containing a covenant which stated that the tenant could use the premises for business purposes only. The tenant had been induced to sign the lease by an oral assurance given by the lessors' agent that the lessors would not raise any objection to the tenant residing in the premises. An action was brought for forfeiture of the premises based on the ground that the tenant had used the premises for residential purposes.

Held

Evidence of the assurance given by the lessors' agent was admissible to prove the existence of a collateral contract, despite the fact that it contradicted the express terms of the lease.

IMPLIED TERMS

Terms Implied by Custom⁴⁸

Hutton v Warren

Facts

In this case a long standing local custom was to the effect that on

⁴⁷ The underlined statement is extrinsic evidence showing that the contract was to come into operation later i.e. until an independent expert had approved the invention.

⁴⁸ See Footnote 49 for the Requirements of a good Custom.

termination of an agricultural lease the tenant of a farm would be entitled to an allowance for seed and labour on the land. This was an important custom at a time when the majority of the population was engaged in subsistence agriculture.

Held

It was held that the tenant was entitled to an allowance for the seeds and labour on leaving. There was no express term to that effect, but he was so entitled on the basis of a local custom.

British Crane Hire Corporation v Ipswich Plant Hire Ltd

Facts

Both the plaintiffs and defendants were in the business of hiring out heavy earth moving

*In London Export Corporation Ltd v Jubilee Coffee Roasting Company*¹ [1958] 1 WLR 661:

Lord Jenkins at p.675 stated: "An alleged custom can be imported or incorporated into a contract only if there is nothing in the express or

equipment. The defendants hired a crane by telephone from the plaintiffs. After delivery, the plaintiffs sent the

defendants a printed form setting out the conditions of hire, which were similar to those used by all plant hiring firms and which stated that the defendants would be liable for all expenses arising out of the use of the crane. Before this form was signed by the defendants, the crane sank in marshy ground. The plaintiffs sought to recover expenses incurred in recovering the crane from marshy ground, and the defendants claimed that the conditions had not been incorporated.

Held

It was held that the conditions of the hire were part of the contract and the defendants knew that the conditions

the business and

Collateral contracts are written or oral, second, or side (but independent and separate) contracts made between the original parties, or between a third party and an original party, before or at the same time the first or main contract is made.

were in common use in they are always applied.

Affreteurs Reunis Societe Anonyme v Walford

Facts

A charter party provided that commission was to be paid to the Charterers Brokers on the signing of the Charter whereas by custom commission was payable only when the hire had actually been earned.

Held

It was held that the commission was payable on the signing of the charter as custom was entirely inconsistent with the plain words of the agreement and thus, in the circumstances of the case of no effect. The Charterers would enforce this provision against the ship owners.

*The custom or usage must, in the words of Ungeod Thomas J. at p.1438 in **Cunliffe-Owen v Teather & Greenwood** be: "Certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist, that those who conduct business in the market contract with the usage as an implied term; and it must be reasonable."*⁴⁹

⁴⁹ In summary, the custom must be generally known, clear and reasonable, and must not conflict with common or statute law.

Terms Implied by Statute

The Sale of Goods Act 1893 contains a number of implied terms which include the following:

(i) The seller has the right to sell the goods, and the goods are free from charges or encumbrances in favour of third parties (s.12);

(ii) In a sale by description, the goods shall correspond with the description (s.13);

(iii) In a case of a seller who sales goods in the course of business, there is an implied condition that the goods supplied under the contract are of satisfactory quality (s.14);

(iv) Where the seller sells goods in the course of a business, and the buyer

makes known to the seller any particular purpose for which the goods are

bought, there is an implied condition that the goods supplied under the

contract are reasonably fit for that purpose (s.14 (3)).

- **Terms implied by statute are those terms that are implied into contracts based on the rule of law or public policy, and not on the intention of the parties.**
- **The purpose of terms implied by statute is to provide some form of protection to the weaker party from the exploitation by the stronger party.**
- **Often the weaker, such as the purchasers, particularly consumers, may not have the same bargaining powers as the sellers.**
- **Examples of contracts to which terms are implied include the contracts for sale of goods, landlord and tenant, and master and servant.**

Terms Implied by Fact

Shirlaw v Southern Foundries Ltd

Facts

Shirlaw was appointed managing director of Southern Foundries (SF) for a fixed term of ten years. SF was taken over by another company who altered the pre-existing articles of association empowering two directors and a secretary to remove a director, irrespective of the terms of his contract. Shirlaw was sacked prior to the expiration of the fixed term, and he brought a claim to recover damages for breach of contract.

Issues

The company contended they were empowered to amend their articles of association under **s10 Companies Act 1929**. The new articles had been appropriately adopted, and the new procedures correctly followed. Given the statutory right to alter articles, it would be inappropriate for a court to interfere with the company's right to do so. Shirlaw argued his employment contract was for a fixed term of 10 years, and the articles could not amend that contract. He argued there was an implied term of the contract that the company would not amend its articles in a way which would be detrimental to him.

Held

Shirlaw successfully recovered damages for breach of contract. **It was an implied term of his employment contract that he would not be removed from his role during the fixed ten year period.** The company could not be prevented from altering its articles of association, but it may be liable in damages if it amends the articles so as to prejudice a contract validly made prior to the amendments.

In BP Refinery (Western Port) PTY Ltd v Shire of Hastings [1978] ALJR 20: Lord Simon laid down the requirements for terms implied in fact as follows (at p.26):

“For a term to be implied, the following conditions (which may overlap) must be satisfied:

(i) It must be reasonable and equitable;

(ii) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) It must be so obvious that ‘it goes without saying’;

(iv) It must be capable of close expression;

(iv) It must not contradict any express term of the contract

Moorcock [1889]

Facts

The defendant owned a wharf on the Thames and made a contract with the plaintiff ship owner for him to unload his vessel at their wharf. Both parties knew that the vessel was such that, while at the wharf, it must ground at low tide. The vessel grounded and was damaged.

Held

It was held to be an implied term of the contract that the defendant had taken due care to ascertain that the bed of the river adjoining the wharf was not such as to damage the vessel when it grounded. The defendants were in breach of the implied term that the wharf was safe.

Terms Implied in Law

This may cover many classes of contract, e.g. Contracts of Employment and contracts between landlord and tenant.

Liverpool City Council v Irwin

Facts

Liverpool City Council owned a block of flats in Everton, Liverpool, called “The Piggeries”. The defendant was a tenant in one of those flats. The common parts of those flats had fallen into disrepair and had also been vandalised; in addition the lifts in the building did not function, there were no lights on the stairs, the lavatory cisterns were blocked, as was the chute, and the cisterns also overflowed. The tenants organised to carry out a rent strike, refusing to pay rent until those issues were addressed by Liverpool City Council. The defendant took part in that strike. The Council started proceedings to evict the defendant for refusing to pay her rent. The defendant however started a counter claim against the Council for breach of its obligation to repair the communal properties. The tenancy agreement between the defendant and the council did not, however, state that the Council had any such obligation. No other obligations were imposed on the Council either, with the agreement imposing obligations solely on the tenant. The defendant asserted that the court should imply a term into the contract that the Council had a duty to repair the common parts of the building.

Issue

The issue in this case was whether it was possible to imply a term into the contract as the defendant was asking, even where the contract did not specifically impose any obligations on the Council. A further issue was whether the Council would be in breach of that duty even if it existed.

Held

It was held that it was possible to imply such a term into the contract, but that the Council was not in any event guilty of breaching it as the damage had been carried out by vandals. The residents also had a duty of care.

Baylis v Barnett

Facts

The plaintiff lent the defendant a sum of money. The defendant knew this involved the plaintiff in borrowing the money from the bank.

Held

Although the parties did not discuss the question of interest the court held there was an implied term that the defendant would indemnify the plaintiff for any interest he owed to the bank.



A condition is a statement of fact or promise which forms the essential terms of the contract.

A condition as a term of the contract is so important that failure to perform or fulfill it would render the contract meaningless and destroy the whole purpose of the contract

Classification of Terms: Conditions

Poussard v. Spiers and Pond



Facts

An actress was contracted to perform the lead role in an operetta for a full season. The actress, who was taken ill, was unable to attend for the early performance, by which time the producers had given her role to the understudy. The actress sued for breach of contract but lost.

Held

It was held that she had **in fact breached the contract by turning up after the first night. As a lead singer, her presence was crucial to the production and so was a condition entitling the producers to repudiate and terminate her contract for non-attendance** at the early performances.

Classification of Terms: Warranties

Bettini v. Gye

Facts

A singer was contracted to appear at a variety of theatres for a season of concerts. His contract included a term that he should attend rehearsals for six days prior to the beginning of the actual performances. In the event, he was absent for the first three days of rehearsals and on his return his role had been replaced. When the singer sued, the producers' claim that the obligation to attend rehearsals was a condition failed.

Warranties are considered as minor terms of the contract or those terms where the contract might still continue despite their breach.

A warrant is therefore any term of the contract which does not go to the root of the contract.

Warranties are a residual category of terms dealing with obligations that are either ancillary or secondary to the major purpose of the contract.

Held

It was held that the requirement was only ancillary to the main purpose of the contract which was appearing in the actual production. In consequence, the court held that the breach only entitled the producers to sue for damages and not to end the contract and replace the singer as they had done.⁵⁰

Consequently, the remedy for a breach of warranty is merely an action for damages. There is no right for the injured party to repudiate for a breach of a warranty. If the party who is the victim of the breach of a warranty tries to repudiate his obligations then this itself is an unlawful and actionable repudiation.

⁵⁰ Compare to the previous case of **Poussard v. Spiers and Pond**

Classification of Terms: Innominate Terms

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd

Facts

Ship owners let the vessel, *Hongkong fir*, to charterers for a period of 24 months. Clause 1 of the contract obliged the owners to deliver a “seaworthy” vessel and Clause 3 further obliged them to maintain the vessel’s seaworthiness and good condition. Upon initial delivery, the vessel’s machinery was described to be in ‘reasonably good condition,’ yet required constant maintenance due to its age. The vessel owner’s chief engineer was inefficient and incompetent, and the vessel suffered numerous breakdowns and delays. The charterer’s repudiated the contract, alleging a breach of the obligations to deliver and maintain a seaworthy vessel.

Issue

The questions arose as to (1) whether the seaworthiness obligation constituted a ‘condition’ of contract, the breach of which entitles the party to repudiate; and (2) whether the breach caused delays of a sufficient degree so as to entitle the charterer to treat the contract as repudiated.

Held

Firstly, the Court held that in order to construe whether a contractual clause constitutes a condition precedent, the breach of which permits repudiation, or an innominate term, the breach of which permits damages, depends on a holistic assessment of the contract’s surrounding circumstances in determining the intention of the parties in their treatment of the clause. **On the facts, the Court held that the seaworthiness and maintenance clause was not viewed as so fundamental so as to amount to a condition of the contract, but rather constitutes a term allowing damages.** Secondly, the Court held that an innocent party cannot treat the contract as repudiated due to delays, however significant, if the breach falls short of a frustration of the contract rendering performance impossible. On the facts, the delays, albeit serious and repeated, did not amount to a frustration of contract that entitled repudiation of the contract, but merely a breach allowing for damages.

Schuler Ag v Wickman Machine Tool Sales Ltd

Facts

The parties made a contract in which one party agreed to visit certain manufacturers at least once every week. The written contract described this promise as a condition of the agreement.

Held

The House of Lords held that the use of the word 'condition' was an indication that the parties intended that the innocent party should be allowed to terminate if that term was breached but it was only an indication. It was important to discover the intention of the parties by looking at the contract as a whole and the relevant consideration could be whether imposing strict legal meaning

Of the condition created a very unreasonable result. In that the more unreasonable the result the less likely it is that the party intended it. In this case their Lordships felt the result would be unreasonable since the term could be breached in very minor ways. Thus the term was not held to be a condition.

Supplementary Material (Not Required to Read)
Contract Law: Terms 1

What is a term?

The terms of a contract are its contents—determine the basis on which the parties are in agreement. They **define the rights & obligations arising from the contract**.

Any term of a contract must be clear and certain

- Any ambiguity and there can be no agreement

Gibson v Manchester CC [1979]

- How do terms get into the contract?
- Is when a **statement of fact is deemed by the court to become a contractual promise**.

What is not a term?—Terms v Representations v Mere Puff

- □ □ □ Statements made during negotiations:
 - o (1) Representation: **statements of facts or law** - which the **parties do not intend to be binding = representations**, if they help to induce the making of the contract.
 - o (2) Terms: **Statements of facts which the parties intend to be binding**—can be seen as **promissory** in nature. These are **the terms** of the contract—can be sub-divided into conditions, warranties, innominate terms (ch 10).
 - o (3) **Mere puffs—statements of no legal significance**.
- Distinction between non-contractual **representations and contractual terms** is important. Which are **contractual terms; and which are non-contractual representations**.
- If a term is not fulfilled = breach of contract
- If a representation is untrue = misrepresentation
- Distinction between term and representation less importance since Misrepresentation Act 1967: which makes it easier to obtain damages for misrepresentation.
- Also, one statement can be both a term and a representation: giving rise to an action for both breach of contract and misrepresentation.

- Mere puffery....Advertising hyperbole
- E.g. Carlsberg, 'probably the best beer in the world'.
- Statements made to induce you into entering into a contract
- A statement of future intention is not provable.

Terms—two ways in

- Expressed: express terms which the parties agree to be part of the contract. Can be written, oral or partly written and partly oral.
- Implied—either: **Either implied in fact; or implied in law.**
 - o **Implied in fact:** gives effects to the **presumed intentions of the parties.**
 - o **Implied in law:** either at **common law; or by statute**—in order to **give effect to the provisions of a statute.**

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- o **So terms implied in law = obligations which arise irrespective of the intentions** of the parties.

EXPRESS TERMS

Express term or a representation?

- In seeking to discover **whether the parties intended to be bound by a statement** made by one of them, court will apply **objective test**—'what would a reasonable man understand to be the intentions of the parties, having regard to all the circumstances'?

- **Many factors used to apply this test**

Express terms—what do the courts consider?

- Remember: express terms can be made orally or in writing.
- □ □ □ **Importance of the statement** — how important was the statement to the buyer?
 - o A statement may be regarded as a term if can be shown the injured party considered it so important that they **would not have entered into the contract BUT FOR the statement.**

o ***Bannerman v White*** (1861)

o Negotiations to purchase hops. D said: 'if they have been treated with Sulphur, I am not interested in even knowing the price of them'. D assured Sulphur not used. In fact, Sulphur had been used.

o D treated the contract as repudiated.

o Agreed a price, then went away, then White found out the hops had been treated with Sulphur. B sued W, for enforcing the sale. W's defence—hops had not been treated with Sulphur.

o HELD: the **statement was understood and intended by the parties to be a term of the contract** of sale. The fact that W wasn't even prepared to discuss price without knowing there had been no Sulphur—attached **great importance to the statement that no Sulphur had been used, would not have entered the contract *but for*** that statement.

□ **Timing:**

o If statement made at time of contracting □ more likely to be a term, than if made at an earlier stage.

o **If there's a delay between the statement the parties entering the contract □ less likely to be treated as a term.**

o ***Routledge v McKay*** (1954)

o Seller of a motor cycle told buyer, in good faith, that it was a 1941 or 1942 model. One week later, buyer and seller entered a contract of sale. The written memo of sale didn't mention the year of the model.

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o In fact, was a 1930 model, buyer sued for breach.

o HELD: **the lapse of time between the making of the statement and entering into the contract □ the**

statement about the year of the model was *not* a term, was a representation instead.

□ □ □ □ **Reduction of the contract into writing**

o Also apparent from *Routledge v McKay* that the court was influenced by fact that the **contract had been reduced into writing; and yet the previous oral statement was not included.**

o Inference drawn by court = the **statement could not have been regarded as significant by the other parties, otherwise they would have included it in the written agreement.** Hence was only a representation.

o See also Lightman J in *Inntrepreneur v East Crown* (2000)

o **However, the fact that an oral statement was not included in an agreement reduced into writing is not necessarily decisive** in classifying that statement as a mere representation:

o **Other factors** may be **considered.**

o Eg *Birch v Paramount Estates* (1956): D made a statement re the quality of a house that was being sold; but the written contract made no reference to this. **Nevertheless, CA HELD: the statement is a contractual term.** The other factor taken into account was the special skill and knowledge of the defendants, who were making the statement.

□ □ □ □ **Specialist knowledge/skill**

o Experts include shopping assistants. It's about who has the authority.

o If the party who made the statement had exclusive access to info/special knowledge, of the other party, this is likely to be taken into account in the latter's favor.

o E.g. *Birch v Paramount* (1956); *Couchman v Hill* (1947).

o *Oscar Chess v Williams* (1957):

□ Plaintiff car dealers, Oscar Chess, agreed on a trade-in of D's old car as part of the arrangement when he purchased another car from them. The registration book of the car gave its date as 1948. D, Williams, confirmed this date in good faith.

□ Some months later, discovered the date was actually 1939. Car thus worth much less.

□ HELD, majority CA: the **age of the car was not a term of the contract, because the skill & expertise lay**

in the hands of the plaintiff car dealers, not Williams, who was making the statement. So was a representation.

□ because Williams knows nothing about cars, and you were car experts—if anyone had known should be you.

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o **CF *Dick Bentley v Harold Smith (Motors)* (1965)**

□ **Here, the skill & expertise lay in the hands of the statement maker, and thus the statement was a term** of the contract.

□ Mr. Bentley wants a Bentley. Harold Smith is a car dealer, finds a Bentley and sells it to him, tells Bentley it was in good condition. Tells Bentley the card had done 20 thousand miles only.

□ He bought the fact. In fact, was in bad condition, had clearly done more than 20 thousand miles.

□ HELD, CA: the **statement re the mileage done by the car, was a term of the contract—the statement**

maker, D, was a car dealer who should be take not have better knowledge of such matters than plaintiff, who was not involved in motor trade.

□ □ □ □ **Checks—** Statement may become a term of contract **where the vendor expressly accepts the responsibility for the soundness of the sale item** in question

o ***Schawel v Reade* (1913)**

□ Plaintiff required a horse; attempted to examine D's horse, but was told he need not look for anything and that the horse was sound in every way. Price agreed; delivery of horse took place.

□ In fact, horse not fit for purposes.

□ HELD: **Because Reade stopped Schawel from checking, Reade took responsibility that any statement related to health of the horse would become a term of the contract. Held that (1) D, at time of sale, represented that the horse was fit for stud purposes; (2) the purchaser acted on that statement in purchasing the horse.**

o **CF Hopkins v Tanqueray** (1854)

- Here, horse sale in auction, which is without guarantee, this is an industry standard.
- Plaintiff purchased D's horse at auction. One day prior, D, finding the plaintiff buyer examining the horse's legs, declared "you need not examine his legs: you have nothing to look for. I assure you that he is perfectly sound in every respect."
- Hopkins goes to check the horse; Tanqueray says there's no need to check the horse, this is a perfectly sound horse. Tanqueray comes back the next day and buys the horse. The horse is not ok, it goes lame.
- Hopkins tries to argue it was a term of the contract that the horse was ok.
- HELD, Court of Common Pleas: **D's statement was not a term**, but a mere representation.

o **Why the difference between Schawel and Hopkins:**

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- **(1)—horses sold at auction are never warranted**, this is an industry standard, unless expressly stated in the catalogue.
- **(2)** another reason, suggested by Lord Evershed MR in *Harling v Eddy* (1951): in **Schawel**, the contract was made on same day as the statement; **CF Hopkins**, contract made on day after the statement. **So time lapse.**

In *Schawel*, Defendant, by strength of his statement, actually **dissuaded the plaintiff from making further checks himself** with regard to fitness of the horse for stud purposes. **CF Ecay v Godfrey** (1947): where seller of a boat stated it was sound, but advised the buyer to have it surveyed—not a term, the onus of verification of soundness lay with the purchaser.

Parol Evidence Rule (re adducing evidence extrinsic to a written contract).

- □ □ □ **Parol Evidence rule:** Nothing outside the written contract can come into it-
Extrinsic evidence, oral or otherwise, may not be adduced to add, vary or contract the terms of a written contract.

o **Jacobs v Batavia** (1924): Stated that '**parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties**'.

□ □ □ □ Initially applied strictly by courts, but soon become apparent it was never intended to be applied as a rule of law; but **merely as a presumption**.

□ □ □ □ **Non Paternalistic—Freedom of Contract**

□ □ □ □ Due to the many exceptions (seen below), in 1976 the Law Commission proposed the ‘parol evidence rule’ should be repealed: this never occurred, but in 1986 the Law Commission conceded that legislation was no longer necessary as the ‘**rule**’ **did not prevent the courts** from looking outside the written document where the parties so intended.

□ □ □ □ Avoiding the rule:

(1) Not wholly written contracts (construing a contract as partly written/partly oral):

□ Somewhat circular argument: if, on one hand, the written agreement really was the whole agreement, neither party would be seeking to introduce extrinsic evidence. Conversely, if some non-written terms were intended to be part of the contract, the parol evidence rule would never exclude them.

□ General approach: where one party is reasonably entitled to assume that the writing does contain all the terms of the contract, the other party will not be allowed to give evidence that it does not.

□ ***J Evans & Sons v Andrea Merzario*** (1976)

□ Claimants, importers of machines, regularly contracted with D’s forwarding agents. On every occasion the machines were carried below deck in crates/trailers so as to avoid risk of corrosion. IN 1967, D’s proposed to change to containerized transportation to enable them to carry goods both above and below deck.

□ However, in discussions with claimants, Ds gave them an oral assurance that their machines would be packed in containers but would always be carried below deck. Year later, such a container was inadvertently carried on deck and lost overboard.

□ HELD, CA: **the oral promise did have contractual force**—on basis that D attached great importance to the carriage of his goods under deck; and on basis he would not have agreed to the new mode of carriage but for the promise.

□ Roskill and Geoffrey Lane LJJ: **this was a partly oral/partly written contract**, because you had discussions; **and so the parol evidence rule doesn't apply, and the oral term was admissible as a term.**

□ Also applied in ***Couchman v Hill*** (1948): HELD: the documents in the case were held to form not the **whole but only part of the contract; the oral assurance could be laid side by side** with them so as to constitute a single and binding transaction.

□ See also : ***Harling v Eddy*** . **BUT note *Hopkins v Tanqueray*** .

(2) Collateral Contracts

□ Court may hold there are in fact **two contracts**: the written contract, to which the parol evidence rule applies; and **the oral collateral contract, to which the parol evidence rule does not apply.**

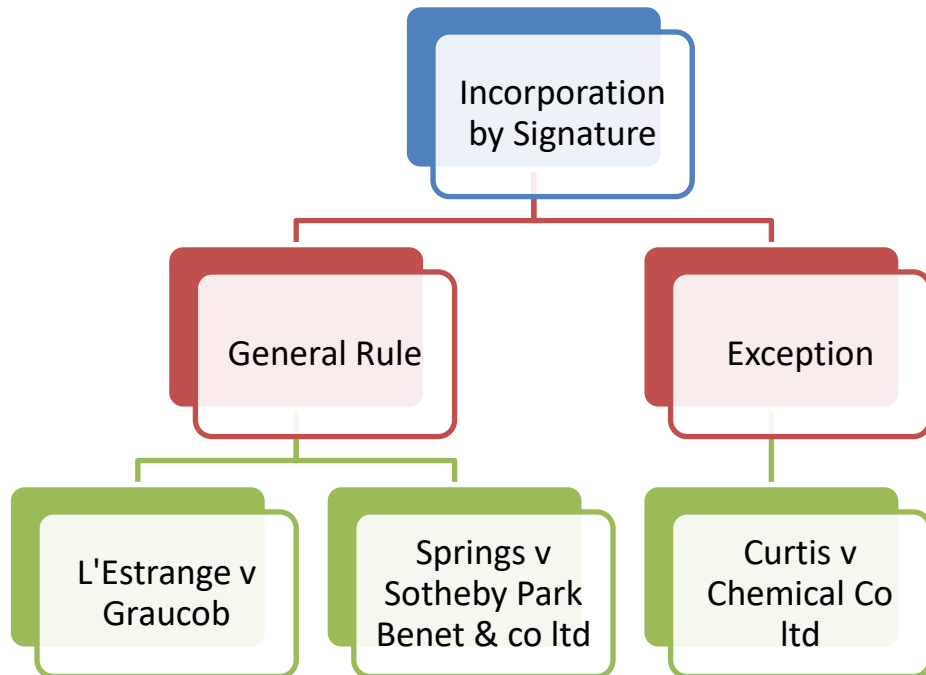
□ Basis: that an **extrinsic oral assurance is given, the consideration for that promise being that the recipient then enters into the main written agreement—clearly a benefit to the other party.**

□ Concept summarized by Lord Moulton in ***Heilbut Symons & Co v Buckleton*** (1913): ‘ . . . **there may be a contract consideration for which is the making of some other contract . . . It is collateral to the main**

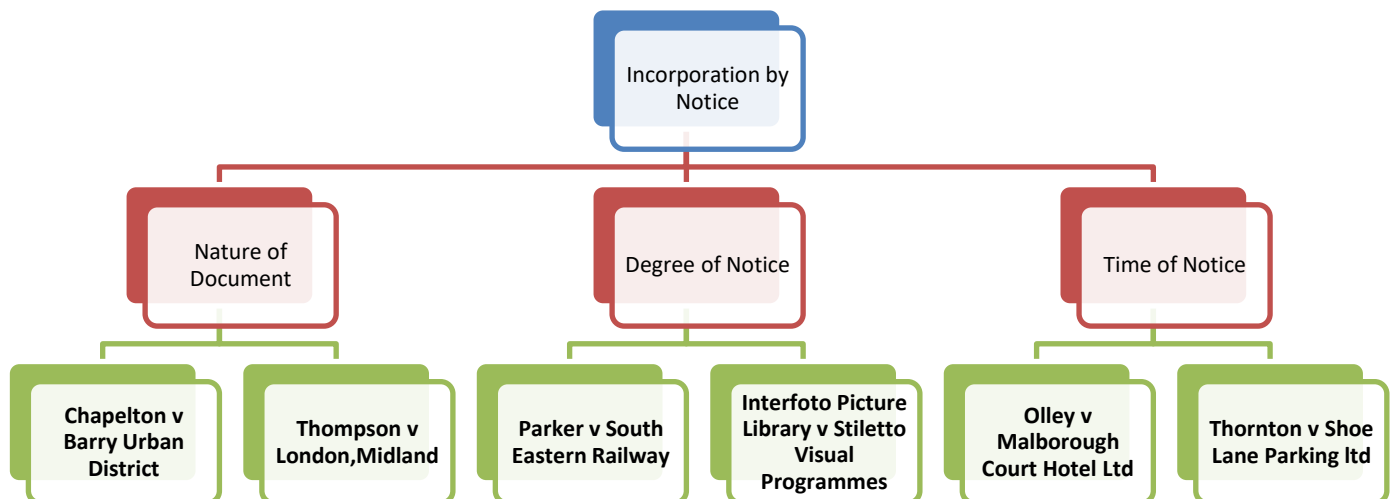
EXCLUSION CLAUSES

Incorporation of Exclusion Clauses (Skeleton Guides)

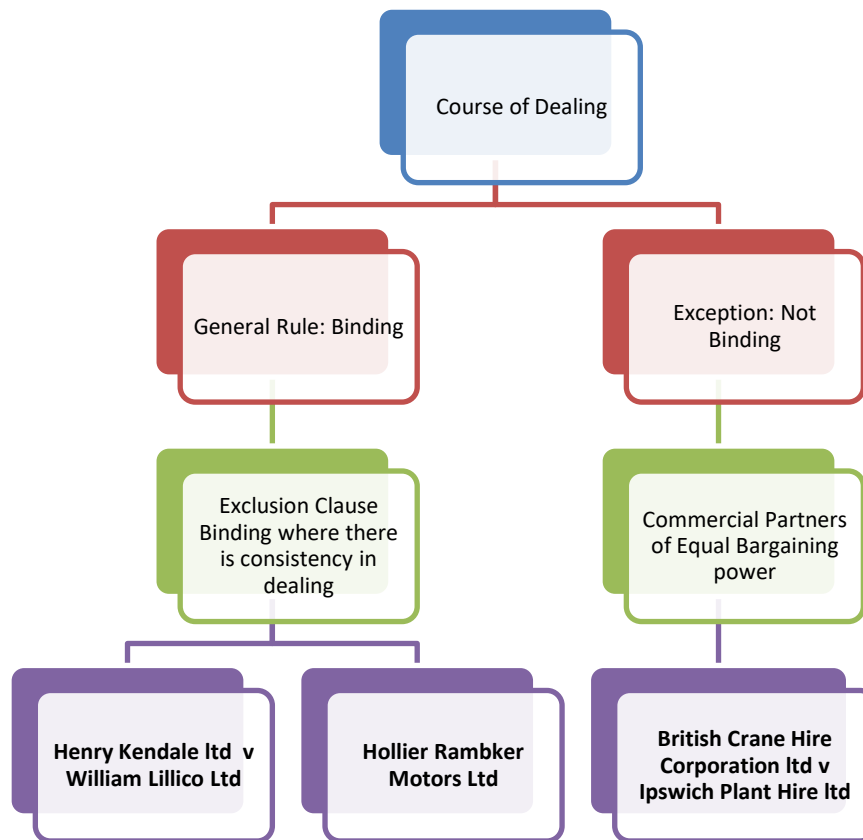
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Last Skeleton



Incorporation by Signature

L'Estrange v Graucob

Facts

The claimant, L'Estrange, contracted to purchase a slot machine for cigarettes from the defendant, Graucob, and the agreement included an express clause stating 'This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded'. The machine proved to be faulty and the claimant thus brought an action against the defendant, alleging that the machine breached the Sale of Goods Act by not being of merchantable quality. The defendant asserted that the statute was made irrelevant by the express clause, and that he was not in breach of the agreement they had made. The claimant

responded she had been unaware of the clause as she had not properly read the agreement and it ought not apply.

Issue

Whether the clause excluding all terms not stated in the contract should be deemed effective and binding.

Held

The Court of Appeal found for the defendant, determining that the express provisions of the contract were binding and effectively excluded the relevance of statutory sales provisions. Furthermore, the fact that the claimant had not properly read the contract did not impact its validity, as in signing the contract she consented to be bound by its contents. Significantly this case emphasizes the Court's respect for sanctity of contract.

Springs v Sotheby Park Benet & Co Ltd

Facts

The plaintiffs deposited a diamond with the Sotheby's to be auctioned. He signed a document, without reading it, and put it straight into his wallet. The document contained details of the agreement and a declaration in bold type immediately above the space for the plaintiff's signature. The declaration "I have read and agreed to the instructions for sale as detailed on the reverse of this form". On the reverse of the form there was an exclusion clause.

Held

It was held that the clause had been validly incorporated into the contract.

Curtis v Chemical Cleaning Co Ltd

Facts

The claimant, Curtis, took her wedding dress to be cleaned by a professional laundry service, the defendants, the Chemical Cleaning and Dyeing Company. Upon purchasing their services, the

defendants asked the claimant to sign a form, and she asked the service assistant what the consequences of signing would be. The assistant replied that the form merely included an exclusion of liability clause for any damage they may cause to any beading and sequins on garments, however in actuality the exclusion of liability clause pertained to all possible damage that may befall a garment whilst being cleaned. When the claimant returned to pick up her dress, it had been damaged by the defendants and she thus brought a claim for damages against them. In response, the defendants submitted that she had no grounds for a claim due to the exclusion of liability clause.

Issue

Whether the exclusion of liability clause was binding upon the claimant given that the service assistant had misrepresented its consequence.

Held

The Court of Appeal found for the claimant, viewing that whilst a party is typically bound by all the contents of a signed written contract, even where they had not properly read the contract, a clause ought not be deemed legally enforceable where the drafting party misrepresents the effect of a clause to the other party. Thus, the exemption of liability clause was not deemed properly incorporated into the contract and the claimant was awarded damages.

Incorporation by Notice

Nature of the Document

Chappelton v Barry Urban District

Facts

The plaintiff wished to hire a deck chair to sit on the bench. The defendant council had left a pile of deck chairs with a notice giving the hire charge and stating that tickets were obtainable from the deck chair attendant. The notice itself contained no exempting conditions. The plaintiff obtained two chairs from the attendant and received two tickets. The plaintiff did not know that tickets contained conditions because he simply glanced at them and put them into his pocket. In fact, on the reverse side of the ticket were the words: 'The council will not be liable for any accident or damage arising from the hire of the

chair'. Due to the negligence of the defendant council, the canvas on the plaintiff's chair gave way when he sat on it. The council argued that the clause on the ticket exempted them from liability.

Held

It was held that the ticket was merely a receipt and not the sort of contractual document which a reasonable person might have expected to contain contractual terms. The exemption clause was therefore ineffective and the defendants were liable.⁵¹

Thompson v London, Midland & Scottish Railway

Facts

The plaintiff, an elderly lady, obtained an excursion ticket which contained a notice on its reverse side stating that it was issued subject to the conditions in the defendant's timetables. The timetables, which could be obtained for 6d, stated that the ticket was issued subject to the condition that 'no action would lie against the company in respect of the injury, fatal or otherwise, however caused.' The plaintiff, who could not read, was injured when she got off the train when, due to the defendant's negligence, it was not safe to do so. She sued claiming damages and the defendant company relied on the exemption clause.

Held

It was held that the fact that the plaintiff could not read did not alter the fact that she was bound by the condition on the ticket. **An indication of where a condition could be found in another document was sufficient notice of the existence of the clause so that it was validly incorporated.**

⁵¹ The ticket was not a suitable way to give notice of an exclusion clause. Compare and see **Thompson v London, Midland & Scottish railway.**

The Degree of Notice should show an intention to bring the notice to the attention of the other party.

Degree of Notice **Parker v South Eastern Railway**

Facts

The plaintiff deposited his bag in the defendant's cloakroom, paid 2d and received a ticket. On the face of the ticket the words 'see back' were printed, and on the back a notice stated that the company would not be responsible for the value of any package in excess of £10. A notice containing the same condition was displayed in the cloakroom. The plaintiff's bag was lost or stolen and he claimed its value, which was more than £10. He argued that he had taken the ticket without reading it and thought it was only a receipt for 2d or evidence that the company had possession of his bag. He had not seen the notice in the cloakroom.

Held

It was held that the defendant had not taken reasonable steps to give the plaintiff notice of the condition.⁵²

Interfoto Picture Library v Stiletto Visual Programmes

Facts

Stiletto Visual Programmes (SVP) ordered 47 photographic transparencies from Interfoto Picture Library (IPL). On the delivery note was a clause stating that transparencies should be returned within 14 days of delivery. If they were not so returned, a holding fee of £5 per transparency per day would be charged. SVP returned the transparencies four weeks later and received a bill for over £3,700. SVP refused to pay and IPL successfully received judgment for payment. SVP appealed.

Issues

SVP contended they had never dealt with IPL before, were unaware of their standard conditions and they had not been sent a copy of their conditions prior to their having returned the

⁵² Compare to the **Inferfoto** case

transparencies. Even if they had been sent a copy of the terms, IPL had not taken sufficient steps to communicate their onerous terms, namely, that the fees were more than ten times higher than other lending libraries. SVP argued the contract was formed when they requested the transparencies, and IPL agreed to send them. IPL argued the delivery note was included with the transparencies and was clear and unambiguous in its terms and, accordingly, they could rely on the clause and claim the funds due. They claimed the contract was formed when SVP took delivery of the transparencies.

Held

The clause had not been successfully incorporated into the contract. **Where a clause is particularly onerous, as in this case, and the fees are exorbitant at ten times the level of other photographic libraries, the party seeking to rely on the clause must show they have taken reasonable steps to bring the clause to the other party's attention.** IPL had failed to do this and they could, therefore, only recover fees assessed on a quantum meruit basis.

Time of Notice

It's notice then contract signed and agreed, not the other way round.

Olley v Malborough Court Hotel Ltd

Facts

The plaintiff booked at the defendant's hotel. When she went to her room she saw a notice on the wall stating that the hotel would not be liable for articles lost or stolen unless they were deposited for safe custody. The plaintiff left some furs and jewelry in the bedroom, closed the self-locking door, and hung the key on a board at the reception. The furs were stolen.

Held

It was held that the defendant was not entitled to rely on the exclusion clause as it was not a term of the contract. The contract was concluded at the reception desk and the plaintiff had no notice of the exclusion clause at that stage.

Thornton v Shoe Lane Parking Ltd

Facts

The plaintiff went to park his car in the defendants' automatic car park. A notice at the entrance to the car park gave details of the charges and stated that all cars were 'parked at owner's risk'. When a car was driven up to it, a machine dispensed a ticket. The plaintiff took the ticket which gave the car's time of arrival and stated in small print that it was issued subject to the terms and conditions displayed within the car park. One of these conditions purported to exclude the defendants' liability for injury to customers howsoever caused. The plaintiff was injured by the defendants' negligence when he came to collect his car.

Held

Lord Denning said, "The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by these terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made."

Course of Dealing

An Exclusion Clause is binding where there is consistency in dealing.

Henry Kendale Ltd v Rambler Motors Ltd

Facts

The sellers had sold goods to the buyers under an oral contract. The next day the sellers had sent the buyers a 'sold note' containing a clause stating that the buyer took responsibility latent

defects in the goods. There had been three or four contracts a month between the parties over a three year period using the same 'note', though the buyers never read the clause.

Held

It was held that 100 similar contracts over a period of three years constituted a course of dealing.

Hollier v Rambler Motors Ltd

Facts

The plaintiff had his car repaired at the defendant's garage on three or four occasions over a five year period. On at least two of these occasions he had signed a form containing an exemption clause which he had not read. The exemption stated that 'the company is not responsible for damage caused by fire to customers' cars on the premises

Held

The court held that the exemption clause had not been incorporated because there was not a consistent course of dealing. The defendant was therefore liable.⁵³

British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd

Facts

A clause was incorporated into the contract on the basis of two previous transactions and the custom of the trade.

Held

The court put emphasis on the fact that the parties were of equal bargaining power, and they were dealing in the same business or trade and as such conditions were habitually incorporated into these types of contracts.

⁵³ Three or Four occasions over a period of five years is not consistent. Different from the previous case of **Henry Kendale Ltd v William Lillico Ltd**

Construction and Interpretation of Exemption Clauses

Rectification

Ferederick E. Rose (London) Ltd v William H. Pim Junior and Co. Ltd

Facts

The buyers asked the plaintiff to supply them with ‘Moroccan Horsebeans described as feveroles’. The plaintiffs did not know what feveroles were but were informed by the defendants that they were to supply them with ‘horsebeans’ which the plaintiffs would then sell to the buyers, both parties believing that feveroles were just horsebeans. In fact, ‘feveroles’ were a superior type of horsebean, and the buyers had claimed damages from the plaintiffs for not supplying ‘feveroles’. The plaintiffs wanted to have their written contracts with the defendants rectified by the insertion of the word ‘Feveroles’ so that the defendant would have been in breach in supplying the wrong goods.

Held

The Court of Appeal refused to rectify the contract since the parties had agreed on the sale of horsebeans and the agreement correctly reflected this. The Court of Appeal observed that this is not a case in which the document failed to record the intention of the parties. The document did reflect their prior agreement; it was simply the case that the parties were under a shared misapprehension that ‘horsebeans’ were ‘feveroles’.

The court takes the following principles in consideration when rectifying a document:

*It will only rectify a document which shows that there is convincing proof that **document fails to record the intention of the parties**. See *Joscelyne v Nissen* page 123*

*The document must be preceded by a continuing common intention as it was in the case of *Joscelyne v Nissen*.*

Rectification is an equitable remedy and is available at the discretion of the court. Lapse of time or conflict with third party rights may prevent rectification.

*The document must fail to record the intentions of both parties; Thus in Unilateral mistake, the claim for rectification cannot be granted **unless the defendant had actual knowledge of the existence of the plaintiff's mistake at the time the contract was signed**. *A.Roberts & Co ltd v Leistershire county council**

Joscelyne v Nissen

Facts

A father and daughter agreed that the daughter would purchase the father’s business and would, in return, pay all the expenses of the father’s home, including the gas, electricity and coal bills. The formal contract signed by the parties made no mention of the fact that the daughter had agreed to pay these bills. There was no prior contract to which the court could have regard.

Held

It was held that there was sufficient evidence of a continuing common intention that the daughter pay the gas, electricity and coal bills to enable the court to rectify the agreement to give effect to their common intention.

Contra Proferentum Rule

Andrew's Brothers (Bournemouth) Ltd v Singer & Co. Ltd

Facts

The plaintiff agreed in writing to buy a 'new Singer car'. The contract contained a clause which excluded the defendant's liability for breach of "all conditions, warranties and liabilities implied by statute, common law or otherwise". The plaintiff car delivered to the plaintiff had in fact done a considerable number of miles.

Held

It was held that the seller was in breach of an express condition that the car would be new. He could not therefore rely on an exclusion of implied terms, and was liable to the plaintiff.

Baldry v Marshall

Facts

The plaintiff told the defendant that he required a car suitable for touring. The defendant was a car dealer and, on his recommendation, the plaintiff bought a Bugatti. The written contract excluded the seller's liability for breach of any "guarantee or warranty, statutory or otherwise". The car proved unsuitable for touring.

Held

It was held that the seller was in breach of the implied condition under **S.14 of the Sale of Goods Act**⁵⁴ that the car would be suitable for a purpose made known to the seller. The exclusion clause was ineffective because it excluded only guarantees or warranties and did not exclude liability for breach of a condition of the contract.

⁵⁴ See Sales of Goods Act Table of Authorities

Contra Proferentum Rule: An exemption clause is **interpreted narrowly or strictly against the party seeking to rely on it.**

Houghton v Trafalger Insurance CO. Ltd

Facts

A car insurance policy excluded liability for damage ‘caused or arising while the car is conveying any load in excess of that for which it was constructed’. At the time of an accident there were six people in a car with a sitting capacity of five and the insurers denied liability claiming that this was a load in excess of that for which the car was constructed.

Held

It was held that the word ‘load’ only covered cases where there was a specified weight which must not be exceeded, as in the case of Lorries or Vans.

Liability for Negligence

Canada Steamship Lines Ltd v R establishes a three stage test in determining whether an exemption clause covers liability for negligence.

Monarch Airlines Ltd v London Luton Airport Ltd

Facts

Loose paving blocks had damaged one of the plaintiff’s Airline’s Aircraft as it was preparing to take off from the airport. When the plaintiff sued to recover damages for negligence and/or breach of duty under section 2 of the Occupiers Liability Act 1957, the defendant sought to rely on clause 10 of its standard conditions which excluded the liability of the airport, its servants and agents for any damage to aircraft “arising or resulting directly or indirectly from any acts, omissions, neglect or default unless done with intent to cause damage or recklessly and with knowledge that damage would probably result”. The plaintiff submitted that this clause did not cover the liability which occurred since it did not cover negligence liability.

Held

It was held that the clause excluded liability for negligence and any breach of statutory duty unless the negligence or breach was caused either with intent to cause damage or recklessly and with knowledge that damage would probably result. In any event, the words “neglect or default” were synonymous with negligence.

White v John Warwick & Co. Ltd

Facts

The plaintiff contracted with the defendant for the hire of a tradesman's tricycle. The tricycle supplied under the agreement had a defective saddle. The plaintiff was thrown off the tricycle when the saddle tripped up, and was injured. Clause 11 of the agreement provided that “**nothing in this agreement shall render the owners liable for any personal injury to the riders or the machines hired.**” The plaintiff sought damages alleging (i) that the defendants were strictly liable in supplying a tricycle which was not reasonably fit for the purpose for which it was required, and (ii) they were negligent in that they had failed to take care to ensure that the tricycle supplied was in a proper state of repair and in working condition.

Held

It was held that the exemption clause should be construed as merely applying to the strict liability under the contract and not the liability for negligence.⁵⁵

Limitation of Liability

Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd

Facts

Securicor had undertaken to provide a security service for the boats belonging to a fishing association whilst those vessels were in Aberdeen Harbour. Ailsa Craig were members of that association. One night their vessel, the Strathallen, fouled another boat and sank. Ailsa Craig claimed £55,000 damages from Securicor. Securicor conceded that they had been negligent, and breached their contract, but sought to rely upon a clause in the contract restricting their liability to £1,000.

Held

It was held that the limitation clause operated to limit liability to £1,000. Limitation was not to be construed by the exacting standards applicable to exclusion clauses and since this clause was clear and unambiguous, it was wide enough to cover liability in negligence.

⁵⁵ The construction of that clause only applies to the first argument raised by the plaintiffs.

Inconsistent Terms

Mendelssohn v Normand Ltd

Facts

The plaintiff, wishing to park his car, was told by the car park attendant that the rules required the car to be unlocked. The plaintiff explained that he had a suitcase in the car containing valuables, and the attendant agreed to lock the car as soon as he had moved it. The plaintiff was then given a ticket exempting the garage from responsibility for loss or damage to the vehicles or their contents, however caused. On his return the plaintiff found the car unlocked and later discovered that his suitcase was missing.

Held

It was held that the defendants were liable, since the attendant's promise (to lock the car, which implied that he would see that the contents were safe) took priority over the printed condition because the printed condition was repugnant to that express promise.

Harling v Eddy

Facts

Mr. Eddy had put a heifer up for sale at an auction. When the heifer came into the ring nobody bid for her until Mr. Eddy said there was nothing wrong with her and he would absolutely guarantee her in every respect. Mr. Harling then bid for and purchased the heifer. Within three months the heifer was dead from tuberculosis. Mr. Eddy sought to defend himself from a claim for breach of contract by relying on condition 12 of the printed conditions of sale at the auction. Condition 12 said "No animal...is sold with a warranty unless specifically mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account". The statement Mr. Eddy had made as to the heifer's condition had not appeared on Mr. Harling's account.

Held

The court held that the statement was a condition and not covered by a clause relating to the warranty but, even if this was not the case, the oral statement overrode the printed term. The defendant implied "that the animal should be sold on the faith of what he stated, to the exclusion

The doctrine of fundamental breach was developed to prevent anyone relying on an exemption clause if he had failed to perform or carry out the basic purpose of the contract.

As Lord Abinger stated in Chanter v. Hopkins [1838] 4 M & W 399, at P 404, "If a man offers to buy peas of another, and sends him beans, he does not perform his contract. But that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it".

A 'fundamental' breach is more serious than a breach of condition or warranty, and as such an exemption clause which protects a party against a breach of a condition or warranty, could not shield him from the consequences of a fundamental breach of the contract.

of condition 12, or any other condition which might be found in the auction particulars which would of itself appear to exclude any oral statement" (Lord Evershed MR at P.744).

Fundamental Breach

General Rule: Fundamental Breach ousts Exclusion clauses

Karsales (Harrow) Ltd v. Walli

Facts

The defendant inspected a car owned by Y, found it in good order and wished it on hire purchase. Y thus sold it to the plaintiffs, and they resold it to a hire-purchase company. The defendant made a contract with this company. The contract contained a term that 'no condition or warranty that the vehicle is road-worthy or as to its condition or fitness for any purpose is given by the owner or implied therein'. One night a 'car' was left outside the defendant's premises. It looked like the car in question. **But it was a mere shell; the cylinder head was broken; all the valves were burnt; two pistons were broken, and it was incapable of self-propulsion.**

Held

The court held that there has been a fundamental breach of the contract.

There was such a substantial difference between the contract as formed and the contract as performed that the breach went to the root of the

contract, the central purpose of the contract was defeated by the breach and the claimant was unable to rely on the exclusion clause to avoid liability.

Exceptions:

i) Waiver of the breach

- **An innocent party to contract may elect to waive the fundamental breach and treat a contract as subsisting.**
- In *Hain SS Co Ltd v. Tate & Lyle* [1936] 2 ALL ER 597, the defendant lost their claim because they had earlier waived their rights and so the charter party remained in force.

(ii) Excluding liability for a fundamental breach

An exemption clause can be framed or drafted in such wide terms so that it covers even a fundamental breach or excludes liability even for a fundamental breach. ; *Photo Production Ltd v. Securicor Transport Ltd*

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