Chapter 1
Historical introduction

SUMMARY

A THE MEDIAEVAL LAW[1]

English contract law as we know it today developed around a form of action known as the action of *assumpsit*, which came into prominence in the early sixteenth century as a remedy for the breach of informal agreements reached by word of mouth—by 'parol'.[2] As a coherent court-centred system the common law itself, the royal law of the central courts, is much older, a product of the twelfth century. The early common law was largely concerned with serious crime and land tenure, and Glanvill, writing in about 1180, tells us that in his time, 'it is not the custom of the court of the Lord King to protect private agreements'.[3] Three centuries were to pass before the common law courts acquired a general jurisdiction over both formal and informal contracts. But the limitations upon the scope of the common law of contract at any given time did not mean that there then existed no forum for contractual business, but merely that remedies had to be sought elsewhere. For the common law evolved

1 Bibliographical note: The principal secondary literature on the history of English contract law comprises: Ames *Lectures on Legal History and Miscellaneous Legal Essays* (1913); Barbour 'The History of Contract in Early English Equity' in vol IV, *Oxford Studies in Social and Legal History* (1914); Fifoot *History and Sources of the Common Law, Tort and Contract* (1949); Holdsworth *A History of English Law* (1922-66) esp vols III and VIII; Kiralfy *The Action on the Case* (1951); Simpson *A History of the Common Law of Contract: The Rise of Assumpsit* (1975); Stoljar *A History of Contract at Common Law* (1975); Atiyah *The Rise and Fall of Freedom of Contract* (1979); Cornish and Clark *Law and Society in England 1750-1950* (1989); Ibbetson *A Historical Introduction to the Law of Obligations* (1999). There is also an extensive periodical literature, and much material is available in the publications of the Selden Society. Baker and Milsom *Sources of English Legal History* (1986) reproduce many early cases.

2 The account given in this introduction can only pick out certain salient developments, and is kept as free from technical detail as possible. The student can also usefully start by reading Baker *An Introduction to English Legal History* (1990), esp chs 9, 10 and 16, and Milsom *Historical Foundations of the Common Law*, esp chs 10-12.

3 Glanvill X, 18.

in a society served by a bewildering diversity of courts outside the common law system, enforcing a variety of bodies of law. Thus there were county courts, borough courts, courts of markets and fairs, courts of universities, courts of the Church, courts of manors, and courts of privileged places such as the Cinque Ports. Many such courts handled contractual business.[4] In addition the Court of Chancery in the fifteenth century developed an extensive contractual jurisdiction. The story of the growth of the common law, in contract law and elsewhere, is the story of the expansion of the common law courts' jurisdiction at the expense of other jurisdictions, and the consequential development—whether by invention or reception—of common law with which to regulate the newly acquired business.

Contracts under seal

Mediaeval law was a formulary system, developed around the writs which a litigant could obtain from the chancery to initiate litigation in the royal courts, and each writ gave rise to a particular manner of proceeding or form of action, with its individual rules and procedures.[5] It is convenient, in setting out the elements of mediaeval contract law, to differentiate between formal and informal contracts;[6] not surprisingly formal contracts were absorbed into the common law first. Then as now important contracts were made in writing, and it was the practice to authenticate written documents by sealing them. Contracts thus entered into soon became generally actionable at common law by one of two forms of action. The action of covenant, which came into common use in the thirteenth century, originated as an action for the specific performance of agreements to do something, such as to build a house, as opposed to agreements to pay definite sum of money; it developed into an action for damages, assessed by a jury, for the wrong of breaking a covenant. In the early fourteenth century this action came to be limited to agreements under seal, and hence the term 'covenant', originally meaning simply 'agreement' came to mean 'agreement under seal' as it still does. Where there was a formal agreement under seal to pay a definite sum of money—that is a debt—the appropriate form of action was debt 'on an obligation'. Such agreements were looked upon as grants of debts, and the term 'obligation' or 'bond' was used to describe the sealed document which generated the duty to pay. The formality involved in sealing a document should not be overstressed—the seal might be very elaborate, or a mere blob of wax impressed with a finger nail, but a sealed instrument was quite essential.

Penal bonds

In practice, for reasons which are not fully understood, the action of covenant was little used; instead important agreements were commonly reduced to agreements whereby the parties entered into bonds to pay penal sums of money unless they carried out their side of the bargain. Thus if C wished to lend D £100, D would execute a bond binding himself to pay C £200 on a certain day; the bond would have a condition that it became void (a condition of defeasance) if £100 was paid before the day, and D would hand over this

4 For examples see Fifoot *History and Sources* ch 13, and Helmholz 91 LQR 406.
5 Though in some respects now superseded the best introduction is still Maitland *The Forms of Action at Common Law* (1954).
6 For a fuller account see Simpson *History* Pt I.

bond as he received the loan of £100. In, for example, a sale of land at a price of £100 the seller would execute a bond binding himself to pay a penal sum *unless* he conveyed the land as agreed, and the buyer similarly would bind himself to pay a penalty *unless* he paid the price; disputes as to whether the condition had been performed or not (and the condition contained the real agreement) were triable by jury. Such penal bonds with conditional defeasance could be adapted to cover virtually any transaction, and were widely used as contractual instruments; they began to pass out of use in the late seventeenth century, when the Court of Chancery began to give relief against contracts involving penal provisions.[7] Until this development the vast preponderance of the common law of contract concerned bonds and the rules which governed them.

This law was flexible though tough, sometimes to the point of harshness; it was also highly developed in a complex case law. A creditor for example who lost the bond, or allowed the seal to come off, was remediless; a debtor who paid but failed to have the bond defaced remained liable. The debtor who defaulted was very much at the mercy of his creditor, who could, if he wished, have him imprisoned indefinitely for default. The institution, with its topsy-turvy treatment of the underlying agreement, gave rise to much law on conditions, for it was in the condition to the bond that the real agreement lurked. Hence in mediaeval law such matters as illegality and impossibility are largely dealt with in connection with conditions—is an illegal or impossible condition void? Some of this old law was later to be absorbed into the law of assumpsit, and the modern rules outlawing penal contracts originate in the seventeenth century's attack on the penal bond.[8]

Informal contracts

So far as informal or parol agreements are concerned mediaeval common law was more restrictive.[9] One general limitation was financial; under the Statute of Gloucester (1278) an attempt was made to limit claims in the common law courts to those involving more than forty shillings, then a very large sum. This could be and was evaded; more serious were the restrictions developed by the courts themselves and associated with the relevant forms of action. Covenant, as we have seen, could not be used on parol agreements at all, and hence never grew into a general contractual remedy. Debt, and detinue, could however, be brought, the former (known a debt *sur contract*) for claims to specific sums owed by informal transaction, for example the price of goods sold, or money lent, the latter to enforce claims to chattels due, for example a horse sold or lent. These two actions covered a very considerable area of informal contract law—sale of goods, bailment, loans of money. In a money economy a debt is the normal outstanding obligation, and so an action to recover debts will cover a very large field of demand. There were however serious gaps in the law; in particular there was no action for breach of an informal agreement to *do* something, for example build a house. Thus there was no action for failure to convey land, though the price of land sold could be recovered by debt. More

7 For a fuller account see Yale in 79 Seldon Society, esp at 7-30. See also Henderson 18 Am J of Legal Hist, 298.

8 See pp 688-693, below.

9 For a fuller account see Simpson *History*, esp pp 47-52 and 136-198; and on sale see Milsom 77 LQR 257 and Fifoot *History and Sources* ch 10.

generally the method of trial in debt and detinue on informal contracts was not jury trial, but compurgation. The defendant could swear an oath that he owed nothing, and bring eleven others to support his oath, and if they carried out the ritual correctly the action was lost; perjury might imperil the soul, but no temporal remedy existed. In the sixteenth century compurgation (wager of law) came to be regarded as farcical, and oath swearers could indeed be hired for a modest fee.[10] There existed other apparent defects in the law of debt and detinue; rules developed by the mediaeval courts came to be attached to these forms of action, and were immune from frontal attack. For example, executors were not liable on informal contracts; the debt died with the debtor. Informal guarantees, and promises of marriage gifts were not actionable by debt, and the latter situation in particular provoked controversy.

When the common law courts provided no remedy, or one inadequate in some respect, the litigant had to go elsewhere, and in many cases this may not have been an unsatisfactory alternative. But it is clear that there existed in the fifteenth century a considerable demand for the intervention of royal justice in areas not covered by the common law, in particular in the case of informal contracts, and this encouraged the fifteenth century chancellors to develop equitable remedies to supplement the common law.[11] This may have been a factor which spurred the common law courts into taking action themselves to remedy the defects of their own system; although the maxim is that equity follows the law the historical process has often been the reverse.

B THE ORIGIN OF ASSUMPSIT

The mechanism by which the old common law of informal contracts was supplemented, and eventually superseded, was an extremely curious one; it involved the use of a form of action which would not naturally appear to be concerned with contract at all. Back in the fourteenth century the common law courts developed a general jurisdiction over wrongs or torts (then called trespasses) in which the Crown had a special interest, typically those involving breach of the royal peace.[12] Actions of trespass (ie tort actions) were commenced by a writ form which was flexible, and writs could be drafted which were adapted to the special circumstances of the case—these were called writs 'on the case'. The method of trial in such actions was trial by jury, and the remedy damages, which the jury assessed. Round about 1370 it came to be settled that such tort actions on the case could be brought to remedy purely private wrongs, not involving breach of the royal peace or any special Crown interest. Among actions brought about this time there were some where the plaintiff relied in his writ on an allegation that the defendant had entered into an informal arrangement with him, and then by misconduct caused damage in a way not envisaged by the transaction. Thus in a case in 1367, *Skyrne v Butolf*,[13] the plaintiff sued a doctor to whom he had come for cure of the ringworm: he alleged that the defendant:

10 For an account see Baker [1971] CLJ at 228-230.

11 Barbour's account of this development has not been superseded, though published as long ago as 1914.

12 Milsom's articles in 74 LQR 195, 407, 561, have superseded all earlier work on the evolution of trespass and case.

13 YB 2 Ric 2 (Ames Series) 223. For other examples see Fifoot *History and Sources* ch 14.

> ... undertook (*assumpsit*), in London, in return for a certain sum of money previously paid into his hand, competently to cure [the plaintiff] of a certain infirmity.

Having set out these special circumstances, he went on to allege that the defendant had so negligently performed his cure as to cause damage. This form of trespass on the case has come to be called the action of assumpsit, the name being derived from the allegation in the Latin pleadings that he undertook (*assumpsit*). The early examples all involve negligent misconduct after an undertaking.[14]

Misfeasance and nonfeasance

Such trespass or tort actions could no doubt be viewed as involving a liability based upon the breach of an informal agreement, and as being (in our terms) contract actions. But as tort actions they did not of course require the production by the plaintiff of any formal evidence under seal, and this could be exploited by lawyers who wished to sue on informal agreements at common law. In 1400 in the case of *Watton v Brinth*[15] an attempt was made to bring such an action against a builder who had undertaken to build a house, but done nothing at all to fulfil his undertaking. This amounted to an attempt to achieve by trespass action what one could not achieve by action of covenant—sue on an agreement to do something without producing an instrument under seal. The court rejected the action; as was said in 1425[16] in a similar case by Martin J: 'Verily if this action be maintainable on this matter, for every broken covenant in the world a man shall have an action of trespass'. To prevent this a curious compromise was reached: it came to be the basic doctrine of the fifteenth century that assumpsit lay for *misfeasance*, for doing something badly, but not for *nonfeasance*, doing nothing at all. Though attacked and qualified, and indeed at times rejected, the *nonfeasance* doctrine survived for over a century.

The action for breach of promise

It was abandoned in the early sixteenth century in a series of cases[17] culminating in *Pickering v Thoroughgood* (1533),[18] for reasons which are still not wholly clear, but may owe something to rivalry with Chancery or to the church courts.[19] Spelman J in that case said:

> And in some books a difference has been taken between nonfeasance and malfeasance; thus on the one an action of covenant lies, and on the other an action on the case lies. This is no distinction in reason, for if a carpenter for £100 covenants with me to make me a house, and does not make it before the day assigned, so that I am deprived of lodging, I shall have an action for this nonfeasance just as well as if he had made it badly.

This was a momentous development, for the common law now had a form of action whereby in principle any undertaking could be sued upon: the action

14 For a fuller account see Simpson *History* Pt II, ch 1.
15 YB 2 Hen 4, fo 3, pl 9. Fifoot *History and Sources* p 340.
16 YB 3 Hen 6, fo 36, pl 33, *Fifoot* p 341.
17 See in particular *Orwell v Mortoft* or *The Case of the Sale of Barley* (1505) YB 20 Hen 7, for 8, pl 18; *Anon* Keil f 69 and 77 (*Fifoot* p 351) and the note, properly dated 1498, in YB 21 Hen 7, fo 41, pl 66 (*Fifoot* p 353).
18 From Justice Spelman's MS Reports, 93 YB Sel Soc 4 (*Pykeryng v Thurgoode*).
19 See Helmholtz 91 LQR 406.

had become an action for breach of promise, and the allegation of an undertaking was indeed commonly coupled with one of a promise. The action could now remedy breach of any informal agreement. It was triable by jury and led to the award of compensatory damages. This new departure gave rise to two problems, which preoccupied the courts in the sixteenth century. The first involved the relationship between assumpsit and the older forms of action, particularly debt *sur contract*. The second involved the evolution of a body of doctrine which would define which promises were actionable, and which not, a doctrine to define the scope of promissory liability.

C ASSUMPSIT AND DEBT

Attempts were soon made to use assumpsit not to fill gaps in the law, but to replace the action of debt *sur contract*; the primary purpose of doing so was to deprive the defendant of his right to wage his law, and force him to submit to trial by jury. *Pickering v Thoroughgood* (1533) is itself such a case, and from the 1520s onward the King's Bench allowed the plaintiff election between the older and newer remedies. The Court of Common Pleas by the 1570s took the same course, but in the late years of the sixteenth century the practice became a matter of acute disagreement between the courts of King's Bench and Common Pleas, the former court allowing assumpsit to supersede debt *sur contract*, whilst the judges of the latter court insisted that this was improper. The history of this dispute is complex[20] and to some extent still controversial; its complexity is increased by the general acceptance in sixteenth century law of a principle, variously formulated, whereby action on the case ought not to be used simply as alternatives to older forms of actions. Great ingenuity was expended by progressives in reconciling this dogma with allowing election of remedies in practice.

Slade's Case

The dispute was settled in *Slade's Case* (1602),[1] after prolonged argument, and the view which triumphed was that of the King's Bench. The principal significance of this case was that by allowing plaintiffs to use assumpsit in place of debt *sur contract* (which they would always in practice choose to do) it produced a situation in which assumpsit became the general remedy on informal contracts, whether the plaintiff was complaining about a failure to pay a definite sum of money, or a failure to do something else—such as build a house. After *Slade's Case* the law of informal agreements was the law of a single form of action. About the same time another similar dispute between the courts was resolved in *Pinchon's Case* (1611)[2] when it was held that liability to pay debts, now enforceable in assumpsit, passed to the executors of the debtor; this case began the process of making simple contract liability passively transmissible.

20 The development has given rise to a considerable literature. See in particular Ames *Lectures* pp 147 ff; Simpson 74 LQR 382; Lücke 81 LQR 422, 539, 82 LQR 81; Baker [1971] CLJ 51, 213; Simpson *History* pp 282 ff; Baker 94 Selden Society 255 ff; Ibbetson 41 Camb LJ 142, 4 OJLS 295, in the latter piece attributing to me at n 1 a view I do not hold.

1 4 Co Rep 91a, Yelv 21, Moore KB 433, 667; Baker gives further texts in [1971] CLJ 51.

2 9 Co Rep 86b, 2 Brown 1 137, Cro Jac 293.

D THE DOCTRINE OF CONSIDERATION

The other principal achievement of the sixteenth and early seventeenth centuries was the evolution of a body of doctrine to define the scope of the newly recognised promissory liability. Where assumpsit was merely taking over a long-established liability, previously remedied by debt *sur contract*—such as liability to pay the price of goods sold—new doctrine was not urgently required; where innovation in the form of recognition of new contractual liabilities was involved it was. The answer given to the problems posed was the doctrine of consideration, which is found in assumpsit cases around the mid-sixteenth century.[3] A 'consideration' meant a motivating reason, and the essence of the doctrine was the idea that the actionability of a parol promise should depend upon an examination of the reason why the promise was made. The reason for the promise became the reason why it should be enforced, or not enforced. In contemporary thought a promise was a declaration of will, and the effect of the doctrine was to deprive a bare declaration of will of legal effect. Only a declaration of will supported by a good reason or motive bound the declarer to performance.

Consideration analysed

This basic idea was capable of great elaboration in two respects. Firstly, the courts could and did develop, case by case, a vast body of learning as to which reasons were good or sufficient, and which not. Would a promise in consideration of natural love and affection to a kinsman be actionable? Would a promise to pay a debt, in consideration that a debt was owed? Would a promise in consideration of a nominal payment? Here what starts life as a list of good considerations eventually comes to be summed up in terms of a general principle, the first attempt to formulate such a principle being found in Coke's argument in *Stone v Wythipol* (1588):[4]

> ... every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff, and no case can be put out of this rule.

The reference to a 'charge' is an echo of the passage in St Germain's *Doctor and Student* (1530) where the author, in a critical discussion of contract law, offers the idea of induced reliance as an alternative theory of promissory liability to an analysis in terms of consideration.[5] But by 1588 detriment consideration had uneasily absorbed the idea that a promise should bind if the promisee had been induced to rely upon it.

Secondly, the courts evolved or adapted an analysis in temporal terms of the relationship between promise and consideration, which is first found in *Hunt v Bate* (1568).[6] A promise might be motivated by something in the past,

3 The history of consideration is controversial: in addition to the works listed at p 1, n 1, above, see Holmes *The Common Law* Lect VII; Salmond *Essays in Jurisprudence and Legal History* pp 187 ff; Milsom [1954] CLJ 105; Barton 85 LQR 372; Baker 94 Seldon Society 255 ff. Baker in Arnold on the Laws and Customs of England 336. The earliest assumpsit case in the printed reports to mention consideration *eo nomine* is *Joscelin v Shelton* (1557) 3 Leon 4, Benl 57, Moo KB 51: the consideration was a future marriage, and the case concerned a promised marriage gift or dowry.

4 Cro Eliz 126; 1 Leon 113; Owen 94; Latch 21, 78 ER 383.

5 91 YB Sel Soc 230.

6 3 Dyer 272a. See Simpson *History* pp 452-465.

for example a past favour: such a *past* (or executed) consideration was in general bad. A consideration might be some continuous state of affairs—such as the existence of a marriage—and this was a *continuous* consideration, and good. A *present* consideration meant an act or promise contemporaneous with the promise, and a *future* (or executory) consideration—something yet to happen, such as a marriage not yet celebrated. Into this analysis, which in part survives, was fitted the important rule that an actionable counter-promise would rank as a good consideration.

Mutual promises

This rule was settled by 1589, when in *Strangborough v Warner*[7] it was said: 'Note, that a promise against a promise will maintain an action on the case', and seems to have originated in connection with bets, the earliest case being *West v Stowel* (1577);[8] plainly unless an unperformed counter-promise is a good consideration, a bet can never be enforced. When the plaintiff's promise was relied upon as a consideration it had to be a present consideration – ie contemporaneous with the defendant's promise, and as in the case of other present considerations the plaintiff did not have to perform before he could sue; in the case of a future consideration performance had to be shown, for without performance no consideration yet existed. Seventeenth century case law settled that one party to such an agreement could not withdraw without the consent of the other, and thus it came to be law that wholly executory contracts were both binding and actionable.

But this was a highly unsatisfactory rule, for often it was not the intention that one party could sue without performing his side of the agreement, and a right of action represents a bird in the bush, as compared with actual performance—a bird in the hand. In time the courts evolved an intricate body of law whereby mutual promises were commonly treated as mutually dependent, the obligation to perform one side being treated as conditional upon performance of the other.[9] The involved old learning on dependent and independent promises was summed up in the notes to *Pordage v Cole* (1669)[10] and *Cutter v Powell* (1795).[11]

Origins of consideration

Whether the doctrine of consideration was an indigenous product, or in part derived from the doctrine of *causa promissionis* of canon or civil law, has long been a matter of controversy, and it cannot be said that its pedigree has yet been explained in a fully satisfactory way.[12] Those who have seen it as a purely homespun product have sought its origin either in a doctrine associated with debt in mediaeval case law (the doctrine of *quid pro quo*),[13] or in the acceptance by the sixteenth-century judges of a notion that only 'bargains' (ie commercial contracts of exchange) should be enforced,[14] or in a transmutation of the need

7 4 Leon 3.
8 2 Leon 154
9 See Stoljar *History* ch 12 and the same author in 2 Sydney L Rev 217.
10 1 Wms Saund 319.
11 6 Term Rep 320.
12 See Simpson *History* Pt II, chs 4-7 for a full account. See also Baker in *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (ed Morris S Arnold, 1981).
13 Notably Holmes.
14 Strenuously argued by Fifoot himself; see also Shatwell 1 Sydney L Rev 289.

to show damage in a tort action into detriment suffered as a form of consideration in a contract action.[15] The opposing view,[16] which the present writer has argued at length elsewhere, relates the early doctrine of consideration in assumpsit to the earlier doctrine of consideration in relation to uses of land (the ancestor of the modern trust) and sees its ultimate source in canon and civil law, though the precise mechanism of the reception remains problematical.

E THE SEVENTEENTH AND EIGHTEENTH CENTURIES

The structure of informal contract law established in the Elizabethan period was essentially simple; as it was said in *Golding's Case* (1586):[17]

> In every action upon the case upon a promise there are three things considerable, consideration, promise and breach of promise.

In essence this simple structure was not radically altered until the nineteenth century, when the essentially one-sided or *unilateral* concept of an actionable promise was supplanted by the more complex conception of an actionable contract, a bilateral transaction. The seventeenth and eighteenth centuries saw an extensive development of commercial law and reception of the law merchant, but in basic informal contract law what was involved was largely elaboration rather than innovation. There were however certain areas of significant development, particularly in relation to the place of formality in contract law and to the enforcement of duties imposed rather by law than by the consent of the parties.

Relief against penalties

So far as the first is concerned assumpsit began life as an action on parol, that is to say verbal, promises, and its evolution into a general promissory remedy, limited by the doctrine of consideration, left the old law of formal written contracts under seal, appropriate to commercial and social contracts of real significance, untouched. Such contracts were actionable quite irrespective of consideration, and were normally embodied in penal bonds. Though never wholly superseded the traditional system of using formal contracts under seal for important transactions received a serious blow in the seventeenth century when the Court of Chancery began to grant relief against the penal element in such contracts, and by the eighteenth century the principle had emerged that, 'Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made'.[18] This approach, soon adopted by the common law courts, canonised the compensatory principle in formal contracts, and it had already been long accepted in assumpsit; hence the penal bond came to be less used. At the same time assumpsit, though in origin an action on verbal promises, could in principle be used where promises were *evidenced* in written documents, such as letters. Such use was no doubt encouraged by the increase in the practice of authenticating documents by signature or mark, and the general increase in the use of writing.

15 In different forms argued by Holdsworth and, recently, by Milsom.
16 In modern times first argued by Salmond.
17 2 Leon 71.
18 Francis *Maxims of Equity* (1728).

Statute of Frauds

Against this background was passed the Statute of Frauds (1677).[19] The unregulated character of seventeenth-century jury trial had made it, in the opinion of some, too easy for plaintiffs in assumpsit to bring actions on verbal promises inadequately proved; if the old system of wager of law had unduly favoured defendants, its supersession by *Slade's Case* unduly favoured plaintiffs. The remedy adopted was to require formality, in the new form of writing under signature, for actions on the more important agreements—for example on agreements to transfer interests in land, and contracts for the sale of goods worth more than ten pounds. The Statute, an essentially reactionary measure, produced a curious list of agreements which needed writing, and was from the start supplemented by the equitable doctrine of part performance; in the eighteenth century it provoked Lord Mansfield's rational, if heretical, suggestion, that the general structure of contract law needed revision, the doctrine of consideration being confined to contracts by word of mouth (where it originated), whilst written contracts under signature ought, like contracts authenticated by the more ancient seal, to be actionable without proof of consideration. But this approach was emphatically rejected in the opinion of the judges in *Rann v Hughes* (1778):[20]

> All contracts are by the laws of England distinguished into agreements by specialty [ie under seal] and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.

Thus was an opportunity to rationalise the law defeated.

Quasi-contract

The seventeenth century also saw the extension of assumpsit into what came to be called quasi-contract.[1] The pleaders of the late sixteenth century evolved a form of assumpsit which came to be known as *indebitatus assumpsit*, where the plaintiff averred that the defendant was indebted to him (*indebitatus*) in a certain sum, and had promised to pay this sum. This was appropriate when a debtor was sued in the new action, and after *Slade's Case* (1602) sanctioned this use of assumpsit it came to be settled that in *indebitatus assumpsit* the details of the transaction generating the debt need only be set out in a summary form—the defendant would be said to be indebted 'for the price of goods sold and delivered', 'for money lent', 'for work and services performed'. These were known as the common *indebitatus* counts, and the promise to pay relied upon was normally implied only, and need not be proved. *Indebitatus assumpsit* was contrasted with *special assumpsit*, a form of pleading where the details of the transaction were set out 'in detail' (specially). Now the action of debt had laid in the old law in any situation where a precise sum was due by law, whether the obligation arose from agreement, or by operation of law. In such cases the defendant was indebted, and at least from the late seventeenth century onwards *indebitatus assumpsit*

19 29 Car 2 c 3.

20 4 Bro Parl Cas 27, 7 Term Rep 350n.

1 For fuller discussion see Jackson *The History of Quasi-Contract in English Law*, in addition to the works cited at p 1, n 1, above.

could be used, as in *London City Corpn v Goree* (1676)[2] where the action was for customary wharfage dues. This extended assumpsit to wholly fictitious promises. In addition a standard count was evolved in *indebitatus assumpsit* to recover money 'had and received to the plaintiff's use', the earliest successful attempt being *Rooke v Rooke* (1610).[3] The evolution of *indebitatus assumpsit* provided the courts with a procedure whereby, in the guise of promissory or contractual liability, any obligation to pay money which the law was prepared to recognise might be enforced; it opened the way to the assertion by Lord Mansfield in the great case of *Moses v Macferlan* (1760)[4] that an action of *indebitatus assumpsit* on an implied promise could be brought whenever natural justice and equity required a defendant to return money. The courts also evolved a form of special assumpsit which lay on agreements to pay reasonable prices or remuneration—actions on a *quantum meruit* or *quantum valebat*. In the old law debt did not lie in the absence of any agreement for a definite sum, and this excluded *indebitatus assumpsit* which presupposed a debt; eventually the rule changed, and either special or *indebitatus assumpsit* could be used. Such actions again tended to blur the distinction between genuine promissory liability, and liability on implied or fictional promises, and thus laid the foundation for the extensive use of the concept of an implied promise in English contract law.

F THE NINETEENTH CENTURY

The nineteenth century is usually regarded as the classical age of English contract law, and this for two reasons. The first is that the century witnessed an extensive development of the principles and structure of contract law into essentially the form which exists today, and this process appears to modern lawyers more significant when linked to the belief (which is perhaps too readily accepted) that until the industrial revolution contract law was somewhat crude and inadequate. The second involves a change in the attitude of thinking lawyers to contract. In previous years lawyers, in so far as they troubled themselves at all, conceived of contract law primarily as an adjunct to property law. In the nineteenth century a powerful school of thought, originating in the work of Adam Smith, saw in the extension of voluntary social co-operation through contract law, and in particular through 'freedom of contract', a principal road to social improvement and human happiness, and one distinct from the static conditions involved in the possession of private property. This line of thought, variously developed, led firstly to an increased and self-conscious emphasis on a policy summed up in the words of Sir George Jessel in *Printing and Numerical Registering Co v Sampson* (1875):[5]

> ... if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.

Yet the period also saw much statutory interference in private contracts.

2 Lev 174, 3 Keb 677, 1 Vent 298, Freem 433.
3 Cro Jac 245, 1 Rolle 391, Moo KB 854.
4 2 Burr 1005.
5 LR 19 Eq 462.

Secondly, an increase in the moral dignity of contract encouraged thinking lawyers to feel that contract law was of central significance in the scheme of civilised legal regulation. This development lives on to this day in the presence of contract law, particularly the law governing the formation of contract, in the core of legal education.

Although many of the nineteenth-century authorities on contract are familiar as timeless living law, the period has until recently been relatively little studied from a historical point of view, and the doctrinal history is, indeed still inadequately understood. It is clear however that the basic structure of the law of assumpsit, as established in the sixteenth and seventeenth centuries, remained generally unaltered until the nineteenth century, which saw a shift in emphasis from the essentially unilateral notion of a promise, to the conception of a contrac—a bilateral conception—which generated rights and duties in the parties. This process was accompanied by a very remarkable elaboration in contractual doctrine, and the new doctrine was superimposed upon the old ideas derived from earlier case law. To a very considerable extent the initial impetus for this elaboration came from the treatise writers on contract, whose existence was a new phenomenon in the history of English contract law. In recent times there have been a number of attempts to explain the reasons for this development, but to date no consensus has emerged among historians; the increase in the sheer quality of contract law is an aspect of the history of the control over civil juries, and this too is not yet fully understood.[6]

For until 1790, when John Powell published his *Essay upon the Law of Contracts and Agreements*, there existed no systematic treatise expounding the English law of contract, and no tradition of writing such works.[7] Powell set out 'to discover the general rules and principles of natural and civil equity' on which the case law of contract was founded, and he started a tradition in which the present treatise stands. Many contract treatises appear in the nineteenth century, of which perhaps the most celebrated were Chitty (1826), Addison (1847), Leake (1867), Pollock (1875) and Anson (1879). The new literature, lacking a native tradition, leant heavily upon contractual writers in the civil (ie Roman) law tradition and in particular upon the work of R J Pothier, the great eighteenth century French legal scholar whose work, a product of the natural law tradition, profoundly influenced the French Civil Code Pothier's *Treatise on the Law of Obligations* was translated and published in England in 1806, after original publication in 1761-64. Appearing as it did at a critical period, the new literature led to a partial reception of ideas derived from the civil law of continental Europe, many of which, adapted through the case law, remain as contractual categories, as chapter heads in the books, today.

Offer and acceptance

Thus the doctrine of *offer and acceptance* first clearly emerges in the cases in *Adams v Lindsell*[8] in 1818 as a mechanism for settling the moment of contracting

6 There is a major study by P S Atiyah *The Rise and Fall of Freedom of Contract* (1979); though it has not convinced all commentators, and a valuable survey by Cornish and Clark *Law and Society in England* 1750-1950 (1989) 197-226 with bibliography. See Nicholas 48 Tulane L Rev 946; Horwitz 87 Harvard L Rev 917; Simpson 91 LQR 247, 46 U Chicago L Rev 533; 1 OJLS 265; Danzig 4 J Legal Studies 249; Baker [1979] Current Legal Problems 17. See also Fifoot *Judge and Jurist in the Reign of Victoria* (1959) and the entertaining theory of Gilmore *The Death of Contract* (1974).

7 On the evolution of the treatise see Simpson 48 U Chicago L Rev 632.

8 1 B & Ald 681.

in agreement by correspondence; it became a central doctrine, and in 1882[9] Sir William Anson was able to claim that 'Every expression of a common intention arrived at by the parties is ultimately reducible to question and answer'. The doctrine derives ultimately from a title in Justinian's Digest[10] which distinguishes between 'pollicitations' and 'promises', the former being promises made and not accepted; it first appears in English law in Powell's treatise in 1790. Eventually the doctrine was even applied, albeit somewhat unhappily, to unilateral contracts in *Carlill v Carbolic Smoke Ball Co* in 1893.[11] The relationship between the new doctrine of offer and acceptance and the old requirement of consideration, which was re-emphasised as an essential in *Eastwood v Kenyon* (1840),[12] was and remains difficult simply because two layers of development in contractual thought are involved.

Intention to contract

Another new development was the reception of a requirement that there must be *an intention to create legal relations* for there to be a binding contract. The earlier common law scorned such a requirement for 'of the intent inward of the heart man's law cannot judge'.[13] The doctrine, in one form or another, was commonplace in continental legal thought, and versions are found in Leake (1867) and in Pollock's influential treatise (1875), the latter version being derived from the German jurist Savigny. It was received in the case law in *Carlill v Carbolic Smoke Ball Co* (1893) and accepted by the House of Lords in *Heilbut, Symons & Co v Buckleton* in 1913.[14]

The will theory

More radically the nineteenth-century case law came to emphasise what is variously called the 'consensus' or 'will' theory of contract exhaustively analysed in Atiyah *The Rise and Fall of Freedom of Contract*. This asserts that contractual obligations are by definition self-imposed: hence any factor showing lack of consent is fatal to the existence of a contract, and conversely the rules governing the formation of contract are all conceived of as designed to differentiate cases of true *consensus*, where two wills become one will, from cases where *consensus* is lacking. In terms of the functions of the court this theory finds expression in the idea that the exclusive task of a court in contract cases is to discover what the parties have agreed, and give effect to it, except in cases of mistake, duress or illegality. This approach was not novel in English law, but it received a new emphasis from the text-writers, under the influence of foreign models; as Evans wrote in 1806:[15]

> As every contract derives its effect from the intention of the parties, that intention, as expressed, or inferred, must be the ground of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction.

It also conformed to the fashionable theories of the political economists.

9 Anson *Principles of the English Law of Contract* (2nd edn) p 15.
10 *D* 50.12.3.
11 [1892] 2 QB 484; affd [1893] 1 QB 256. See Simpson 14 JLS 345.
12 11 Ad & El 438.
13 St Germain *Doctor and Student* Bk III, ch VI, see s V.
14 [1913] AC 30. See Simpson 14 Journal of Legal Studies 345 for a full illustrated discussion of this.
15 In appendix V to his edition of Pothier's *Treatise on Obligations*, at p 35.

Mistake

The ramifications of the will theory were extensive, and still influence both the law and the form in which it is expressed. Perhaps its most striking expression in nineteenth century legal development is to be found in cases dealing with *mistake*, for, given the premise, 'Error is the greatest defect that can occur in contract ...'[16] in consequence a doctrine of mistake follows inevitability. A good example of a case decided under the influence of a full blown *consensus* theory is *Cundy v Lindsay* (1878),[17] the well-known case on error as to the person; a more recent conquest may be *Bell v Lever Bros*[18] in 1932. A more puzzling example is *Raffles v Wichelhaus*.[19] Another branch of contract law much influenced by the will theory was the assessment of damages, where the landmark is the decision in *Hadley v Baxendale* (1854),[20] which related the damages recoverable on breach of contract to the notional foresight of the contracting party when the contract was made; contract liability was self-imposed, and the contractor's liability was to be related to what he reasonably thought he was taking on. Later nineteenth century case law even required, in the case of unusual or special loss, a contract to bear that loss,[1] a notion close to Holmes' theory that a contract was really an agreement to pay damages in certain eventualities.[2] *Hadley v Baxendale* itself was much influenced by the French Code Civil, and by Pothier, as well as by American literature on damages, and is a particularly good example of the reception of alien ideas.[3]

G IMPLIED TERMS

The basic philosophy of the will theory confines the functions of a court to enforcing the contract which the parties have made; when however a contractual dispute arises for which the express terms of a contract make no advance provision the court has of necessity to employ, in resolving the dispute, material not to be found in the terms of the express contract, and in the common law system the conceptual vehicle employed is the 'implied term'. In a sense the extensive development of the use of 'implied terms' to supplement contracts, and at times to modify them, runs contrary to the credo of the will theory; in another sense it reconciles the will theory with activities of the courts which, in strict theory, ought never to be undertaken.

Implied terms in sale

The use of the concept of an implied promise has a long history in the law of assumpsit; implied promises to pay debts had, for example, been used as a basis of liability in *indebitatus assumpsit*, and there are other early examples of the implication of promises by the courts to produce just results.[4] In eighteenth

16 At p 152 of vol 1 of Evans' edition.
17 (1878) 3 App Cas 459. See p 277, below.
18 [1932] AC 161. See pp 259-260, below.
19 (1864) 2 H & C 906, Simpson 11 Cardozo LR 287.
20 9 Exch 341. For discussion see Washington in 48 LQR 90, Simpson in 91 LQR 273-277 and Danzig in 4 J Legal Studies 249.
1 *British Columbia Saw Mills Co v Nettleship* (1868) LR 3 CP 499.
2 See Holmes *The Common Law* Lect VIII.
3 For recent discussion of the will theory in general see Atiyah *The Rise and Fall of Freedom of Contract*.
4 See Simpson *History* pp 491-493, 503.

and nineteenth century law the courts made extensive use of the notion of an implied term to read into particular contracts normal or usual incidents of that type of contract. In doing so, whilst purporting to fill out the understandings of the parties, what might in reality be involved was the imposition *ab extra* of standards derived from continental mercantile law or civil law.[5] Thus in sale of goods the original position was *caveat emptor*. On an *express* warranty, if one had been given, it was possible to sue in tort for deceit; *Stuart v Wilkins* (1778)[6] is the earliest reported case where action was brought on the contract, though the practice began rather earlier around 1750. The development of the notion of an *implied* warranty was a slow process. So far as warranty of title is concerned the law started from the position that there was no implied warranty; from the time of *Medina v Stoughton* (1700)[7] the insistence on an express warranty began to be eroded, and by the time of the decision in *Eichholz v Bannister* (1864)[8] the exception had for all practical purposes eaten up the rule; the development had taken a century and a half. So far as quality is concerned the principle of *caveat emptor* was never wholly abandoned. Although there is some slight evidence in eighteenth-century law of an implied warranty of merchantable quality where a proper price was paid,[9] or at least of the imposition of liability where the seller knew of the defect, it was held in 1802 in *Parkinson v Lee*[10] that there was no such implied warranty in the case of a sale by sample, and assumed that in general *caveat emptor* applied in the absence of fraud or an express warranty. But *Laing v Fidgeon* (1815)[11] held that in a sale by description the goods must be merchantable, and *Jones v Bright* (1829)[12] that there was an implied term that goods sold for a particular purpose were suitable for it. In these and following cases the courts built up the complex structure of implied obligations codified by Chalmers in the Sale of Goods Act of 1893. During the same period the courts were also using the concept of an implied term to impose a solution in cases where there had been mistake, and in cases where some drastic change of circumstances had affected a contract, as in the leading case of *Taylor v Caldwell* (1863).[13] In the implied term the courts possessed a conceptual device of great potential, but one which suffered from one major drawback—in principle an implied term could never override an express provision, however unjust its operation. Much of the development of contract law in this century has been provoked by attempts to grapple with this difficulty.

For history continues, and although the present century has not perhaps witnessed so extensive a reformulation of the categories of contract law as the last, it has nevertheless produced a considerable body of new law. Thus the doctrine of frustration, though its roots lie back in the early nineteenth century law on charterparties, has acquired a prominence it never possessed in the nineteenth century: again the doctrine of promissory or equitable estoppel, though again based on nineteenth century case law, has been put

5 No full historical study of the evolution of the implied term exists.
6 1 Doug KB 18.
7 1 Salk 210, 1 Ld Raym 593.
8 17 CBNS 708.
9 See Horwitz 87 Harvard L Rev 926, Simpson 46 U Chicago L Rev 533.
10 2 East 314.
11 6 Taunt 108.
12 5 Bing 533.
13 32 LJQB 164.

to new uses. In a historical system of law change has both to be fitted into the past, and if possible justified by reference to it, and the manner in which new departures are presented makes it peculiarly difficult to differentiate radical innovation from mere elaboration of existing doctrine. Perhaps the most general significant change has been a general tendency to reject the nineteenth century's confidence in the virtues of freedom of contract and the associated will theory, without the adoption of any very clearly formulated alternative. Some writers, notably Professor Grant Gilmore and Professor P S Atiyah have argued that much of what passes as general contract law is better regarded as an outmoded relic of the past, and that the whole subject is ripe for radical revisionism. But these are matters we ought, perhaps, to leave to the judgement of future historians.

Chapter 2

Some factors affecting modern contract law

SUMMARY

The English law of contract, it has been seen, was evolved and developed within the framework of assumpsit, and, so long as that framework endured, it was not necessary to pursue too fervently the search for principle. But when the forms of action were abolished this task could no longer be avoided. The lawyers of the nineteenth century, when they braced themselves to face it, were influenced by two major factors.

A CONTINENTAL INFLUENCE IN THE NINETEENTH CENTURY

The first was the example of continental jurisprudence. This was felt primarily through the writings of Pothier, who drew an idealised picture of contract in eighteenth century France. In 1806 his *Treatise on the Law of Obligations* was translated into English; in 1822 Best J declared its authority to be 'as high as can be had, next to a decision of a court of justice in this country';[1] in 1835 it was 'strenuously recommended' as a student's textbook;[2] and in 1845 Blackburn made copious references to it in his work on sale. It was not surprising, therefore, that English judges should have been tempted to accept his analysis of contract as dependent upon 'a concurrence of intention in two parties, one of whom promises something to the other, who on his part

1 *Cox v Troy* (1822) 5 B & Ald 474 at 480.
2 Samuel Warren *A Popular and Practical Introduction to Law Studies* (1835).

accepts such promise'.[3] More belated, and directed largely upon academic lawyers, was the influence of Savigny. The first edition of Pollock's *Treatise on the General Principles concerning the Validity of Agreements in the Law of England* appeared in 1875, and the first edition of Anson's *Principles of the English Law of Contract* in 1879. The former was dedicated to Lord Lindley, who had first taught the writer 'to turn from the formless confusion of textbooks and the dry bones of students' manuals to the immortal work of Savigny'.[4] The latter was equally ready to acknowledge a similar debt. 'We may regard contract as a combination of the two ideas of agreement and obligation. Savigny's analysis of these two legal conceptions may with advantage be considered here with reference to the rules of English law.' In the result, 'agreement' was 'necessarily the outcome of consenting minds'. As Lord Cairns said in a contemporaneous and famous case, there must be 'consensus of mind' to lead to contract.[5]

B INFLUENCE OF ECONOMIC THEORY

The weight of foreign jurisprudence was reinforced by a second factor, the pressure of economic doctrine. Sir Frederick Pollock once declared that 'the sort of men who became judges towards the middle of the century were imbued with the creed of the "philosophical Radicals" who drove the chariot of reform and for whom the authority of the orthodox economists came second only to Bentham's'. Their patron saint, he added, was Ricardo.[6] Individualism was both fashionable and successful: liberty and enterprise were taken to be the inevitable and immortal insignia of a civilised society. The state, as it were, delegated to its members the power to legislate. When, voluntarily and with a clear eye to their own interests, they entered into a contract, they made a piece of private law, binding on each other and beneficial alike to themselves and to the community at large. The freedom and the sanctity of contract were the necessary instrument of *laissez-faire*, and it was the function of the courts to foster the one and to vindicate the other. Where a man sowed, there he should be able to reap. In the words of that formidable individualist, Sir George Jessel, 'if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice'.[7] In more detached and less complacent language the sentiment was echoed by Henry Sidgwick in his *Elements of Politics*.[8]

3 *Treatise on Obligations* Pt I, s I, art I; see the English translation by Sir W D Evans, at p 4. As late as 1887, Kekewich J declared that the definitions of contract in textbooks were 'all founded' on Pothier, though he himself preferred the 'slightly different version' offered by Pollock; see *Foster v Wheeler* (1887) 36 ChD 695 at 698.

4 In the third edition, Pollock relegated Savigny to the decent obscurity of an appendix. Lord Lindley's interest in continental legal thought was further evidence by his translation in 1855 of Thibaut's *Jurisprudence*.

5 *Cundy v Lindsay* (1878) 3 App Cas 459 at 465; p 277, below.

6 39 LQR 163 at 165. It is suggestive that the judge chosen by Pollock as typical of the general attitude was Lord Bramwell, who sought persistently to champion the cause of 'real' consent. See his judgment in *British and American Telegraph Co v Colson* (1871) LR 6 Exch 108.

7 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

8 (1879) p 82 cited in Kessler and Gilmore *Contracts, Cases and Materials* (2nd edn, 1970) p 4. See the whole of the Introduction of this book, pp 1-16. Shatwell 1 Sydney L Rev 289. An exhaustive account of the interplay of economic and social doctrines and the

'Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates—gifted with mature reason and governed by enlightened self-interest.'

LIMITS OF INDIVIDUALISTIC THEORY

Even when they wrote them, the words of Jessel and Sidgwick could hardly have been received without reservation. To make a serious promise usually involves a moral duty to keep it: if it is part of what the law calls a contract the moral will be reinforced by a legal sanction. But the intrusion into the context of the epithet 'sacred' is at best incongruous, at worst grotesque. Moreover, when these words are examined, it will be seen that, despite their apparent breadth, they are hedged about with qualifications. The men to be accorded 'the utmost liberty of contracting' must be 'of full age and competent understanding'. They are to approximate as best they may to the heroes of an individualistic mythology and to be 'gifted with mature reason and governed by enlightened self-interest'. Even in the middle years of the nineteenth century the ideal was one to which few could attain. Society had long recognised the need to protect the young, the deranged, the blind, the illiterate. Common law and equity were moving in different ways and with hesitant steps to rescue the victims of misrepresentation and undue influence.[9] It was accepted that, while private enterprise was the main road to public good, freedom of contract must at times yield to the exigencies of the state and to the ethical assumptions upon which it was based. But in less obvious cases the qualifications demanded by Jessel and Sidgwick of their contracting parties were more difficult to define and to secure. How were the courts to assess the due measures of 'competent understanding' or to ensure that contracts were 'freely and voluntarily made?'

As the nineteenth century waned it became ever clearer that private enterprise predicated some degree of economic equality if it was to operate without injustice. The very freedom to contract with its corollary, the freedom to compete, was merging into the freedom to combine; and in the last resort competition and combination were incompatible. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The background of the law, social, political and economic, has changed. *Laissez-faire* as an ideal has been supplanted by 'social security'; and social security suggests status rather than contract.

The state may thus compel persons to make contracts, as where, by a series of Road Traffic Acts from 1930 to 1972, a motorist must insure against third-party risks; it may, as by the Rent Acts, prevent one party to a contract from enforcing his rights under it,[10] or it may empower a tribunal either to reduce or to increase the rent payable under a lease.[11] In many instances a statute prescribes the contents of the contract. The Carriage of Goods by Sea Act 1971 contains six pages of rules to be incorporated in every contract for 'the carriage

law of contract is to be found in Ativah *The Rise and Fall of Freedom of Contract*. For a modern analysis of freedom of contract, see Trebilcock *The Limits of Freedom of Contract* (Harvard UP 1993); *Smith* 59 MLR 167.

9 This is the conventional view but Ativah ch 15 argues that during the late eighteenth and early nineteenth centuries the move was in the opposite direction.

10 The earliest Act was that of 1915. The law is currently to be found in the Housing Act 1988.

11 See eg Housing Act 1988, s 14.

of goods by sea in ships where the port of shipment is a port in the United Kingdom';[12] the Sale of Goods Act 1979 inserts into contracts of sale a number of terms which the parties are forbidden to exclude;[13] successive Landlord and Tenant Acts from 1927 to 1954 contain provisions expressed to apply 'notwithstanding any agreement to the contrary'.[14] The erosion of contract by statute continues briskly.[15]

The most striking inroads into freedom of contract have been the product of statute, but common law has played its part, particularly perhaps in the regulation of exemption clauses.[16] Curiously enough there has been little analysis by English lawyers[17] of the effects of interference with freedom of contracts, perhaps because to do so might appear 'political'. It is apparent, for instance, that restrictions on freedom of contract in regard to residential tenancies have led to a dramatic reduction in the amount of residential accommodation available for rent in the private sector and in many ways have exacerbated the problems.[18] On the other hand restrictions on freedom of contract in regard to business and agricultural tenancies do not appear to have produced the same result.[19]

The substantial inroads that have been made into freedom of contract can sometimes obscure the fact that across a broad spectrum of contract it remains a prime value because often the only way we can value goods or services is in relation to the price people are willing to pay for them. It may be foolish for a businessman to pay £100 for a bottle of claret to accompany his business lunch or for a football club to pay £20,000,000 for a player but there are no legal values which would justify refusing to enforce such contracts.

C INEQUALITY OF BARGAINING POWER

The critical analysis of freedom of contract has led to the suggestion that contracts should be treated differently where there is inequality of

12 See also the Carriage by Air Act 1961.

13 Pp 196-215, below.

14 See Landlord and Tenant Act 1927, s 9, Landlord and Tenant Act 1954, s 17.

15 Eg Contracts of Employment Act 1972, Counter-Inflation Act 1973. See Kahn-Freund 30 MLR 635.

16 See pp 171-195, below. Another example is the modern tendency to refer questions which were previously decided by reference to the intention of the parties to other tests. See pp 162-171 below.

17 American lawyers have been much more active. See especially Posner *Economic Analysis of the Law* ch 3 and Posner and Kronman (eds) *The Economics of Contract Law*; Schwartz 49 Indiana LJ 367. Some of the American literature may perhaps be regarded as excessively 'free market' in its theoretical approach. Cf Goldberg 17 J Law and Economics 461.

18 Theoretically removal of restrictions would lead to the building of houses and flats for residential letting in sufficient numbers that eventually supply and demand would come into equilibrium. In practice, given the instability of the building industry, it is very doubtful whether this would be so.

19 A possible explanation for this is that only in residential tenancies has the law interfered with the price. It is true that in economic theory restrictions as to other terms should affect the price but in practice this is often not so because parties do not in practice negotiate equally hard about all terms—although they are nearly always keenly interested in the price! The speeches in *Johnson v Moreton* [1980] AC 37, [1978] 3 All ER 37, contain much that is instructive in this area. See also Goldberg 17 J Law and Economics 461; Reiter, 1 Oxford JLS 347; Trebilcock in Studies in Contract Law 379.

bargaining power. This suggestion has received formal recognition in the United States[20] and it has received not unfavourable notice in a number of English judgments though it is not yet clearly the ratio of any.[1] One may however venture some observations. First, inequality of itself cannot be a ground of invalidity since there is usually no way for the stronger party to divest himself of the advantage and it would not be to the advantage of the weaker party to prohibit contracts between the parties altogether. Invalidity must be dependent on the stronger party taking unfair advantage of his position. Secondly, exact equality of bargaining power is unusual. Where one party is in slightly the stronger position, the process of bargaining should lead to an agreement where both parties concur equally in the result. Take the case of a potential vendor and purchaser for a private house. At any given moment the market may be favourable either to vendors or purchasers and there may be special considerations leading either vendor or purchaser to be anxious to complete a quick sale. Such factors will affect the price but no one has suggested that the subsequent contract should be invalid. Inequality of bargaining power should only be relevant where it is great in extent. Thirdly, when we talk of inequality of bargaining *power* we are often in fact thinking of inequality of bargaining *skill*. Secondhand car salesmen do not normally have greater bargaining power than their potential customers but they are usually better salesmen and better informed. Finally, we may meet cases of unequal access to relevant information. Suppose a contract is made by A and B for the sale by A to B of a painting for £50. A believes the painting to be a copy of a Constable; B 'knows' that it is an original. Our analysis of whether the resultant agreement is fair depends on whether we think that B should have shared his knowledge with A. At the intuitive level this may depend on whether A is a little old lady and B an art dealer or the other way round. It is important to bear in mind, however, that in many cases B's superior knowledge is part of his professional equipment and is the fruit of years of study and experience. In general the acquisition of such knowledge would not be encouraged by a regime which required it to be gratuitously shared.

D THE USE OF STANDARD FORM CONTRACTS

The process of mass production and distribution, which has largely supplemented if it has not supplanted individual effort, has introduced the mass contract—uniform documents which must be accepted by all who deal with large-scale organisations. Such documents are not in themselves novelties: the classical lawyer of the mid-Victorian years found himself struggling to adjust his simple conceptions of contract to the demands of such powerful bodies as the railway companies.[2] But in the present century many corporations,

20 Uniform Commercial Code, s 2-302; Leff 115 U Pennsylvania L Rev 485; White and Summers *Uniform Commercial Code* ch 4.

1 See Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624, [1974] 1 WLR 1308 at 1316 quoted below, p 22, and the cases on 'economic duress' discussed below, pp 340-344.

2 Pp 173-179, below.

public and private, found it useful to adopt, as the basis of their transactions, a series of standard forms with which their customers can do little but comply.[3]

Lord Diplock has recently pointed out that:[4]

> Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'

It is fair to add that even in Lord Diplock's second class there are good as well as bad reasons for the adoption of standard form contracts. In many cases the actual conclusion of the contract is in the hands of relatively junior personnel, who are not trained in contract negotiation and drafting and there are enormous economies to be effected if the company only employs one (or at most a few) standard forms of agreement.[5] As regards the first class, we should note that whole areas of English commercial practice are governed by the prevalent standard forms which exist in a symbiotic relationship with the courts, so that an historical analysis of the development of a particular form would show that the clause represented a response to a decision in the past.[6]

In the complex structure of modern society the device of the standard form contract has become prevalent and pervasive. The French, though not the English, lawyers have a name for it.

3 An early standard form of contract is the Baltoon charterparty adopted in 1908 for use in the coal trade between the United Kingdom and the Baltic ports: see Rordam *Treatise on the Baltoon Charterparty* (1954). See also Sales 16 MLR 318, and the standard forms issued by the Institute of London Underwriters and reprinted in appendix II of Chalmers *Marine Insurance Act 1906*.

4 *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 524, [1974] 1 WLR 1308 at 1316. This case is the subject of a very illuminating analysis by Trebilcock 26 U Toronto LJ 359. For the history of standard form contracts, see Prausnitz *The Standardisation of Commercial Contracts in English and Continental Law* (1937).

5 Macaulay 19 Vanderbilt L Rev 1051.

6 See eg the building industry where nearly all substantial contracts are made on one or the other of the JCT forms. See Duncan Wallace *Building and Engineering Standard Forms* (reviewed Atiyah 85 LQR 564). See also Duncan Wallace 89 LQR 36 and *Gilbert-Ash (Northern) v Modern Engineering (Bristol)* [1974] AC 689, [1973] 3 All ER 195.

> The term contract d'adhesion is employed to denote the type of contract of which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance en bloc and is not open to discussion.[7]

These developments emphasise that to make a contract may no longer be a purely private act. It may be controlled or even dictated by legislative or economic pressure, and it may involve the courts in feats of construction akin to or borrowed from the technique of statutory interpretation. Yet it is possible to exaggerate the effect. In daily life individually negotiated contracts exist and even abound. Moreover, as has already been said, the current law of contract is largely the creation of the nineteenth century lawyers, and it is this law which their successors have to apply even in a new and uncongenial environment. The tools of the trade remain the same if they are put to uses that their inventors neither envisaged nor desired.

E. CONSUMER PROTECTION

Nineteenth century contract law was dominated by disputes about commercial contracts. If litigation involved what we would now regard as a consumer transaction, it tended to involve questions like the buying of horses where a judge would naturally assume that a gentleman could look after himself.[8]

Economic theory might proclaim that in the market place the consumer was king but in the law courts he was uncrowned. The twentieth century has seen a very different approach. Increasingly sophisticated technology has meant that consumers might expend substantial sums on machines such as cars, washing-machines and televisions whose efficiency and durability they were quite unable to estimate for themselves. Consumers have responded to this trend by organising themselves as pressure groups (for example, Consumers Association) and governments have created organisations to care for the consumer interest (Office of Fair Trading, National Consumer Council) and have appointed junior ministers with special responsibility for consumer affairs.

These developments have been reflected in changes in the law of contract whose aim has been to protect consumers. The most striking examples have perhaps been in the judicial and parliamentary attempts to deal with the problem of exemption clauses, which culminated in the Unfair Contract Terms Act 1977.[9] Other important examples are the Fair Trading Act 1973 and the Consumer Credit Act 1974.[10] It should perhaps be added that legislative attempts to protect consumers are by no means confined to the law of contract.

7 Amos and Walton *Introduction to French Law* (2nd edn, 1963) p 152. See Kessler 43 Col L Rev 629; Friedmann *Law in a Changing Society* (2nd edn) ch 4; Atiyah *Introduction to Law of Contract* (5th edn 1995) ch 1; Lord Devlin *Samples of Law Making* ch 2; Thornely [1962] CLJ 39 at 460-49; Gluck 28 ICLQ 72.

8 *Hopkins v Tanqueray* (1854) 15 CB 130.

9 See below, pp 196-215.

10 See Borrie and Diamond *The Consumer, Society and the Law* (4th edn, 1981); Harvey and Parry *The Law of Consumer Protection and Fair Trading* (4th edn, 1992); Mickleburgh *Consumer Protection*; Cranston *Consumers and the Law* (2nd edn, 1984); Lowe and Woodroffe *Consumer Law and Practice* (3rd edn, 1991); Miller and Harvey *Consumer and Trading Law Cases and Materials*; Ramsay *Consumer Protection*. See Atiyah 1 Liverpool L Rev 20.

Indeed the law of contract is in many ways an unsatisfactory instrument since enforcement depends on the consumer knowing his rights; being able to afford to enforce them and considering the cost and time involved worthwhile.

F THE RELATIONSHIP BETWEEN STANDARD FORM CONTRACTS, INEQUALITY OF BARGAINING POWER AND CONSUMER PROTECTION

Standard form contracts, inequality of bargaining power and consumer protection are three themes which underlie many developments in modern contract law. It is important to remind ourselves that there are indeed three separate themes which intertwine but remain distinct. It is easy for instance to think of consumers as the only class that needs protection against inequality of bargaining power but this is not so as is shown by the enactment of the Housing Grants, Construction and Regeneration Act 1996, part II of which introduced mandatory terms in all construction contracts.

A typical construction transaction will involve a complex web of contracts. At the centre will be a contract between the person who is procuring the contract (the Employer) and the person who will organise the work (the Contractor). In practice the Contractor does little of the work himself but subcontracts it and subcontractors may in turn sub-subcontract. The contract between an Employer and a Contractor will usually employ one of family of standard form contracts produced by the Joint Contracts Tribunal (JCT). These forms are designed by JCT to be fair as between employers and contractors as classes.[11] JCT also produce standard forms designed to be used for the contracts between contractors and sub-contractors but in practice these contracts are often on forms drafted by the contractor's advisors to improve the position of the contractor.

In general contractors would tend to be in a stronger position than sub-contractors, though, of course this is not always the case. A common example of superior power is that sub-contracts drafted by contractors, typically provide that the contractor need not pay the subcontractor for the work done until he has been paid by the employer, a so called *'pay when paid'* clause. Parliament has treated this as so pervasive an abuse of the contractor's superior bargaining power that such clauses are made ineffective by section 113(1) of the 1996 Act.

G CONTRACTUAL BEHAVIOUR

Writers of contract textbooks tend to talk as if in real life agreements are effectively controlled by the law as stated in their books. A moment's reflection will show that this is not so. There is a wide range of transactions where the sums at stake are so small that litigation between the contracting parties is exceptionally unlikely.[12] Many businesses choose not to insist on their strictly legal rights. So if a lady buys a dress and the next day decides she does not like

11 This is certainly the stated aim of JCT. It is a matter of debate amongst specialist construction lawyers as to whether the aim is achieved.

12 So, many contract points arise only collaterally in criminal or tax cases. See the cases on offers, pp 37-39, below, and *Esso Petroleum Co Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1 discussed at p 130, below.

the colour, it is clear law that she is not entitled to return it but many shops would allow her to exchange it and some would make a cash refund.

One might think that things would be different in the cold world of business but it seems that this is probably not so. In a seminal article in 1963[13] Macaulay showed that in substantial areas of business, contractual disputes were resolved by reference to norms which were significantly different from the theoretical legal position. The most important single reason for this seems to be that, in many business situations, the contract is not a discrete transaction but part of a continuing relationship between the parties and that insistence on certain strict legal rights would be disruptive of that relationship.[14] Such work as has been done in England points in the same direction.[15]

In other areas of business, strict (or even over-strict) insistence on legal rights is common.[16] It is at the moment far from clear what factors determine these differences in behaviour.[17]

H A LAW OF CONTRACT OR CONTRACTS?

An observant reader of the table of contents of this book would have noticed that it is quite different from that of a textbook on torts or criminal law, where a major part of the book would be devoted to a consideration of nominate torts or crimes. This does not mean that there are no special rules about particular contracts but in English law (unlike some other systems)[18] we start from the position that in principle the law of contract is the same for all contracts. So in *Cehave NV v Bremer Handelgesellschaft MbH* Roskill LJ said:[19]

> In principle it is not easy to see why the law relating to contracts for the sale of goods should be different from the law relating to the performance of other contractual obligations, whether charter parties or other types of contract. Sale of goods law is but one branch of the general law of contract. It is desirable that the same legal principles should apply to law of contract as a whole and that different legal principles should not apply to different branches of that law.[20]

It must be noted however that Parliament has consistently taken a different approach, so that most legislation with contractual implications applies only to a limited list of contracts. The Unfair Contract Terms Act 1977[1] is perhaps the most striking recent example of this tendency.

13 (1963) 28 Am Sociological Rev 55. This journal may not be easily available but the article is reprinted in a number of books, for example, *Sociology of Law* (ed Aubert) p 194, Schwartz and Skolnick (eds) *Society and the Legal Order* p 161. See also Macaulay 19 Vanderbilt L Rev 1051, 11 Law and Society 507.

14 MacNeil 72 North Western U L Rev 854.

15 Beale and Dugdale 2 Brit Jo Law and Society 45; Lewis 9 Brit Jo Law and Society 153.

16 See eg *Mardorf Peach & Co v Attica Sea Carriers Corpn of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545.

17 It is not inconceivable that those businesses which habitually insist on strict legal rights employ more lawyers.

18 For example, classical Roman law. In his entertaining book *The Death of Contract*, Professor Grant Gilmore argues that in American law, general contract theory was an invention of the Harvard Law School. Professor Gilmore held a Chair at Yale.

19 [1976] QB 44 at 71, [1975] 3 All ER 739 at 756. For further discussion of the issues of this case see p 169, below.

20 See also *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193.

1 See pp 196-215, below.

I THE INTERRELATIONSHIP OF CONTRACT AND TORT

When a plaintiff is injured and seeks compensation he may express his claim either as one in contract or in tort. Traditionally contract lawyers and tort lawyers have taken little interest in the details of each other's subjects but this aloofness can no longer be safely practised since over the last twenty years the area of overlap between tort and contract has significantly increased. This development has taken a number of turns. Plaintiffs have been active in exploring the possibility that they have an action against the defendant both in contract and in tort. Although a plaintiff cannot, of course, recover twice for the same injury, he may by suing in contract avoid an obstacle to an action in tort[2] or vice versa.[3]

The modern position has been authoritatively stated by the House of Lords in *Henderson v Merrett Syndicates Ltd.*[4] This case involved the consideration of preliminary points in an action brought by Names at Lloyds against their members' agents (whose principal function is to advise Names on which syndicates to join) and their managing agents (whose principal function is to underwrite contracts of insurance on behalf of the syndicates which they are managing). In some cases, the members' agents and managing agents were the same (as permitted by the relevant rules which have since been changed) and sometimes not. In general, names would be in a contractual relationship with their members' agents but not with the managing agents, unless the managing agents were also members' agents. Among the preliminary questions considered, the House of Lords was asked to rule whether there could be a tort action against the members' agents where there was a contractual relationship between the plaintiff and the members' agent.

The principal judgment was delivered by Lord Goff. He had no doubt at all that the answer to the general question, can there be concurrent liability in contract and tort, was Yes and that concurrent liability could exist on the facts of the present cases. There was a careful consideration of French law which, in general, prohibits concurrent liability in contract and tort through the doctrine of non cumul and it was noted that the other great civil law system, the German civil code, did not have a similar doctrine. There was a careful consideration also of some Commonwealth cases, including the important decision of the Supreme Court of Canada in *Central Trust Co v Rafuse*[5] where Le Dain J said:

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

Lord Goff entirely agreed with this statement and was full of praise for the judgment delivered by Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp.*[6]

2 *Matthews v Kuwait Bechtel Corpn* [1959] 2 QB 57, [1959] 2 All ER 345.
3 *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384, [1978] 3 All ER 571; see p 305.
4 [1994] 3 All ER 506.
5 (1986) 31 DLR (4th) 481.
6 [1979] Ch 384, [1978] 3 All ER 571.

The position now seems completely clear. The question is to be resolved by considering, in each case, whether the ingredients of a tort action and a contract action are present. The mere fact that all the ingredients for a contract are present does not prevent there being a tort duty nor, presumably, vice versa. Of course, the terms of the contract may, in particular cases, make it clear that the parties intended to exclude or limit liability in tort. This they are certainly entitled to do unless the case is one of those in which there is a statutory restriction on the ability of the parties to contract out of tort liability. A plaintiff who wants to argue that there is wider liability in tort than in contract may have greater difficulties.[7]

In other cases a plaintiff whose natural remedy lies in contract against one defendant has been successful in a tort action against a different defendant. So in *Junior Books v Veitchi Co Ltd*[8] the plaintiffs entered into a contract with A to build a warehouse. The defendants were nominated sub-contractors for the flooring. It was alleged that the defendants had carelessly installed sub-standard flooring. If that were so, then the plaintiffs would normally have had an action in contract against A, and A, in turn, would have had a contract action against the defendants. However, the House of Lords held that on such facts the plaintiffs could have a tort action against the defendants even though there was no danger of physical injury or property damage to the plaintiffs.

It is unclear why in this case the plaintiffs found their normal contract action against A unsatisfactory.[9] But the possibility of an alternative tort action on such facts is clearly of great theoretical and practical significance and has led to much discussion.[10] It has been suggested that the logical result of the *Junior Books* decision is that every negligent breach of contract is a tort but the courts so far have shown no signs of accepting this position.[11] On the contrary since 1982 subsequent decisions have confined *Junior Books v Veitchi* within the narrowest limits. Courts have consistently said that the case turns on the close commercial relationship which exists between an employer in a building contract and a nominated sub-contractor who is chosen by him though he contracts with the contractor. Indeed it is common for the employer to contract direct with the nominated sub-contractor as well as with the contractor and in the case most like *Junior Books v Veitchi, Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd*[12] the Court of Appeal held that because in that case there was a direct contract between employer and nominated sub-contractor, there was no room for a separate duty of care in tort between the same parties with wider limits. This case is very much in line with the insistence of the House of Lords that remorseless expansion of the tort of negligence should not be allowed to usurp the proper place of the law of contract.[13]

7 This is probably what was meant by the cautionary words of Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 at 957.

8 [1983] 1 AC 520, [1982] 3 All ER 201.

9 The most plausible explanation would perhaps be that A was insolvent or that the plaintiffs had entered into a settlement with A before they realised how faulty the floor was.

10 See *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss* (ed Furmston, Duckworths 1986); Holyoak 99 LQR 591; Jaffey 5 Legal Studies 77.

11 *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350, [1985] 2 All ER 44. Reynolds 11 NZULR 215.

12 [1989] QB 71, [1988] 2 All ER 971, 17 Con LR 43.

13 *D & F Estates Ltd v Church Comrs for England* [1988] 2 All ER 992, [1988] 3 WLR 368 and *Murphy v Brentwood District Council* [1990] 2 All ER 908, [1990] 3 WLR 414.

J GOOD FAITH IN CONTRACT LAW[14]

Do the parties owe each other a duty to negotiate in good faith? Do the parties, once the contract is concluded, owe each other a duty to perform the contract in good faith? Until recently, English lawyers would not have asked themselves these questions or, if asked, would have dismissed them with a cursory 'of course not'. On being told that the German civil code imposed a duty to perform a contract in good faith[15] or that the Italian civil code provides for a duty to negotiate in good faith,[16] a thoughtful English lawyer might have responded by suggesting that the practical problems covered by these code positions were often covered in English law but in different ways. This may still be regarded as the orthodox position but the literature of English law has begun to consider much more carefully whether there might not be merit in explicitly recognising the advantages of imposing good faith duties on negotiation and performance. This view is reinforced by the fact that other common law systems have already moved in this direction. So, the American Uniform Commercial Code, Section 1-203 provides:

> Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

In Section 205 of the American Law Institute, the Statement of Contract (2nd) provides:

> Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

and in the Australian case of *Renard Constructions (ME) Pty Ltd v Minister of Public Works*[17] Priestley JA said:

> People generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.

It is not inconceivable that on appropriate facts and with skilful argument, English law may make tentative steps in the same direction.[18]

K THE GLOBALISATION OF CONTRACT LAW

Common Law contract lawyers have always taken an interest in parallel developments in other common law jurisdictions whether the systems started

14 *Good Faith and Fault in Contract Law* (Ed. Beatson, Friedmann, Clarendon Press 1995) (helpfully reviewed by Brownsword 15 Legal Studies 466); Adams and Brownsword, *Key Issues in Contract* (Butterworths 1995) Ch 7; Carter and Furmston 8 Journal of Contract Law 1, 93).

15 S 242.

16 For general surveys see Hondius, *Pre-Contractual Liability* (Kluwer 1991) and the International Chamber of Commerce, *Formation of Contracts. Pre-Contractual Liability*. Stapleton (1999) 52 Current Legal Problems 1. For a very broad survey of what good faith might mean in contract law see Whittaker and Zimmermann, *Good Faith in European Contract Law* (2000).

17 (1992) 33 Con LR 72 at 112-3.

18 *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472.

to diverge in 1783 or only in the middle of the twentieth century. The last few years have seen a renaissance in the interest which the contract lawyers of the civil law and common law families have taken in each other's systems.

This interest has taken two practical forms. In 1980 the International Institute for the Unification of Private law (Unidroit) set up a working group to prepare a set of principles for international, commercial contracts. The working group reported in 1994 and its report was accepted by the Governing Council of Unidorit. A new working group, with some changes in membership, is now at work on an enlarged edition. At the same time another group (The Lando Commission) were at work preparing principles of European contract law.

There were both important differences and striking similarities between the two projects. In numbers Europe is predominantly a civil law area. If we regard Scotland as a civil law country, only England and Wales and Ireland come from the common law. In the world at large on the other hand both its most powerful economy (The United States) and its most populous democracy (India) are members of the common law family. Both groups proceeded however by seeking to produce a coherent set of rules and not by counting heads. There were overlapping memberships of the two groups and there were many similarities in the final texts.[19]

19 For fuller discussion see Bonell, *An International Restatement of Contract Law* (2nd edn 1997) and *A New Approach to International Commercial Contracts* (ed Bonell, Kluwer 1999).

Chapter 3

The phenomena of agreement[1]

SUMMARY

1 Introduction

This chapter and the three succeeding chapters on Consideration, Intention to create legal relations and Contents of the contract are concerned with formation of the contract. They consider the rules by which English law answers two questions: Is there a contract? What are the terms of the contract? For purposes of exposition it is convenient to deal with these questions separately but they are intimately connected since in the final analysis inability to say what the terms of the contract are may lead to the conclusion that there is no contract.[2] In the same fashion the rules as to agreement, consideration and intention to create legal relations are closely interlocked.[3]

This book deals only with what are usually called *simple* contracts—agreements made either by word of mouth or in writing.[4] In addition to this

1 A fuller discussion of many of the topics in this chapter may be found in Furmston, Norisada and Poole, *Contract Formation and Letters of Intent* (1998).

2 See pp 46-49, below. On the other hand mere difficulty in understanding the meaning of the contract does not make it void: *Holiday Credit Ltd v Erol* [1977] 2 All ER 696, [1977] 1 WLR 704.

3 See, for example, the problem of revocation of offers which presents difficulties both in relation to agreement and consideration, pp 64-67, below.

4 It has not been found easy to describe by a single epithet both the oral and the written contract, each of which has to be sharply distinguished from the so-called 'contract under seal'. In the earlier law the word 'parol' was used, see *Rann v Hughes* (1778) 7 Term Rep 350, n, p 80, below; but it is scarcely apt to designate written as well as oral agreements, and it has generally been replaced in the vocabulary of the modern English lawyer by the word 'simple', here adopted. Williston (*Contracts* s 12) and the American Law Institute Restatement of the Law of Contracts s 11, prefer 'informal'.

normal type of contract, it has long been the tradition of English lawyers to speak of 'contracts under seal', where a person undertakes an obligation by expressing his intention on paper or parchment, attaching his seal and delivering it 'as his deed'.[5] The phrase is misleading. It is true that, in the early law, the obligation engendered by the affixing of a seal was regarded as essentially 'conventional' or contractual.[6] It is also true that, in the modern law, the deed plays its part. On the one hand, it may still be necessary, in a few contracts made with corporations before 1960, that they should have been concluded by a document under seal.[7] On the other hand, if an individual wishes to bind himself by a gratuitous promise, the rule that all simple contracts require to be supported by the presence of consideration forbids him to implement his intention otherwise than by deed. If he complies with this formality, he will doubtless be made to pay damages should be break his promise. But he is thus bound, not because he has made a contract, but because he has chosen to act within the limits of a prescribed formula. The idea of bargain, fundamental to the English conception of contract, is absent. So far, indeed, is his liability removed from the normal notion of agreement that it has even been held that a deed may create a legal duty in favour of a beneficiary who is unaware of its existence.[8] The affinity of the deed is with gift, not with bargain, and it is fair to say that the so-called 'contract by deed' has little in common with agreement save its name and its history, and that it does not seem to require detailed examination in a modern book upon the law of contract. It is fair to add however that many agreements which have all the ingredients necessary for a binding simple contract are in practice made by deed. This is particularly true of buildings and engineering contracts, where all the standard forms commonly in use envisage the use of a deed. The main practical reason for this appears to be that the limitation period for contracts by deed is twelve years as opposed to the six years for simple contracts.[9] This is particularly important where, as in a building contract, the contract may easily be broken in a way which is not readily apparent to the other party.

The common law has long stressed the commercial flavour of its contract. An Englishman is liable, not because he has made a promise, but because he has made a bargain.[10] Behind all forms of contract, no doubt, lies the basic idea of assent. A contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done. While such must be, in some degree, the standpoint of every legal system, the common law, preoccupied with bargain, lays peculiar emphasis upon external appearance. As long ago as 1478 and in the context of sale Chief Justice Brian proclaimed 'that the intent of a man cannot be tried, for the Devil himself knows not the intent of a man',[11] and in the early years of the nineteenth

5 Any requirement of a seal is removed by Law of Property (Miscellaneous Provisions) Act 1989, s 1 but the possibility of contracting by deed remains.

6 P 2, above.

7 P 248, below.

8 See *Fletcher v Fletcher* (1844) 4 Hare 67; *Xenos v Wickham* (1866) LR 2 HL 296; and *Lady Naas v Westminster Bank Ltd* [1940] AC 366, [1940] 1 All ER 485.

9 See p 708, below.

10 This was the firm view of the original authors but it must be confessed that there are other views. For a valuable survey see Coote 1 JCL 91, 183.

11 *Anon* (1477) YB 17 Edw 4, fo 1, pl 2.

century this position was re-asserted by judge and jurist alike. Lord Eldon protested that his task was not 'to see that both parties really meant the same thing, but only that both gave their assent to that proposition which, be it what it may, de facto arises out of the terms of their correspondence'.[12] So, too, Austin, after saying that 'when we speak of the intention of contracting parties, we mean the intention of the promisor or the intention of the promisee', added 'or rather, the sense in which it is to be inferred from the words used or from the transaction or from both that the one party gave and the other received it'.[13] In the common law, therefore, to speak of 'the outcome of consenting minds' or, even more mystically, of *consensus ad idem* is to mislead by adopting an alien approach to the problem of agreement. The function of an English judge is not to seek and satisfy some elusive mental element but to ensure, as far as practical experience permits, that the reasonable expectations of honest men are not disappointed. This is often compendiously expressed by saying that English law adopts an objective test of agreement.[14]

It is for this reason that the title of the present chapter is not 'Agreement' but 'The phenomena of agreement', concerned not with the presence of an inward and mental assent but with its outward and visible signs.

2 Offer and acceptance: offer[15]

In order to determine whether, in any case given, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm 'offer' and if the other may likewise be taken to have 'accepted' that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases.

It must be emphasised however that there are cases where the courts will certainly hold that there is a contract even though it is difficult or impossible to analyse the transaction in terms of offer and acceptance,[16] for as Lord Wilberforce has said:[17]

12 *Kennedy v Lee* (1817) 3 Mer 441.

13 Austin, Lect XXI, n 90.

14 However although virtually all common lawyers agree that an objective test of agreement prevails there are significant differences as to how the objective test should be formulated and applied, see Spencer [1973] CLJ 104; Samek 52 Can Bar Rev 351; Howarth 100 LQR 265; Goddard 7 LS 268; Vorster 103 LQR 274; De Moor 106 LQR 632. See the (possibly differing) views expressed by Lord Brandon, Lord Diplock and Lord Brightman in *The Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34 and the consideration of these views by Robert Goff LJ in *The Leonidas D* [1983] 3 All ER 737, [1984] 1 WLR 1. An illuminating discussion of whether Anglo-American law was wise so wholeheartedly to accept the objective test will be found in the opinion of Frank J in *Ricketts v Pennsylvania Rly Co* 153 F 2d 757 (1946). A classic example of objectivity is *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158, CA. See also Steyn LJ in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27; *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 4 All ER 942.

15 Winfield 55 LQR 499; Kahn 72 SALJ 246.

16 See eg *Clarke v Earl of Dunraven and Mount-Earl, The Satanita* [1897] AC 59, discussed at p 69, below.

17 *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 at 167, [1974] 1 All ER 1015 at 1020.

> English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

The first task of the plaintiff is to prove the presence of a definite offer made either to a particular person or, as in advertisements of rewards for services to be rendered, to the public at large. In the famous case of *Carlill v Carbolic Smoke Ball Co*[18] it was strenuously argued that an effective offer cannot be made to the public at large. In that case:

> The defendants, who were the proprietors of a medical preparation called 'The Carbolic Smoke Ball', issued an advertisement in which they offered to pay £100 to any person who succumbed to influenza after having used one of their smoke balls in a specified manner and for a specified period. They added that they had deposited a sum of £1,000 with their bankers 'to show their sincerity'. The plaintiff, on the faith of the advertisement, bought and used the ball as prescribed, but succeeded in catching influenza. She sued for the £100.

The defendants displayed the utmost ingenuity in their search for defences. They argued that the transaction was a bet within the meaning of the Gaming Acts, that it was an illegal policy of insurance, that the advertisement was a mere 'puff' never intended to create a binding obligation, that there was no offer to any particular person, and that, even if there were, the plaintiff had failed to notify her acceptance. The Court of Appeal found no difficulty in rejecting these various pleas. Bowen LJ effectively destroyed the argument that an offer cannot be made to the world at large.

> It was also said that the contract is made with all the world—that is, with everybody, and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? ... Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.

Offer distinguished from invitation to treat

An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not

18 [1892] 2 QB 484; affd [1893] 1 QB 256. For a fascinating account of the setting of this case, see Simpson 14 Journal of Legal Studies 345. An example of the Smoke Ball itself may be seen at Dairyland, Tresillian Barton near Newquay, Cornwall. It should be noted that the plaintiff bought the smoke ball not from the defendants but from a chemist. In other cases English law has been reluctant to discover a contract between consumer and manufacturer where the consumer has bought from a retailer in reliance on the manufacturer's advertisements. *Lambert v Lewis* [1982] AC 225, [1981] 1 All ER 1185. Cf. *Bowerman v ABTA Ltd* [1995] NLJR 1815. See Borrie and Diamond *The Consumer, Society and the Law* (4th edn, 1981) pp 106-110. Cf Legh-Jones [1969] CLJ 54.

in time result. He must be prepared to implement his promise, if such is the wish of the other party. The distinction is sometimes expressed in judicial language by the contrast of an 'offer' with that of an 'invitation to treat'. Referring to the advertisement in the *Carlill* case, Bowen LJ said:

> It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer.

The application of this distinction has long agitated the courts. It arose first in the law of auctions, where the problem may appear in at least three forms.

First, is the auctioneer's request for bids a definite offer which will be converted into an agreement with the highest bidder, or is it only an attempt to 'set the ball rolling'? The latter view was accepted in *Payne v Cave*.[19] The bid itself constitutes the offer which the auctioneer is free to accept or to reject. In accordance with this principle the Sale of Goods Act 1979, provides that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and that until such announcement is made any bid may be retracted.[20]

Secondly, does an advertisement that specified goods will be sold by auction on a certain day constitute a promise to potential bidders that the sale will actually be held? A negative answer was given to this question in *Harris v Nickerson*.[1] In that case the plaintiff failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was ultimately cancelled. His claim was condemned as 'an attempt to make a mere declaration of intention a binding contract'. In the words of Blackburn J:

> This is certainly a startling proposition and would be excessively inconvenient if carried out. It amounts to saying that anyone who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses.

Thirdly, does an advertisement that the sale will be *without reserve* constitute a definite offer to sell to the highest bidder? A Scottish court has denied that this is so, holding, in accordance with the general rule, that no agreement is complete unless and until the auctioneer acknowledges the acceptance of the bid by the fall of his hammer.[2] The point was long undecided in England, though it was the subject of *obiter dicta* in *Warlow v Harrison*.[3] The action in that case failed both in the Queen's Bench and in the Court of Exchequer Chamber because the plaintiff pleaded his claim upon an obviously incorrect ground. But three of the judges in the Exchequer Chamber were of opinion that he would succeed if he brought a fresh action pleading that the auctioneer by his advertisement had implicitly pledged himself to sell to the highest bidder. In the view of these judges, two separate questions must be disentangled. On the one hand, had a contract of sale been concluded, and, if so, at what moment of time? Since the advertisement was not itself an offer to sell the goods but only an 'invitation to treat', the plaintiff's bid was not an

19 (1789) 3 Term Rep 148.
20 Sale of Goods Act 1979, s 57(2).
1 (1873) LR 8 QB 286.
2 *Fenwick v Macdonald, Fraser & Co* 1904 6 F (Ct of Sess) 850.
3 (1859) 1 E & E 309; see *Johnston v Boyes* [1899] 2 Ch 73, and *Rainbow v Howkins & Sons* [1904] 2 KB 322.

acceptance and did not constitute a sale. Was there, on the other hand, a binding promise that the sale should be without reserve? The majority of the Exchequer Chamber were prepared to discover such a promise. The auctioneer in his advertisement had made a definite offer to this effect, and the plaintiff, by making his bid in reliance upon it, had accepted the offer. This constituted a distinct and independent contract, and for its breach an action would lie. This view was described by Blackburn J in *Harris v Nickerson*[4] as resting upon 'very plausible grounds'. But it was not universally accepted. It is indisputable that the mere advertisement of an auction, without further qualification, is an invitation to treat and not an offer. The auction need not be held, and prospective purchasers have no legal complaint if they have wasted their time and money in coming to the sale rooms. But, if the *dicta* in *Warlow v Harrison* are correct, the addition to the advertisement of the two words 'without reserve' converts it into an offer, presumably to the public at large, that the sale will in fact be subject to no reserve price. If, in these circumstances, the sale is actually held and a prospective purchaser makes a bid, he accepts the offer of a sale 'without reserve', and the auctioneer, if he then puts a reserve price upon any of the lots, is liable to an action for breach of contract. But if the auctioneer were to refuse to hold any sale at all, he would not be breaking any binding promise and could not be sued.[5]

The dispute was finally settled by the decision of the Court of Appeal in *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd.*[6] The court had no doubt that an auctioneer who stated that an auction was without reserve entered into a collateral contract with the highest bidder.[7]

Simular reasoning was used in the decision of the House of Lords in relation to the analogous situation of contract by tender in *Harvela Investments Ltd v Royal Trust Co of Canada Ltd.*[8]

The first defendants held some 12% of the shares of a company as trustees of a settlement. They wished to sell the shares. The two obvious buyers were the plaintiffs who owned 43% of the shares and the second defendants who owned 40%, since if either bought the shares they would obtain control of the company. The first defendants decided to dispose of the shares by sealed competitive tender and sent identical telexes to the plaintiffs and the second defendants inviting tenders and stating 'We confirm that if the offer made by you is the highest offer received by us we bind ourselves to accept such offer providing that such offer complies with the terms of this telex'. The plaintiffs bid $2,175,000. The second defendants bid $2,100,000 or '$100,000 in excess of any other offer which you may receive which is expressed as a fixed monetary amount whichever is higher'. The first defendants accepted the second defendants' offer.

The House of Lords held that the first defendants were legally obliged to accept the plaintiff's offer. In coming to this conclusion their Lordships

4 (1873) LR 8 QB 286 at 288.

5 See Slade 68 LQR 238, 69 LQR 21. Cf Gower 68 LQR 467. Support for the two contract analysis can be found in *Tully v Irish Land Commission* (1961) 97 ILT 174.

6 [2001] 1 All ER 944, [2000] 1 WLR 1962; Meisel 64 MLR 468.

7 Since it cannot be known at the time that a bid is made that it will be the highest bid, it must be possible to argue that there is a collateral contract with all who bid or even with all who attend the auction. Claimants other than the highest bidder will usually not be able to show loss however.

8 [1986] AC 207, [1985] 2 All ER 966.

analysed the problem in a very illuminating way and adopted a two contract approach. The telex was treated as an offer of a unilateral contract to accept the highest bid which would be followed by a bilateral contract with the highest bidder. It was further held that a referential bid such as the second defendant's was inconsistent with an obligation to accept the higher of two sealed bids.

Instances of invitation to treat

The distinction between an offer and an invitation to treat has been applied in other everyday practices. The issue, for instance, of a circular or catalogue advertising goods for sale is a mere attempt to induce offers, not an offer itself.[9] Lord Herschell has exposed the inconvenience of a contrary interpretation:

> The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.[10]

In *Partridge v Crittenden*[11] the appellant had inserted in a periodical entitled *Cage and Aviary Birds* a notice 'Bramblefinch cocks and hens, 25s each'. It appeared under the general heading of 'Classified Advertisements' and the words 'offer for sale' were not used. He was charged with unlawfully offering for sale a wild live bird contrary to the provisions of the Protection of Birds Act 1954, and was convicted. The divisional court quashed the conviction. There had been no 'offer for sale'. Lord Parker said:[12]

> I think that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale.

A not dissimilar question long remained undecided. If goods are exhibited in a shop-window or inside a shop with a price attached, does this constitute an offer to sell at that price? Parke B at least felt no doubt about the matter, for, when counsel suggested that: 'If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked', the learned judge peremptorily cut him short with the reply: 'No; if you do, he has a right to turn you out.'[13] This view was confirmed in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.*[14]

> The defendants adapted one of their shops to a 'self-service' system. A customer, on entering, was given a basket, and having selected from the shelves the articles he required, put them in the basket and took them to the cash desk. Near the desk was a registered pharmacist who was authorised, if necessary, to stop a customer from removing any drug from the shop.

9 Cf *Spencer v Harding* (1870) LR 5 CP 561.
10 *Grainger & Son v Gough* [1896] AC 325 at 334. A similar rule has been applied to the notice of a scholarship: *Rooke v Dawson* [1895] 1 Ch 480.
11 [1968] 2 All ER 421, [1968] 1 WLR 1204.
12 Ibid at 424 and 1209, respectively.
13 *Timothy v Simpson* (1834) 6 C & P 499 at 500.
14 [1952] 2 QB 795, [1952] 2 All ER 456; affd [1953] 1 QB 401, [1953] 1 All ER 482.

The court had to decide whether the defendants had broken the provisions of section 18 of the Pharmacy and Poisons Act 1933, which made it unlawful to sell any listed poison 'unless the sale is effected under the supervision of a registered pharmacist'. The vital question was at what time the 'sale' took place, and this depended in turn on whether the display of the goods with prices attached was an offer or an invitation to treat. According to the plaintiffs, it was an offer, accepted when the customer put an article into his basket, and, if this article was a poison, it was therefore 'sold' before the pharmacist could intervene. According to the defendants, the display was only an invitation to treat. An offer to buy was made when the customer put an article in the basket, and this offer the defendants were free to accept or to reject. If they accepted, they did so only when the transaction was approved by the pharmacist near the cash-desk. Lord Goddard, at first instance, had no hesitation in deciding that the display was only an invitation to treat so that the law had not been broken, and the Court of Appeal upheld his decision and adopted his reasoning.[15]

> The transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that person can insist on buying any article by saying 'I accept your offer'. I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes'. That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer.' Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.

In *Fisher v Bell*[16] Lord Parker treated the point as beyond dispute.

> It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract.[17]

15 [1952] 2 QB 795 at 802, [1952] 2 All ER 456 at 458, 459.

16 [1961] 1 QB 394 at 399, [1960] 3 All ER 731 at 733.

17 Although the rule is well settled, its application to self-service stores has been criticised. See Unger 16 MLR 369; cf Montrose 4 Am J Comp Law 235. Display of goods in a self-service store was held an offer in *Lasky v Economy Grocery Stores* 319 Mass 224, 65 NE 2d 305 (1946) and display of deck chairs on a beach an offer to hire in *Chapelton v Barry U D C* [1940] 1 KB 532, [1940] 1 All ER 356. In practice the question has usually arisen in the context of a criminal statute making it an offence to 'offer' goods of a prescribed description for sale. Display of goods in a shop window may well fall within the mischief of such a statute and a well drafted statute may contain a special wider definition of 'offer'. See eg Trade Descriptions Act 1968, s 6. See further on the application of offer and acceptance to criminal offences, Smith [1972] B] CLJ 197 at 198-201, 204-208. The orthodox contract analysis of a self-service store transaction presents recurrent problems in the criminal law. See eg *Lacis v Cashmarts* [1969] 2 QB 400; *Pilgram v Rice-Smith* [1977] 2 All ER 658, [1977] 1 WLR 671; Williams [1977] CLJ 62.

It is surprising that in other matters of daily life the legal position remains doubtful. If a passenger boards a bus, is he accepting an offer of carriage or is he himself making an offer in response to an invitation to treat? In *Wilkie v London Passenger Transport Board*,[18] Lord Greene thought that a contract is made when an intending passenger 'puts himself either on the platform or inside the bus'. The opinion was obiter;[19] but if it represents the law it would seem that the corporation makes an offer of carriage by running the bus and that the passenger accepts the offer when he gets properly on board. The contract would then be complete even if no fare is yet paid or ticket given.[20]

Negotiations for the sale of land present no difference of principle. But they may involve the adjustment of so many questions of detail that the courts will require cogent evidence of an intention to be bound before they will find the existence of an offer capable of acceptance. Thus in *Harvey v Facey*:[1]

> ... the plaintiffs telegraphed to the defendants, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' The defendants telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title-deeds.' The rest was silence.

It was held by the Judicial Committee of Privy Council that there was no contract. The second telegram was not an offer, but only an indication of the minimum price if the defendants ultimately resolved to sell, and the third telegram was therefore not an acceptance. So, too, in *Clifton v Palumbo*,[2] the plaintiff and the defendant were negotiating for the sale of a large, scattered estate. The plaintiff wrote to the defendant:

> I ... am prepared to offer you or your nominee my Lytham estate for £600,000 ... I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.

The Court of Appeal held that this letter was not a definite offer to sell, but a preliminary statement as to price, which—especially in a transaction of such magnitude—was but one of the many questions to be considered. In the words of Lord Greene:[3]

> There is nothing in the world to prevent an owner of an estate of this kind contracting to sell it to a purchaser, who is prepared to spend so large a sum of money, on terms written out on a half sheet of note paper of the most informal description and even, if he likes, on unfavourable conditions. But I think it is legitimate, in approaching the construction of a document of this kind, containing phrases and expressions of doubtful significance, to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description couched in such terms, is remote. If they have done it, they have done it, however unwise and however unbusinesslike it may be. The question is, Have they done it?

18 [1947] 1 All ER 258.
19 The Court of Appeal held on the facts that the plaintiff had not made a contract with the Board, but was only a licensee. See also p 184, below.
20 In practice these questions will not be governed solely by the law of contract. See Public Passenger Vehicles Act 1981 and regulations made thereunder.
1 [1893] AC 552.
2 [1944] 2 All ER 497.
3 Ibid at 499.

Both *Harvey v Facey* and *Clifton v Palumbo* were distinguished in *Bigg v Boyd Gibbins Ltd.*[4] The Court of Appeal, on the facts before them, here held that the parties were not still negotiating, but had agreed on a price and made a contract. After reading the relevant letters, Russell LJ said that he could not 'escape the view that the parties would regard themselves at the end of the correspondence, quite correctly, as having struck a bargain for the sale and purchase of the property'.[5]

The distinction between offer and invitation to treat is neatly illustrated by the case of *Gibson v Manchester City Council.*[6]

In September 1970 the council adopted a policy of selling council houses to council tenants. On 16 February 1971 the City Treasurer wrote a letter to Mr Gibson stating that the council 'may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180 (freehold)'. The letter invited Mr Gibson to make a formal application which he did. In the normal course, this would probably have been followed by the preparation and exchange of contracts but before that process had been completed, control of the council changed hands as a result of the local government elections of May 1971. The policy of selling council houses was reversed and the council decided only to complete those transactions where exchange of contracts had taken place. Mr Gibson claimed that a binding contract had come into existence but the House of Lords held that the Treasurer's letter of 10 February was at most an invitation to treat and that therefore Mr Gibson's application was an offer and not an acceptance.[7]

3 Offer and acceptance: acceptance

Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer. it must again be emphasised that the phrase 'offer and acceptance', though hallowed by a century and a half of judicial usage,[8] is not to be applied as a talisman, revealing, by a species of esoteric art, the presence of a contract. It would be ludicrous to suppose that businessmen couch their communications in the form of a catechism or reduce their negotiations to such a species of interrogatory as was formulated in the Roman *stipulatio.* The rules which the judges have elaborated from the premise of offer and acceptance are neither the rigid deductions of logic nor the inspiration of natural justice. They are only presumptions, drawn from experience, to be applied in so far as they serve the ultimate object of establishing the phenomena of agreement, and their application may be observed under two heads, (a) the fact of acceptance and (b) the communication of acceptance.

4 [1971] 2 All ER 183, esp. at 185, [1971] 1 WLR 913. See also *Storer v Manchester City Council* [1974] 3 All ER 824, [1974] 1 WLR 1403.

5 Cf Prichard 90 LQR 55.

6 [1979] 1 All ER 972, [1979] 1 WLR 294.

7 The majority of the Court of Appeal had taken the opposite view [1978] 2 All ER 583, [1978] 1 WLR 520. This was partly on the basis 'that there is no need to look for a strict offer and acceptance', partly on the basis that the court was dealing with a policy decision by a local council and not with an alleged contract between private individuals, and partly that Mr Gibson had relied on the council's policy being unchanged and spent money on improving the house. The factual basis for the third ground was denied in the House of Lords. Cf *Duttons Brewery Ltd v Leeds City Council* (1982) 43 P & CR 160.

8 See *Adams v Lindsell* (1818) 1 B & Ald 681; Simpson 91 LQR 247 at 258-262.

A THE FACT OF ACCEPTANCE

Agreement may be inferred from conduct

Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words or documents that have passed between them or may be inferred from their conduct. The task of inferring an assent and of fixing the precise moment at which it may be said to have emerged is one of obvious difficulty, particularly when the negotiations between the parties have covered a long period of time or are contained in protracted or desultory correspondence.

This may be observed in the case of *Brogden v Metropolitan Rly Co*:[9]

> Brogden had for years supplied the defendant company with coal without a formal agreement. At length the parties decided to regularise their relations. The company's agent sent a draft form of agreement to Brogden, and the latter, having inserted the name of an arbitrator in a space which had been left blank for this purpose, signed it and returned it, marked 'approved'. The company's agent put it in his desk and nothing further was done to complete its execution. Both parties acted thereafter on the strength of its terms, supplying and paying for the coal in accordance with its clauses, until a dispute arose between them and Brogden denied that any binding contract existed.

The difficulty was to determine when, if ever, a mutual assent was to be found. It could not be argued that the return of the draft was an acceptance of the company's offer, since Brogden, by inserting the name of an arbitrator, had added a new term, which the company had had no opportunity of approving or rejecting. But assuming that the delivery of the document by Brogden to the company, with the addition of the arbitrator's name, was a final and definite offer to supply coal on the terms contained in it, when was that offer accepted? No further communication passed between the parties, and it was impossible to infer assent from the mere fact that the document remained without remark in the agent's desk. On the other hand, the subsequent conduct of the parties was explicable only on the assumption that they mutually approved the terms of the draft. The House of Lords held that a contract came into existence either when the company ordered its first load of coal from Brogden upon these terms or at least when Brogden supplied it.[10]

Counter-offer is a final rejection of original offer

Whatever the difficulties, and however elastic their rules, the judges must, either upon oral evidence or by the construction of documents, find some act from which they can infer the offeree's intention to accept, or they must refuse to admit the existence of an agreement. This intention, moreover, must be conclusive. It must not treat the negotiations between the parties as still open to the process of bargaining. The offeree must unreservedly assent to the exact terms proposed by the offeror. If, while purporting to accept the offer as a whole, he introduces a new term which the offeror has not had the chance of examining, he is in fact merely making a counter-

9 (1877) 2 App Cas 666.

10 See also *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428.

offer. The effect of this in the eyes of the law is to destroy the original offer. Thus in *Hyde v Wrench*:[11]

> The defendant on 6 June offered to sell an estate to the plaintiff for £1,000. On 8 June, in reply, the plaintiff made an offer of £950, which was refused by the defendant on 27 June. Finally, on 29 June, the plaintiff wrote that he was now prepared to pay £1,000.

It was held that no contract existed. By his letter of 8 June the plaintiff had rejected the original offer and he was no longer able to revive it by changing his mind and tendering a subsequent acceptance. A counter-offer may come upon the scene not bearing its badge upon its sleeve but dressed as an 'acceptance'. In principle to be effective an acceptance must accept all the terms contained in the offer. In practice however, many so called 'acceptances' while purporting to accept, also attempt to introduce new terms. Such an acceptance is in fact a counter-offer and creates no contract.[12]

Whether a communication amounts to a counter-offer or not is sometimes difficult to determine. The offeree, for example, may reply to the offer in terms which leave it uncertain whether he is making a counter-offer or merely seeking further information before making up his mind. A mere request for information obviously does not destroy the offer. A relevant and instructive case is *Stevenson v McLean*:[13]

> The defendant offered on Saturday to sell to the plaintiffs 3,800 tons of iron 'at 40s nett cash per ton, open till Monday'. Early on Monday the plaintiffs telegraphed to the defendant: 'Please wire whether you would accept 40 for delivery over two months, or if not longest limit you would give.' No reply was received, so by a telegram sent at 1.34 p.m. on the same day the plaintiffs accepted the offer to sell at 40s cash. Meanwhile the defendant sold the iron to a third person and informed the plaintiffs of this in a telegram despatched at 1.25 pm. The telegrams crossed.

The plaintiffs sued to recover damages for breach of contract. They would be entitled to succeed if the original offer was still open when they sent their telegram at 1.34 pm, for, as will be seen later, an acceptance is complete and effective at the moment when a letter is posted or a telegram is handed in to the post office. But was the first telegram sent by the plaintiffs a counter-offer which destroyed the offer, or was it an innocuous request for information? It might be regarded either as the proposal of a new term or as an inquiry put forward tentatively in the hope of inducing better terms but without any intention to prejudice the position of the plaintiffs if they ultimately decided to accept the original offer. Either construction was possible. In the result Lush J held that the plaintiffs had not made a counter-offer, but had addressed to the defendant 'a mere inquiry, which should have been answered and not treated as a rejection of the offer'.[14] Another way of testing whether the first Monday telegram was a counter offer would be to ask whether the defendant

11 (1840) 3 Beav 334; and see *Brogden v Metropolitan Rly Co*, above.
12 *Jones v Daniel* [1894] 2 Ch 332. This principle is important in relation to the 'battle of the forms', discussed, pp 178-179, below.
13 (1880) 5 QBD 346.
14 Ibid at 350.

could have created a contract by accepting it. It is clear that at this stage the plaintiffs had not sufficiently shown that they agreed.

A conditional assent to an offer does not constitute acceptance. A man who, though content with the general details of a proposed transaction, feels that he requires expert guidance before committing himself to a binding obligation, often makes his acceptance conditional upon the advice of some third party, such as a solicitor. The result is that neither party is subject to an obligation. A common example of this in everyday life occurs in the case of a purchase or a lease of land. Here it is the common practice to incorporate the terms, after they have been settled, in a document which contains some such incantation as 'subject to contract', or 'subject to a formal contract to be drawn up by our solicitors'. Unless there is cogent evidence of a contrary intention, the courts construe these words so as to postpone the incidence of liability until a formal document has been drafted and signed.[15] As regards enforceability the first document is not worth the paper it is written on. It is merely a proposal to enter into a contract—a transaction which is a legal nullity—and it may be disregarded by either party with impunity. Until the completion of the formal contract both parties enjoy a *locus paenitentiae*.[16] In the case of *Branca v Cobarro*[17] the court was presented with a delicate question of construction:

> A vendor agreed to sell the lease and goodwill of a mushroom farm on the terms of a written document which was declared to be 'a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed'.

The Court of Appeal held that, by using the word 'provisional', the parties had intended the document to be an agreement binding from the outset, though subsequently to be replaced by a more formal contract. It must therefore be in each case a question of construction whether the parties intended to undertake immediate, if temporary, obligations, or whether they were suspending all liability until the conclusion of formalities. Have they, in other words, made the operation of their contract conditional upon the execution of a further document, in which case their obligations will be suspended, or have they made an immediately binding agreement, though one which is later to be merged into a more formal contract? However the use of the formula 'subject to contract' creates a strong presumption that the parties do not intend an immediately binding contract.

The usual English practice of making agreements for the sale of land 'subject to contract' normally operates to protect the buyer since it provides time for investigation of title and survey of the premises. During the early 1970s however in a period of rapidly increasing house prices it came to appear unfavourable to buyers since it allowed the seller to 'gazump', that is to refuse to sign the formal contract unless the buyer would agree to an increased price.

15 For an exceptional case where the court found a contract despite the use of the expression 'subject to contract'. See *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, [1985] 1 WLR 721

16 *Winn v Bull* (1877) 7 ChD 29; *Chillingworth v Esche* [1924] 1 Ch 97; *Eccles v Bryant and Pollock* [1948] Ch 93, [1947] 2 All ER 865. *Munton v Greater London Council* [1976] 2 All ER 815, [1976] 1 WLR 649; *Derby & Co Ltd v ITC Pension Trust Ltd* [1977] 2 All ER 890. See the similar rule in Roman law, Inst iii, 23 pr.

17 [1947] KB 854, [1947] 2 All ER 101.

However a Law Commission report concluded that 'gazumping' was the product of short-term factors and that any change in the law or practice would not in general benefit buyers.[18]

Agreement may be inferred from observance of written terms

Upon the particular phrase 'subject to contract' the pressure of litigation has stamped a precise significance. In other cases it is often difficult to decide if the language used justifies the inference of a complete and final agreement.[19] The task of the courts is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow it, and the question of interpretation may thus be stated. Is the preparation of a further document a condition precedent to the creation of a contract or is it an incident in the performance of an already binding obligation? As in all questions of construction, the comparison of decided cases is apt to confuse rather than to illuminate. It would appear, however, that, whenever there is evidence that the parties have acted upon the faith of a written document, the courts will prefer to assume that the document embodies a definite intention to be bound and will strive to implement its terms.[20] Such, at least, will be the instinct of a judge in a commercial transaction, where the parties are engaged in a particular trade and may be taken to have accepted its special and familiar usages as the background of their bargain. Thus in *Hillas & Co Ltd v Arcos Ltd*:[1]

> Hillas & Co had agreed to buy from Arcos Ltd, '22,000 standards of softwood goods of fair specification over the season 1930'. The written agreement contained an option to buy 100,000 in 1931, but without particulars as to the kind or size of timber or the manner of shipment. No difficulties arose on the original purchase for 1930, but, when the buyers sought to exercise the option for 1931, the sellers took the point that the

18 Law Com no 65. The 'subject to contract' practice is quite independent of any legal requirement that a contract for the sale of land should be made or evidenced in writing though the two may interact; see *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, discussed at pp 233-234, below. For further discussion see Clark [1984] Conv 173, 251. Other proposals to avoid the evils of gazumping have continued to be discussed . Some would simply require changes in the practice of conveyancing solicitors. Gazumping would be less extensive if the time gap between the informal deal between buyer and seller and the formal contract were shorter as it is in many systems; other proposals such as requiring the seller to have the house surveyed before he puts it on the market would require legislation. Most proposals would not involve any change in the general law of contract as stated above.

19 It would be a mistake to assume that the use of the words 'subject to' always indicate an inchoate agreement. So an arrangement to sell land 'subject to planning permission' may be a binding agreement, conditional on planning permission being obtained. See eg *Batten v White* (1960) 12 P & CR 66. Such a condition may impose an obligation on one or both parties to do his best to bring the condition about, eg *Martin v Macarthur* [1963] NZLR 403 ('subject to satisfactory finance'). Cf *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775. See further p 163-164, below.

20 *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30. *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 All ER 155 suggests that once performance is complete there must be a contract and similarly *G Percy Trentham v Archital Luxfer* [1993] 1 Lloyd's Rep 25 at 27 per Steyn LJ but Cf. *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504; McKendrick (1988) 2 Oxford JLS 197.

1 (1932) 38 Com Cas 23.

failure to define these various particulars showed that the clause was not intended to bind either party, but merely to provide a basis for future agreement.

The House of Lords held that the language used, interpreted in the light of the previous course of dealing between the parties, showed a sufficient intention to be bound. Lord Tomlin said:

> The problem for a court of construction must always be so to balance matters that, without the violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.[2]

Where, on the other hand, there is no particular trade in question and no familiar business practice to clothe the skeleton of the agreement, the task of spelling out a common intention from meagre words may prove too speculative for the court to undertake. Thus in *Scammell v Ouston*:[3]

> Ouston wished to acquire from Messrs Scammell a new motor-van on hire-purchase terms. After a considerable correspondence, Ouston gave a written order for a particular type of van, which included the words—'This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years.' The order was accepted by Messrs Scammell in general terms, but the hire-purchase terms were never specifically determined. It later appeared in evidence that there was a wide variety of hire-purchase agreements and that there was nothing to indicate which of them the parties favoured.

Messrs Scammell later refused to provide the van, and Ouston sued for damages for non-delivery. Messrs Scammell pleaded that no contract had ever been concluded, and the House of Lords accepted this view.

Lord Wright[4] said that there were two grounds on which he must hold that no contract had been made:

> The first is that the language used was so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention. The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no

2 Ibid at 29. The earlier decision of the House of Lords in *May and Butcher v R*, decided in 1929, but not reported until 1934, ([1934] 2 KB 17n) presents some difficulties of reconciliation. But it would appear from the judgments of the Court of Appeal in *Foley v Classique Coaches Ltd* [1934] 2 KB 1, and in *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16, that the view expressed by the House of Lords in *Hillas v Arcos* offer the better guide in what must always be the difficult task of discovering the intention of the parties. See also *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297.

3 [1941] AC 251, [1941] 1 All ER 14. Contrast *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30.

4 [1941] AC 251 at 268-269, [1941] 1 All ER 14 at 25-26.

> contract. Such a position is not often found. But I think that it is found in this case.[5] My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. ...
>
> But I think the other reason, which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be.

A comparison of these two cases is instructive. In *Hillas v Arcos*, though the document itself left a number of points undetermined, these could be settled by referring to the earlier relations of the parties and to the normal course of the trade. In *Scammell v Ouston* not only were the *lacunæ* themselves more serious but there was nothing either in the previous dealings of the parties or in accepted business practice which might help to supply them. Vital questions had originally been left unanswered and no subsequent negotiations ever settled them. In these circumstances the judges, with the best will in the world, could not invent a contract which the parties had been too idle to make for themselves. At the same time, as Lord Wright pointed out, the judges will always seek to implement and not to defeat reasonable expectations. They will follow, if this is at all possible, the example of *Hillas v Arcos* rather than that of *Scammell v Ouston*.[6] In particular they will not be deterred from proclaiming the existence of a contract merely because one of the parties, after agreeing in substance to the proposals of the other, introduces a phrase or clause which, when examined, is found to be without significance. If there appears to be agreement on all essential matters, either on the face of the documents or by praying in aid commercial practice or the previous course of dealing between the parties, the court will ignore a subsidiary and meaningless addendum. The case of *Nicolene Ltd v Simmonds*[7] illustrates this anxiety of the judges to support the assumptions of sensible men if this is in any way possible.

> The plaintiffs wrote to the defendant offering to buy from him a large quantity of steel bars. The defendant replied in writing that he would be happy to supply them and thanking the plaintiffs 'for entrusting this contract to me'. He added: 'I assume that we are in agreement that the usual conditions of acceptance apply.' The plaintiffs acknowledged this letter and said that they awaited the invoice for the goods, but made no reference to the 'usual conditions of acceptance'. The defendant failed to deliver the goods and the plaintiffs sued for breach of contract.

The defendant argued that, as there had been no explicit agreement on the 'conditions of acceptance', there was no concluded contract. His own letter, at the highest, was only a counter-offer which had not been accepted. The Court of Appeal dismissed the argument and gave judgment for the plaintiffs. It

5 See *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 625.
6 See *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803; and *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505; compare *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426.
7 [1953] 1 QB 543, [1953] 1 All ER 822.

appeared that there were no 'usual conditions of acceptance' to which either party could refer. The words were therefore meaningless and must be ignored.

Denning LJ said:[8]

> It would be strange indeed if a party could escape from every one of his obligations by inserting a meaningless exception from some of them ... You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free.

Hodson LJ said:[9]

> I do not accept the proposition that, because some meaningless words are used in a letter which contains an unqualified acceptance of an offer, those meaningless words must, or can, be relied on by the acceptor as enabling him to obtain a judgment in his favour of the basis that there has been no acceptance at all.

Acceptance may be retrospective

The inclination of judges, whenever possible and especially in commercial transactions, to find the existence of a contract is further evident in their readiness to assume that the acceptance of an offer may have a retrospective effect. It may then serve to clothe with legal force the conduct of parties who have acted on the faith of this assumption. Few such cases, indeed, are to be found in the reports. But there seems no reason to doubt that in law as in common sense an acceptance may thus legitimate the past. The question was discussed by Megaw J in *Trollope and Colls Ltd v Atomic Power Constructions Ltd*:[10]

> Frequently in large transactions a written contract is expressed to have retrospective effect, sometimes lengthy retrospective effect; and this in cases where the negotiations on some of the terms have continued up to almost, if not quite, the date of the signature of the contract. The parties have meanwhile been conducting their transactions with one another, it may be for many months, on the assumption that a contract would ultimately be agreed on lines known to both the parties, though with the final form of various constituent terms of the proposed contract still under discussion. The parties have assumed that when the contract is made—when all the terms have been agreed in their final form—the contract will apply retrospectively to the preceding transactions. Often, as I say, the ultimate contract expressly so provides. I can see no reason why, if the parties so intend and agree, such a stipulation should be denied legal effect.

In the case under consideration there was no such express stipulation. But the parties had assumed that a contract would in due course be made, they had given orders and carried out work on this assumption and no other explanation of their conduct was feasible. The learned judge therefore imported into the contract, when ultimately made, a term that it should apply retrospectively to all that had been done in anticipation of it.

THE REQUIREMENT OF CERTAINTY

The cases discussed in the preceding few pages are all examples of the tensions created by the law's demand for a minimal degree of certainty before

8 Ibid at 551-552 and 824-825, respectively.

9 Ibid at 553 and 826, respectively. See also *Michael Richards Properties Ltd v Corpn of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416, where the words 'subject to contract' were struck out as being meaningless in the context.

10 [1962] 3 All ER 1035, especially at 1040, [1963] 1 WLR 333 at 339.

it will classify an agreement as a contract. Since most contracts are not negotiated by lawyers, it is all too easy for the contract makers to fail this test, particularly as legal and commercial perceptions of certainty may well diverge. So a lawyer would regard an agreement that goods are to be supplied at 'a reasonable price' as prima facie sufficiently certain but would have much more doubt about an agreement 'for a price to be agreed between us'. Many businessmen would be much happier with the second agreement than the first.

Although it is not possible to discover perfect consistency in this area, it is possible to identify certain commonly recurrent types of difficulty. First, the parties may have agreed to postpone the creation of the contract to some future date, which may never arise. The 'subject to contract'[11] cases are one example of this. Another is the 'letter of intent'.[12] This is a very commonly employed commercial device by which one party indicates to another that he is very likely to place a contract with him. A typical situation would involve a contractor who is proposing to tender for a large building contract and who would need to sub-contract, for example, the plumbing and electrical work. He would need to obtain estimates from the sub-contractors on which his own tender would, in part, be based but he would not wish to enter into a firm contract with them unless and until his tender was successful. Often he would send a 'letter of intent' to his chosen sub-contractors to tell them of their selection. More often than not such letters are so worded as not to create any obligation on either side but in some cases they may contain an invitation to commence preliminary work which at least creates an obligation to pay for that work.[13]

There are no doubt exceptional cases where the circumstances in which the letter of intent is to flower into a contract are expressed with sufficient precision to amount to a conditional contract.[14] By far the most important case on letters of intent is *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd.*[15]

In this case the defendants had been engaged as sub-contractors on a contract to build a bank in Saudi Arabia. The defendants were to fabricate the steelwork. The bank was of an unusual design being suspended within a steel lattice-work frame. There were requirements for nodes at the centre of the lattice-work. Apparently no-one in the United Kingdom had made such nodes before but the plaintiffs had experience of constructing similar nodes. The defendants approached the plaintiffs with a view to engaging them to make the nodes. The negotiations both as to the technical specification of the nodes and as to the terms of the contract were complex and lengthy.

On 21 February 1979 the defendants sent the plaintiffs a letter of intent. This stated their intention to place an order for the nodes at prices which had been quoted in an earlier telex from the plaintiffs. It proposed that the order be on the defendants' standard terms, which would, amongst other things, have placed unlimited liability on the plaintiffs for consequential loss in the

11 Pp 43-44, above.

12 The legal effect of 'letters of intent' is a problem for most legal systems. An international working group led by Professor Marcel Fontaine identified as many as 26 variant forms, Fontaine *Droit des Contrats Internationaux: Analyse et Redaction de Clauses* ch 1. See Furmston, Norisada and Poole, chapters 5-8.

13 *Turriff Construction Ltd v Regalia Knitting Mills Ltd* (1971) 222 Estates Gazette 169.

14 *Wilson Smithett and Cape (Sugar) Ltd v Bangladesh Sugar and Food Industries Corpn* [1986] 1 Lloyd's Rep 378.

15 [1984] 1 All ER 504 Ball 99 LQR 572.

event of delay. The plaintiffs made it clear that they were unwilling to contract on the defendants' terms. Nevertheless they went ahead with the construction of the nodes (amidst continuing discussion both as to technical and contractual matters) and by 28 December 1979 all but one of the nodes had been delivered. The final node was not delivered until 11 April 1980 owing to a national steel strike.

The plaintiffs sued for the value of the nodes. The defendants counterclaimed for damages for late delivery. Robert Goff J held that on these facts there was no contract since it was clear that the parties had never agreed on such important questions as progress payments and liability for late delivery. It followed that there could be no damages for late delivery since there was no contract to deliver. However, he held that the plaintiffs were entitled to payment on a *quantum meruit* basis[16] since they had done the work at the defendants' request and the defendants had accepted it.

Although on the precise facts of the case, this decision seems acceptable and perhaps even inevitable it leaves a number of questions in the air. It seems that since there was no contract either party was free at any time to abandon the project without telling the other party but this would be a commercially unacceptable result since each party was relying on the other at least to this extent. Indeed it may be thought odd that the plaintiffs should have done over £200,000 worth of work without any right to payment even for work already completed in the event of the defendants changing their mind. Perhaps this was a risk that they took by doing the work knowing that there was no contract—in the circumstances of the particular contract an acceptably small risk in commercial terms. Another difficulty concerns defects in the goods. Clearly since the buyers were not obliged to accept the goods at all, they were free to reject goods where the defect was apparent at the time of delivery. It is not clear, however, on what theory they could, if there was no contract, recover damages for goods accepted and later found to be defective.

The second difficulty is that the parties may have reserved some major questions such as price for future decision.[17] This is dangerous but not necessarily fatal. Indeed it is not uncommon for parties to contract on the basis that the price is to be fixed by one of them. This might appear uncertain but it is commonly assumed to be valid. So the contracts by which petrol companies agree to supply petrol to filling stations provide for the price to be that ruling at the date of delivery. Many attacks have been made on such contracts in recent years[18] but never on grounds of uncertainty. One explanation might be that the contract is to pay the *list price* at the date of delivery but in *Shell (UK) Ltd v Lostock Garage Ltd*[19] it was assumed that there was no uncertainty where the plaintiffs were delivering petrol at different prices to neighbouring garages.[20] Where the events upon which the price is to depend are themselves

16 See below, pp 737-739.

17 See cases cited p 45, n 2, above and *Loftus v Roberts* (1902) 18 TLR 532. The mere fact that the parties have reserved some non-essential terms for future negotiation does not prevent a contract from arising. *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601.

18 See especially pp 452-456, below. Since the contracts may run for up to five years, it would be commercially impossible for prices to be fixed and very difficult to operate any system of indexation of prices.

19 [1977] 1 All ER 481.

20 In *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 it was held that a contract providing for unilateral variation of the rate of interest charged was valid.

in the future, it is understandable that the parties will wish to settle the price by future agreement. However, in such cases it is undoubtedly prudent to provide machinery to deal with the situation where the parties prove in the event unable to agree. Courts have sometimes held agreements ineffective because of defects in such machinery but the House of Lords liberalised the law in a helpful way in *Sudbrook Trading Estate Ltd v Eggleton.*[1]

> A series of leases granted the lessee an option to purchase the freehold. The price was to be fixed by two valuers, one to be appointed by the lessor and one by the lessee, and if they were unable to agree, they were to appoint an umpire. Although the documents had clearly been prepared by lawyers they failed to deal with the situation where one of the parties refused to appoint a valuer. The lessee sought to exercise the option, the lessor refused to appoint a valuer and argued that as a result the option was ineffective for uncertainty.

Previous decisions of the Court of Appeal had consistently upheld this view but the House of Lords (Lord Russell dissenting) held that it was wrong. The majority held that the provision for fixing of the price by valuers was a decisive indication that the price was to be a reasonable price since valuers were professionals who would be obliged to apply professional and therefore reasonable standards. The option agreement was therefore a valid contract albeit with defective machinery. If necessary the court could provide its own machinery.

Finally, although the parties may have completed their negotiations, they may have expressed the result in such a form that it is not possible to say with certainty what they have agreed or what the agreement means. In *Bushwall Properties Ltd v Vortex Properties Ltd:*[2]

> The defendants agreed in writing to sell 51½ acres of land to the plaintiffs for £500,000. The purchase price was to be paid in three instalments: a first of £250,000 followed in twelve months by a second of £125,000 and then after a further twelve months by a final payment of £125,000. It was further provided that 'on the occasion of each completion a proportionate part of the land shall be released forthwith' to the plaintiffs. The parties provided no machinery for the allocation of the proportionate parts and the Court of Appeal held that the agreement was void for uncertainty.

Acceptance in the case of tenders

A final illustration of the difficulty experienced in deciding whether an offer has been accepted is afforded by the series of cases where a 'tender' is invited for the periodical supply of goods:

> Suppose that a corporation invites tenders for the supply of certain specific goods to be delivered over a given period. A trader puts in a tender intimating that he is prepared to supply the goods at a certain price. The corporation, to use the language of the business world, 'accepts' the tender. What is the legal result of this 'acceptance'?

There is no doubt, of course, that the tender is an offer. The question, however, is whether its 'acceptance' by the corporation is an acceptance in the

1 [1983] 1 AC 444, [1982] 3 All ER 1. See also *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n and *Corson v Rhuddlan Borough Council* (1989) 59 P & CR 185.

2 [1976] 2 All ER 283, [1976] 1 WLR 591. Emery [1976] CLJ 215. So too in *Scammell v Ouston*, above. See also Samek 48 Can Bar Rev 203.

legal sense so as to produce a binding contract. This can be answered only by examining the language of the original invitation to tender. There are several possible cases.

First, the corporation may have stated that it will definitely require a specified quantity of goods, no more and no less, as, for instance, where it advertises for 1,000 tons of coal to be supplied during the period 1 January to 31 December. Here the 'acceptance' of the tender is an acceptance in the legal sense, and it creates an obligation. The trader is bound to deliver, the corporation is bound to accept, 1,000 tons, and the fact that delivery is to be by instalments as and when demanded does not disturb the existence of the obligation.

There would also be a contract if the corporation were to state that it would take all its needs for the year from a particular supplier or take all the supplier's output for the year. In such cases, the contract is sufficiently certain to be enforced even though at the beginning of the year one may not know the extent of the needs or output.

There is more difficulty if the corporation advertises that it *may* require articles of a specified description up to a maximum amount, as, for instance, where it invites tenders for the supply during the coming year of coal not exceeding 1,000 tons altogether, deliveries to be made *if and when* demanded, the effect of the so-called 'acceptance' of the tender is very different. The trader has made what is called a standing offer. Until revocation he stands ready and willing to deliver coal up to 1,000 tons at the agreed price when the corporation from time to time demands a precise quantity. The 'acceptance' of the tender, however, does not convert the offer into a binding contract, for a contract of sale implies that the buyer has agreed to accept the goods. In the present case the corporation has not agreed to take 1,000 tons, or indeed any quantity of coal. It has merely stated that it may require supplies up to a maximum limit.[3]

In this latter case the standing offer may be revoked at any time provided that it has not been accepted in the legal sense; and acceptance in the legal sense is complete as soon as a requisition for a definite quantity of goods is made. Each requisition by the offeree is an individual act of acceptance which creates a separate contract. If the corporation in the case given telephones for 25 tons of coal, there is an acceptance of the offer and both parties are bound to that extent and to that extent only—the one to deliver, the other to accept 25 tons. If, however, the tradesman revokes his offer, he cannot be made liable for further deliveries,[4] although he is bound by requisitions already made.

The nature of a standing offer was considered in *Great Northern Rly Co v Witham*.[5]

In that case:

> The plaintiffs advertised for tenders for the supply of stores. The defendant made a tender in these words: 'I undertake to supply the Company for twelve months with such quantities of [specified articles]

3 Another way of analysing the difficulties here is to say that the corporation has provided no consideration until it makes a promise to buy a definite quantity of goods. Cf Adams 94 LQR 73.

4 *Offord v Davies* (1862) 12 CBNS 748.

5 *Great Northern Rly Co v Witham* (1873) LR 9 CP 16.

6 Ibid. See also *Percival Ltd v LCC Asylums and Mental Deficiency Committee* (1918) 87 LJKB 677.

> as the Company may order from time to time.' The Company replied by letter accepting the tender, and subsequently gave various orders which were executed by the defendant. Ultimately the Company gave an order for goods within the schedule, which the defendant refused to supply.

The company succeeded in an action for breach of contract. The tender was a standing offer, to be converted into a series of contracts by the subsequent acts of the company. An order prevented *pro tanto* the possibility of revocation, and the defendant, though he might regain his liberty of action for the future, was meanwhile bound to supply the goods actually ordered.

B THE COMMUNICATION OF ACCEPTANCE

Even if the offeree has made up his mind to a final acceptance, the agreement is not yet complete. There must be an external manifestation of assent, some word spoken or act done by the offeree or by his authorised agent which the law can regard as the communication of the acceptance to the offeror.[7] What constitutes communication varies with the nature of the case and has provoked many difficult problems. A number of observations, however, may be made.

(1) *Effect of silence* An offeror may not arbitrarily impose contractual liability upon an offeree merely by proclaiming that silence shall be deemed consent. In *Felthouse v Bindley*:[8]

> The plaintiff, Paul Felthouse, wrote to his nephew, John, on 2 February, offering to buy his horse for £30 15s, and adding, 'If I hear no more about him, I consider the horse mine at that price'. The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was going to sell his stock, that the horse was to be kept out of the sale. The defendant inadvertently sold the horse to a third party at an auction held on 25 February, and the plaintiff sued him in conversion.

The Court of Common Pleas held that the action must fail as there had been no acceptance of the plaintiff's offer before 25 February, and the plaintiff had therefore, at that date, no title to maintain conversion. Willes J said:

> It is clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s unless he chose to comply with the condition of writing to repudiate the offer.

Silence is usually equivocal as to consent and the uncle's letter did not render the nephew's failure to reply unequivocal since failure to reply to letters is a common human weakness. It may be going too far, however, to say the silence can never be unequivocal evidence of consent.[9] The second edition of the American Restatement in section 69 provides:

7 See *Powell v Lee* (1908) 99 LT 284, and *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428.

8 (1862) 11 CBNS 869. Miller 35 MLR 489.

9 *Manco Ltd v Atlantic Forest Products Ltd* (1971) 24 DLR (3d) 194. *Way and Waller Ltd v Ryde* [1944] 1 All ER 9, discussed by Murdoch 91 LQR 357 and 378-379. The question has most recently arisen in a group of cases in which it has been argued that an agreement to arbitrate has been abandoned by mutual inactivity, discussed p 619-621, below. Furmston, Norisada and Poole pp 38-49.

Acceptance by silence or exercise of dominion

(1) where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;

(b) where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent or inactive intends to accept the offer;

(c) where, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.'

An example of (a) would arise if I see a window cleaner, who has been asked to clean the windows of my house before, approaching my front door to ask whether he should clean them today and pretend not to be in, guessing correctly that he will then go ahead and clean the windows. An example of (b) would be if the nephew in *Felthouse v Bindley* had clearly manifested his intention to accept the uncle's offer but had not communicated his acceptance to the uncle because he had been told not to bother.[10] An American example of (c) arose in *Ammons v Wilson*[11] where a seller's salesman took an order for 43,916 pounds of shortening on 23 August for prompt shipment 'subject to acceptance by seller's authorized agent at point of shipment'. The seller delayed until 4 September, while the price of shortening rose from 7½ to 9 cents a pound, and then refused to ship. The court held that on these facts it was open to the jury to find that the delay 'in view of the past history of such transactions between the parties, including the booking, constituted an implied acceptance'. There was evidence in this case that the seller's salesman had not only solicited the order but had previously taken several orders which had all been accepted. It is thought that it would be open to English courts to hold that there was a contract in each of these situations.[12]

(2) *Waiver of communication* While an offeror may not present an offeree with the alternatives of repudiation or liability, he may, for his own purposes, waive the need to communicate acceptance. He may himself run the risk of incurring an obligation, though he may not impose it upon another. Such waiver may be express or may be inferred from the circumstances. It will normally be assumed in what are sometimes called *unilateral* contracts. In this type of case the offer takes the form of a promise to pay money in return for an act; and the performance of that act will usually be deemed an adequate indication of assent.[13] In *Carlill v Carbolic Smoke Ball Co*, the facts of which have already been given,[14] the argument that the plaintiff should have notified her

10 See the discussion on p 52, above.

11 176 Miss 645 (1936); *Farnsworth on Contracts*, section 3.15.

12 Suppose A makes an offer to B at a meeting and B replies that he will consult his superiors and if A hears no more within seven days he can assume the offer is accepted. It appears to be assumed in *Re Selectmove* [1995] 2 All ER 531, [1995] 1 WLR 474 that silence by B can be acceptance though the case was decided on another point. See p 104, below.

13 See Brett J in *Great Northern Rly Co v Witham* (1873) LR 9 CP 16 and the Sixth Interim Report of the Law Revision Committee (1937), p 23. *Unilateral* contracts are usually contrasted with *bilateral* contracts. But in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 108, [1968] 1 WLR 74 at 82, Diplock LJ preferred synallagmatic to bilateral because there may be more than two parties involved.

14 P 34, above.

intention to put the defendants' panacea to the test was dismissed as absurd. Bowen LJ, after stating the normal requirement of communication, continued:[15]

> But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so ... and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification ... In the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition ... From the point of view of common-sense no other idea could be entertained. If I advertise to the world that my dog is lost and that anybody who brings the dog to a particular place will be paid some money, are all the police or other people whose business it is to find lost dogs to sit down and write me a note saying that they have accepted my proposal?

It should follow from this that if the nephew on the facts of *Felthouse v Bindley* had sued the uncle, the latter would have been unable to rely on the non-communication of acceptance.[16] It may further be argued that the true principle is that the offeror cannot by ultimatum impose on the offeree an obligation to state his non-acceptance, but that the contract may nevertheless be concluded if the offeree unequivocally manifests his acceptance.[17] This is important, for instance, in relation to the practice of 'inertia' selling, where a tradesman sends unsolicited goods to a customer, accompanied by a letter stating that if the goods are not returned within ten days, it will be assumed that they are bought. At common law it would seem clear that the customer is under no obligation to return the goods but that if he clearly shows his acceptance, eg by consuming the goods, he should be bound to pay for them. Under the Unsolicited Goods and Services Act 1971 however a tradesman may, in such circumstances, be treated as making a gift of the goods to the customer.

(3) *Mode of communication prescribed by offeror* An offeror may prescribe the method of communicating acceptance. Whether some particular mode has been prescribed depends upon the inference to be drawn from the circumstances.[18] There is authority for the view that an offer by telegram is evidence of a desire for a prompt reply, so that an acceptance sent by post may be treated as nugatory.[19] The observance of the mode prescribed by the offeror obviously suffices to complete the agreement. Whether precise observance is necessary is, however, a matter of some doubt:

15 [1893] 1 QB 256 at 269-270.

16 It may appear paradoxical that one party can assert that there is a contract and not the other but this can be explained in terms of estoppel. See eg *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002. Cf *Fairline Shipping Corpn v Adamson* [1975] QB 180, [1974] 2 All ER 967, where this argument was apparently rejected by Kerr J, though on the facts there was no evidence of reliance sufficient to support an estoppel.

17 One difficulty with this approach is that it looks as if the nephew had indeed unequivocally accepted. Two possible escapes from this difficulty have been suggested: (a) that statements to one's own agent are not unequivocal or (b) that the true *ratio* of the case was that there was no sufficient memorandum of the contract within the Statute of Frauds.

18 See *Kennedy v Thomassen* [1929] 1 Ch 426.

19 *Quenerduaine v Cole* (1883) 32 WR 185.

> Suppose, for instance, that a Burton brewer sends a note by his lorry driver to a London merchant, making an offer and asking for a reply to be sent by the lorry on its return. Is an acceptance communicated in any other manner ineffective?

If the offeree posts an acceptance in the belief that it will reach Burton before the lorry and if this is not the case, the better opinion is that the offeror may repudiate the acceptance.[20] But suppose that the acceptance is telegraphed or telephoned, so that it reaches the offeror before the return of his lorry. Is it to be regarded as ineffective merely because it was not communicated in the manner prescribed? Such a ruling, which would be repugnant to commonsense, does not appear to represent English law, for, in a case where the offeree was told to 'reply by return of post', it was said by the Court of Exchequer Chamber that a reply sent by some other method equally expeditious would constitute a valid acceptance.[1] The result would, of course, be otherwise, if the offeror had insisted that a reply should be sent by the lorry *and by that method only*.[2] It is thought that an offeror will need to use very clear words before a means of communication will be treated as mandatory.[3]

(4) If no particular method is prescribed, the form of communication will depend upon the nature of the offer and the circumstances in which it is made. If the offeror makes an oral offer to the offeree and it is clear that an oral reply is expected, the offeree must ensure that his acceptance is understood by the offeror. Suppose that A shouts an offer to B across a river or a courtyard and that A does not hear the reply because it is drowned by an aircraft flying overhead. No contract is formed at that moment, and B must repeat his acceptance so that A can hear it.[4] This rule—that acceptance is incomplete until received by the offeror—governs conversations over the telephone no less than discussions in the physical presence of the parties, and it has now been applied to the most modern methods of communication. In *Entores Ltd v Miles Far East Corpn*:[5]

> The plaintiffs were a London company and the defendants were an American corporation with agents in Amsterdam. Both the plaintiffs in London and the defendants' agents in Amsterdam had equipment known as 'Telex Service' whereby messages could be despatched by the teleprinter operated like a typewriter in one country and almost instantaneously received and typed in another. By this instrument the plaintiffs made an offer to the defendants' agents to buy goods from them, and the latter accepted the offer. The plaintiffs now alleged that the defendants had

20 Cf the American decision in *Eliason v Henshaw* 4 Wheat 225 (1819).

1 *Tinn v Hoffmann & Co* (1873) 29 LT 271. See also *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241.

2 Even here the offeror may waive the necessity of following the exclusive method prescribed and allow a substitute: see the difficult case of *Compagnie de Commerce et Commission SARL v Parkinson Stove Co* [1953] 2 Lloyd's Rep 487, discussed Eckersley 17 MLR 476. See also Winfield 55 LQR 499 at 515-516.

3 See *Yates Building Co Ltd v R J Pulleyn & Sons (York) Ltd* (1975) 119 Sol Jo 370, reversing (1973) 228 Estates Gazette 1597. Cf *Western Electric Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629, discussed 1983 All ER Rev 110.

4 See the illustration given by Denning LJ in *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327 at 332, [1955] 2 All ER 493 at 495.

5 [1955] 2 QB 327, [1955] 2 All ER 493.

broken their contract and wished to serve a writ upon them. This they could do, although the defendants were an American corporation with no branch in England, provided that the contract was made in England.

The defendants contended that they had accepted the offer in Holland and that the contract had therefore been made in that country. But it was held by the Court of Appeal that the parties were in the same position as if they had negotiated in each other's presence or over the telephone, that there was no binding acceptance until it had been received by the plaintiffs, that this took place in London and that a writ could therefore be issued. Parker LJ, after reciting circumstances where expediency might demand another rule,[6] said:

> Where, however, the parties are in each other's presence or, though separated in space, communication between them is in effect instantaneous, there is no need for any such rule of convenience. To hold otherwise would leave no room for the operation of the general rule that notification of the acceptance must be received. An acceptor could say: 'I spoke the words of acceptance in your presence, albeit softly, and it matters not that you did not hear me'; or 'I telephoned to you and accepted, and it matters not that the telephone went dead and you did not get my message'.... So far as Telex messages are concerned, though the despatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other's presence just as if they were in telephonic communication, and I see no reason for departing from the general rule that there is no binding contract until notice of the acceptance is received by the offeror. That being so, and since the offer—a counter offer—was made by the plaintiffs in London and notification of the acceptance was received by them in London, the contract resulting therefrom was made in London.[7]

This result was confirmed in 1982 by the House of Lords in *Brinkibon v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH*[8] where the facts were for all practical purposes identical save that the offer was made by telex in Vienna and accepted by a telex message from London to Vienna. The House of Lords held that the contract was made in Vienna.

In both these cases the telex machines were in the offices of the parties and the messages were sent during ordinary office hours. It is now common for many telex messaages to be transmitted through agencies and machines may be left on for the receipt of messages out of office hours. In *Brinkibon v Stahag Stahl* the House of Lords expressly confined their decision to the standard case and left such variants for future decision.[9]

It would seem very likely that the same rules apply to communications by fax.

Other methods of communication may present greater problems. What is the position where it is acceptable to accept by telephone if the offeree finds himself dealing with an answering machine? It is plausible to argue that one who employs such a machine invites its use but there is scope for argument as to when such an acceptance is effective. It is suggested that this should turn on what is reasonable in all the circumstances.

A much bigger practical problem arises in the field of electronic commerce.[10] In the case of two party e-mails the question is whether to apply

6 See below as to negotiations conducted through the post.
7 [1955] 2 QB at 336, [1955] 2 All ER at 498.
8 [1983] 2 AC 34, [1982] 1 All ER 293.
9 *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] CLC 1011.
10 For a fuller discussion see Rowland and Macdonald, *Information Technology Law* (2nd edn, 2000) pp 295 et seq; Hill 17 J Contract L 151.

the postal or telex model. Although e-mail is just as quick as telex or fax an e-mail message does not signal its arrival in the way that telex or fax does. Nevertheless it is thought that the telex analogy is more appropriate.

It is thought that similar arguments apply to full blown electronic commerce. In this field the problems are much greater in connection with the legal requirements for writing and signature[11] than in relation to offer and acceptance.

(5) *Communications through the post* If no particular method of communication is prescribed and the parties are not, to all intents and purposes, in each other's presence, the rule just laid down—that an acceptance speaks only when it is received by the offeror—may be impracticable or inconvenient. Such may well be the case where the negotiations have been conducted through the post.[12] The question as to what in these circumstances is an adequate communication of acceptance arose as early as 1818 in the case of *Adams v Lindsell*.[13]

> The plaintiffs were woollen manufacturers in Bromsgrove, Worcestershire. The defendants were wool-dealers at St Ives in Huntingdon. On 2nd September 1817, the defendants wrote to the plaintiffs, offering a quantity of wool on certain terms and requiring an answers 'in course of post'. The defendants misdirected their letter, which did not reach the plaintiffs until the evening of 5 September. That same night the plaintiffs posted a letter of acceptance, which was delivered to the defendants on 9 September. If the original offer had been properly addressed, a reply could have been expected by 7 September, and meanwhile, on 8 September, not having received such a reply, the defendants had sold the wool to third parties.

The trial judge directed a verdict for the plaintiffs on the ground that the delay was due to the defendants' negligence, and the defendants obtained a rule nisi for a new trial. The vital question was whether a contract of sale had been made between the parties before 8 September. Two cases only were cited by counsel[14] and none by the court, and it was treated virtually as a case of first impression.

As an academic problem, three possible answers were available. An offer made through the post might be regarded as accepted in the eyes of the law:

(a) As soon as the letter of acceptance is put into the post; or
(b) When the letter of acceptance is delivered to the offeror's address; or
(c) When the letter of acceptance is brought to the actual notice of the offeror.

As the law is now understood, the plaintiffs would have succeeded on any of these theories, since the defendants' offer would not be revoked by their sale to third parties on 8 September.[15] But in 1818 there were no developed rules as to revocation of offers and the court may well have thought it arguable that the sale was sufficient to revoke[16] so that an effective acceptance would need to take place before 8 September.

11 See below, ch 7.
12 Evans 15 ICLQ 353. Gardner 12 Oxford JLS 170.
13 (1818) 1 B & Ald 681.
14 *Payne v Cave* (1789) 3 Term Rep 148; and *Cooke v Oxley* (1790) 3 Term Rep 653.
15 See p 62, below.
16 This view was current as late as *Dickinson v Dodds* (1876) 2 ChD 463, discussed below.

It is commonly said that the choice between these three possible solutions is arbitrary.[17] But the logical application of the doctrine that acceptance must be communicated would clearly point to the adoption of either (b) or (c) depending on the meaning to be given to 'communication'. In fact the Court of King's Bench in *Adams v Lindsell* preferred the first solution and decided that the contract was concluded when the letter of acceptance was posted on 5 September. At first sight it appears strange that the requirement of communication, which is largely devoid of practical content in contracts *inter praesentes*, should not be applied to postal contracts, which provide the most important arena for its application. It is perhaps less surprising if we attend to the history of the matter. *Adams v Lindsell* was the first genuine offer and acceptance case in English law[18] and, in 1818 there was no rule that acceptance must be communicated. As so often happens in English law, the exception is historically anterior to the rule.

The decision in *Adams v Lindsell* did not at once command uncritical acceptance. Although applied by the House of Lords in 1848 in an appeal from Scotland,[19] it was distinguished in two cases[20] where the letter of acceptance did not arrive but it was applied to that situation too by the Court of Appeal in *Household Fire and Carriage Accident Insurance Co v Grant*.[1] In 1880, in *Byrne v Van Tienhoven*, Lindley J treated the question as beyond dispute:

> It may be taken as now settled that, where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination.[2]

Some notes of warning may, however, be sounded. The solution is to be applied only where no particular mode of communication is prescribed by the offeror;[3] and, as it is itself the creature of expediency, it must yield to manifest inconvenience or absurdity. As Lord Bramwell said in 1871:

> If a man proposed marriage and the woman was to consult her friends and let him know, would it be enough if she wrote and posted a letter which never reached him?[4]

More recently Lawton LJ has stated:[5]

> In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other.[6]

17. See Winfield 55 LQR 499 at 506-507. See also Nussbaum 36 Col L Rev 920.
18. Simpson 91 LQR 247 at 260.
19. *Dunlop v Higgins* (1848) 1 HL Cas 381.
20. *British and American Telegraph Co v Colson* (1871) LR 6 Exch 108; *Re Imperial Land Co of Marseilles, Harris's Case* (1872) 7 Ch App 587.
1. (1879) 4 Ex D 216.
2. (1880) 5 CPD 344 at 348.
3. *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155.
4. *British and American Telegraph Co v Colson* (1871) LR 6 Exch 108.
5. [1974] 1 All ER 161 at 167, [1974] 1 WLR 155 at 161.
6. A warning against the assumption that the rule in *Byrne v Van Tienhoven* is to be applied automatically was given by the court in the Australian case of *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, especially at 111-112.

It would appear further that the rule should apply only to a letter which is properly stamped and addressed.[7] A number of questions, however, remain unanswered, and some of these must now be considered.

May acceptance be recalled before it reaches offeror?

May an offeree, perhaps by telephone or telegram, recall his acceptance after he has posted it but before it has reached the offeror? A rigorous application of the rule last laid down would forbid him to do so: the contract is complete from the moment that his letter has been put into the post. There is no English decision upon the point. The Scots case of *Dunmore (Countess) v Alexander*[8] is sometimes cited to support the view that the offeree may be allowed to withdraw. The scope of this decision, however, is not clear. It involves a question of agency, to which perhaps it is exclusively relevant; and the courts were concerned to determine the effect, not of a telegram recalling a letter, but on the simultaneous receipt of two letters. In New Zealand, Chapman J denied the possibility of altering the effect of a letter of acceptance once it has been put into the post[9] and the same view has been taken in South Africa.[10] English courts are free to choose between these opinions, and their choice rests upon expediency rather than upon logic. Even upon this basis there is room for differing opinions. It may be argued, on the one hand, that to allow a letter of acceptance to be withdrawn would give the offeree the best of both worlds. By posting an acceptance he would be free either to hold the offeror to it or to recall it by telegram or telephone. On the other hand, the basic principle laid down in *Adams v Lindsell* rests, as a matter of convenience, upon the ground that it is the offeror who has chosen the post as the medium of negotiation and who must accept the hazards of his choice. If he takes 'the risks of delay and accident in the post, it would not seem to strain matters to say that he also assumes the risk of a letter being overtaken by a speedier means of communication'.[11] He may guard against any of these risks by framing his offer in appropriate terms.

Must acceptor have knowledge of offer?

In the second place, do contractual obligations arise if services are rendered which in fact fulfil the terms of an offer, but are performed in ignorance that the offer exists? The defendant may have offered a reward to anyone who gives information ensuring the conviction of a criminal. If the plaintiff supplies the information before he knows of the reward can be afterwards claim it? In *Neville v Kelly* in 1862,[12] though the decision rested upon another point, the Court of Common Pleas was inclined to favour such a claim, and in *Gibbons v Proctor* in 1891[13] Day and Lawrence JJ, sitting as a divisional court, apparently supported it. But they gave no reason for their opinion, which has been

7 *Re London and Northern Bank, ex p Jones* [1900] 1 Ch 220; *Getreide-Import-Gesellschaft MBH v Contimar SA Compania Industrial Commercial y Maritima* [1953] 2 All ER 223, [1953] 1 WLR 793.
8 1830 9 Sh (Ct of Sess) 190.
9 *Wenkheim v Arndt* (1861) 1 JR 73.
10 *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1974 (4) SA 392.
11 Hudson 82 LQR 169 at 170.
12 (1862) 12 CBNS 740.
13 (1891) 64 LT 594.

generally condemned by academic lawyers.[14] Agreement, it is true, has often to be inferred from the conduct of the parties although it does not exist in fact; but the inference can scarcely be drawn from the mere coincidence of two independent acts. The plaintiff, when he acted, intended not to sell his information, but to give it, and there was nothing to justify any reasonable third party in inferring the contrary.

These academic objections were received as valid in the American case of *Fitch v Snedaker*,[15] where Woodruff J, pertinently asked, 'How can there be consent or assent to that of which the party has never heard?' The position was reviewed and the ruling in *Fitch v Snedaker* taken, perhaps, a little further in the Australian case of *R v Clarke*:[16]

> The Government of Western Australia offered a reward of £1,000 'for such information as shall lead to the arrest and conviction of' the murderers of two police officers, and added that, if the information should be given by an accomplice, not being himself the murderer, he should receive a free pardon. Clarke saw the offer and some time later gave the necessary information. He claimed the reward from the Crown by Petition of Right. He admitted not only that he had acted solely to save his own skin, but that, at the time when he gave the information, the question of the reward had passed out of his mind.

The High Court of Australia held that his claim must fail. He was, in their opinion, in the same position as if he had never heard of the reward. In the words of Higgins J:

> Clarke had seen the offer, indeed, but it was not present to his mind—he had forgotten it and gave no consideration to it in his intense excitement as to his own danger. 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 to forgetting it after hearing.

Isaacs CJ reinforced his opinion with a hypothetical illustration:

> An offer of £100 to any person who should swim a hundred yards in the harbour on the first day of the year would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the offer.

The position would be different if the offer of the reward had been present to the plaintiff's mind when he acted, although he may have been predominantly influenced by some other motive. In *Williams v Carwardine*,[17] where a notice had been published in terms similar to those in *R v Clarke*, the plaintiff had supplied the information with knowledge of the reward but

14 See the strictures of Pollock (13th edn) p 16, and of Salmond and Williams at p 72. Cf Hudson 84 LQR 503.

15 38 NY 248 (1868).

16 (1927) 40 CLR 227. In *Bloom v American Swiss Watch Co* [1915] App D 100, the Appellate Division of the Supreme Court of South Africa held, disapproving *Gibbons v Proctor*, that, where information had been given without knowledge that a reward had been offered, the informer could not recover the reward.

17 The case was decided in 1833 and was variously reported; 5 C & P 566 is the best report and brings out clearly the fact that the plaintiff knew of the reward. Other reports are 4 B & Ad 621, 1 Nev & M KB 418, 2 LJKB 101.

moved rather by remorse for her own misconduct. At the assizes, Parke J gave judgment in her favour, and the defendant moved to enter a nonsuit on the ground that the suggested contract had been negatived by the finding of the jury 'that the plaintiff gave the information to ease her conscience and not for the sake of the reward'. But the judgment was upheld in the King's Bench. Motive was irrelevant, provided that the act was done with knowledge of the reward. Acceptance was then related to offer.[18]

Does agreement result from cross-offers?

What, in the third place, is the effect of two offers, identical in terms, which cross in the post?

> Suppose that A by letter offers to sell his car to B for £100 and that B, by a second letter which crosses the first in the post, offers to buy it for £100. Do these two letters create a contract?

The point was discussed by the Exchequer Chamber in *Tinn v Hoffmann & Co.*[19] where it was held by five judges against two that on the facts of that case no contract had been concluded. Of the five judges in the majority, Archibald and Keating JJ proceeded on the ground that the letters in question contained diverse terms so that the parties were not *ad idem*, while Blackburn, Brett and Grove JJ denied that cross-offers could, in the most favourable circumstances, constitute a contract. Blackburn J said:[20]

> When a contract is made between two parties, there is a promise by one in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion and one having promised in consideration of the promise made by the other—there is an exchange of promises. But I do not think exchanging offers would, upon principle, be at all the same thing ... The promise or offer being made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other.

The case, however, stands alone in the English common law and the difference of judicial opinion makes it the less impressive. The judgments, moreover, reflect the contemporary preoccupation with *consensus*. The American cases seem equally rare and equally inconclusive, although the *Restatement* declares categorically that 'two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other'.[1] Authority, therefore, so far as it goes, would seem to deny the efficacy of cross-offers; but it does not go very far. On principle the issue is equally doubtful. It is certainly true that the act of neither party is in direct relation to that of the other and that the strict requirements of offer and acceptance are unsatisfied. But, in contrast with the situation in such cases as *Fitch v Snedaker* and *R v Clarke*, each party does in truth contemplate legal relations upon an identical basis, and each is prepared to offer his own promise as consideration for the promise of the other. There is not only a coincidence of acts, but, if this is thought to be relevant, a unanimity of mind.

18 See also *Taylor v Allon* [1966] 1 QB 304, [1965] 1 All ER 557.

19 (1878) 29 LT 271.

20 Ibid at 279.

1 *Restatement of the Law of Contracts* (American Law Institute) s 23. For the American cases see *Corbin on Contracts* § 50.

4 Termination of offer

It is now necessary to consider the circumstances in which an offer may be terminated or negatived. It may be revoked, it may lapse, it may be subject to a condition that fails to be satisfied or it may be affected by the death of one of the parties.

A REVOCATION

It has been established ever since the case of *Payne v Cave* in 1789[2] that revocation is possible and effective at any time before acceptance: up to this moment *ex hypothesi* no legal obligation exists. Nor, as the law stands, is it relevant that the offeror has declared himself ready to keep the offer open for a given period. Such an intimation is but part and parcel of the original offer, which must stand or fall as a whole. The offeror may, of course, bind himself, by a separate and specific contract, to keep the offer open; but the offeree, if such is his allegation, must provide all the elements of a valid contract, including assent and consideration.[3] In *Routledge v Grant*[4] the defendant offered on 18 March to buy the plaintiff's house for a certain sum, 'a definite answer to be given within six weeks from the date'. Best CJ held that the defendant could withdraw at any moment before acceptance, even though the time limit had not expired. The plaintiff could only have held the defendant to his offer throughout the period, if he had bought the option by a separate and binding contract.

Revocation of offer must be communicated

The revocation of an offer is ineffective unless it has been communicated to the offeree. It is not enough for the offeror to change his mind. For some years, it is true, obsessed with the theory of *consensus*, the judges were content with

2 (1789) 3 Term Rep 148.

3 It was recommended by the Law Revision Committee in 1937 that the law be altered so as to make binding an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event, even if there is no consideration for the agreement. See Sixth Interim Report (1937), p 31. The Law Commission has made a similar recommendation but limited to firm offers made in the 'course of business': Working Paper 60 (1975). There is a statutory exception to the rule in Companies Act 1948, s 50(5); see Gower *Modern Company Law* (4th edn) p 357; see also Consumer Credit Act 1974, s 69(1)(c)(i)(ii), (7). See Lewis 9 Journal of Law and Society 153. The English rule appears particularly inconvenient in principle where A's offer will be used by B as the basis of an offer which B is going to make to C. This is typically the case in the construction industry where A is a potential sub-contractor and B a potential main contractor who makes a tender to C, a potential employer incorporating the prices which his potential sub-contractors have quoted to him. In this situation B is exposed to the risk that A will revoke his offer to B at the same moment that C accepts B's offer to C. Canadian courts in this situation have held A the sub-contractor bound: *Northern Construction Co v Glage Heating and Plumbing* [1986] 2 WWR 649; *Calgary v Northern Construction Co* (1985) 3 Const LJ 179. Lewis's article op cit suggests that this problem is perceived to be less difficult in practice than in theory in the construction industry. This is presumably because the sub-contractor's price is usually a good indication of what other sub-contractors would charge. The most obvious example of a case where this would not be so is where the sub-contractor's price is based on a mistake in his calculations. This is also the case where the sub-contractor is most likely to wish to withdraw his offer as the facts of the Canadian cases show.

4 (1828) 4 Bing 653.

the mere alteration of intention.[5] But business necessity, in this instance no less than in the definition of acceptance, overbore deductions from a priori conceptions of contract and required some overt act from which the intention might be inferred. Convenience, indeed, demanded a more stringent rule for revocation than for acceptance. To post a letter was a sufficient act of acceptance, since the offeree was entitled to assume that he thereby satisfied the expectations of the offeror. The offeror, when he decided to revoke, could rely on no such assumption. Thus in *Byrne v Van Tienhoven*:[6]

> The defendants posted a letter in Cardiff on 1 October, addressed to the plaintiffs in New York, offering to sell 1,000 boxes of tin-plates. On 8 October they posted a letter revoking the offer. On 11 October the plaintiffs telegraphed their acceptance and confirmed it in a letter posted on 15 October. On 20 October the letter of revocation reached the plaintiffs.

It was held that the revocation was inoperative until 20 October, that the offer, therefore, continued open up to that date, and that it had been accepted by the plaintiffs in the interim. Lindley J, giving judgment for the plaintiffs, pointed out 'the extreme injustice and inconvenience which any other conclusion would produce'. The decision leaves undefined the precise moment at which communication takes place but it seems reasonable to argue that, at least in the case of a business, a letter which arrives on a normal working day should be treated as a communication even if unopened.[7]

The offeror, therefore, if he relies on a revocation, must prove, not only that he has done some act which manifests his intention, but that the offeree has knowledge of that act. But it would seem that he need not himself have furnished this information. In *Dickinson v Dodds*:[8]

> The defendant, on 10 June, gave the plaintiff a written offer to sell a house for £800, 'to be left over until Friday 12 June, 9 am'. On Thursday 11 June, the defendant sold the house to a third party, Allan, for £800, and that evening the plaintiff was told of the sale by a fourth man, Berry. Before 9 am on 12 June, the plaintiff handed to the defendant a formal letter of acceptance.

The Court of Appeal held that the plaintiff, before attempting to accept, 'knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words', that the defendant had validly withdrawn his offer and that the plaintiff's purported acceptance was too late. The decision was followed in *Cartwright v Hoogstoel*[9] in 1911, where Eve J rested his judgment on the ground that 'the defendant had, by conduct brought to the knowledge of the plaintiff, effectually withdrawn the offer before acceptance'.

5 See *Cooke v Oxley* (1790) 3 Term Rep 653, and *Head v Diggon* (1828) 3 Man & Ry KB 97.

6 (1880) 5 CPD 344. See also *Stevenson v McLean* (1880) 5 QBD 346 and *Henthorn v Fraser* [1892] 2 Ch 27.

7 Cf Cairns LJ in *The Brimnes* [1974] 3 All ER 88 at 115, [1974] 3 WLR 613 at 642. In *Shuey v United States* 92 US 73 (1875) it was held that an offer made by advertisement in a newspaper could be revoked by a similar advertisements even though the second advertisement were not read by some offerees.

8 (1876) 2 ChD 463.

9 (1911) 105 LT 628.

The language of the judgments in *Dickinson v Dodds* reflects the persistence of the *consensus* theory and is not free from practical difficulty. Is the offeree bound by any hint or gossip that he may hear, or must he winnow the truth from the chaff? All that can be said is that it is a question of fact in each case. Was the information such that a reasonable man should have been persuaded of its accuracy?

Is a promise in return for an act revocable?

A further difficulty is suggested by the nature of 'unilateral' contracts.[10] If the offeror contemplates, not the creation of mutual promises, but the dependence of his own promise upon the offeree's performance of an act, may he revoke his offer at any time before the completion of this act? A reward may have been advertised for the return of a lost dog to a given address, a sum of money may have been promised if, at the end of five years, the offeree can prove that he has abstained from strong drink throughout the period, or, as in the illustration put by Brett J in *Great Northern Rly Co v Witham*,[11] the defendant may have said to the plaintiff 'If you will go to York, I will give you £100'. May the offeror, by giving notice, revoke his offer when he sees his dog being led through the streets towards his house, or when the offeree has endured three years of abstinence, or when, after a laborious journey, he has succeeded in reaching Doncaster? The application of the ordinary rules of revocation would suggest an affirmative answer. An offer may be revoked at any moment before it matures by acceptance into a contract, and it has generally been assumed that, when a promise is offered in return for an act, there is no acceptance until the act has been completely performed.[12]

This solution, has been felt to be hard, and methods of evasion have been sought.[13] It has been suggested in America that two separate offers are inherent in the offeror's statement: an express offer to pay on the performance of the act, and an implied offer not to revoke if the offeree begins his task within a reasonable time.[14] On this assumption, the beginning of the task not only constitutes the acceptance of the implied offer, but also supplies the consideration which the law requires for its validity, as for that of every contract not under seal.[15] If the offeror attempts thereafter to revoke, he may be sued for the breach of this secondary promise. This American suggestion was, indeed, anticipated by the Supreme Court of New South Wales which, as early as 1860, decided that in the case of a unilateral contract the original offer may not be withdrawn after the offeree has started

10 See p 55, above.

11 (1873) LR 9 CP 16. See also *Rogers v Snow* (1572) Dalison 94; Simpson *History* pp 426-427.

12 See p 55, above. An allied but logically distinct difficulty is that in a unilateral contract the consideration for the promise is the promisee's performance of the stipulated act. See p 82, below.

13 It has, however, been argued that too much can be made of the hardship. Both parties retain their freedom of volition before acceptance; and if, in the hypothetical case suggested above, the abstainer refused to continue his course of temperance after two years, he could not be sued. See Wormser 26 Yale LJ 136.

14 See McGovney 27 Harvard L Rev 644.

15 See ch 4, below.

16 *Abbott v Lance* (1860) Legge's New South Wales Reports 1283. It will be seen that this two contract analysis is similar to that propounded in *Warlow v Harrison*, discussed at p 36, above.

to act.[16] In England Sir Frederick Pollock suggested that a distinction should be drawn between the acceptance of the offer and the consideration necessary to support it. The latter, no doubt, is the completion of the act, and, until this takes place, the offeror need pay no money. The former may be assumed as soon as the offeree 'has made an unequivocal beginning of the performance requested', and proof of this fact makes revocation impossible.[17] The suggestion was adopted in 1937 by the Law Revision Committee.[18]

It may be suggested that neither reason nor justice compels a choice between the stark alternatives of making such offers revocable until performance is complete or irrevocable once performance is commenced.[19] Much must depend on the nature of the offer and it is perhaps unfortunate that discussion has centred upon an apparently frivolous and unexplained walk to York. In some cases the parties may well understand that the offeror reserves a right to revoke at any time until performance is complete, while in others it may be proper to hold that he cannot revoke once the promisee has started performance. There may well be intermediate cases where the promisor can revoke after performance has started but is obliged to compensate the offeree for his trouble.[20]

Two instructive cases are *Luxor (Eastbourne) Ltd v Cooper*[1] and *Errington v Errington and Woods*.[2] In the former case an owner of land promised to pay an estate agent a commission of £10,000 if he effected a sale of the land at a price of £175,000. The House of Lords held that the owner could revoke his promise at any time before completion of the sale. At first sight this might appear to support the view that offers of unilateral contracts are freely revocable until performance. But the House of Lords did not rely on any such principle which would have provided a complete and simple answer to the plaintiff's claim. Instead they held that, *in the circumstances of the case*, it would not be proper to imply an undertaking by the owner not to revoke his promise once performance had begun. Clearly this argument assumed that if such an undertaking could be implied, it would be binding.

Errington v Errington appears to be just such a case. A father bought a house for his son and daughter-in-law to live in. He paid one third of the purchase price in cash and borrowed the balance on a building society mortgage. He told the son and daughter-in-law that if they paid the weekly instalments, he would convey the house to them when all the instalments were paid. They duly paid the instalments though they never contracted to do so. The Court of Appeal had no doubt that so long as they were paying the instalments, the father's promise was irrevocable. It is easy to see why a promise not to revoke should be implied and binding on such facts.[3]

17 *Pollock on Contract* (13th edn) p 19.

18 Sixth Interim Report (1937), pp 23-24, 31. A similar solution is adopted in the *Restatement* s 45, *Farnsworth on Contracts* 3.24.

19 See Atiyah *Essays in Contract* pp 199-206; Murdoch 91 LQR 357 at 369-375.

20 See Viscount Haldane LC in *Morrison Shipping Co Ltd v R* (1924) 20 Ll L Rep 288 at 287.

1 [1941] AC 108, [1941] 1 All ER 33, discussed pp 554 ff, below. See also the somewhat elusive discussion, *arguendo*, in *Offord v Davies* (1862) 12 CBNS 748.

2 [1952] 1 KB 290, [1952] 1 All ER 149.

3 It is true that this case has been doubted by property lawyers but these doubts relate to the proper analysis of the son and daughter-in-law's interest in the land and not to the contractual position. See Cheshire and Burn's *Modern Law of Real Property* (16th edn) pp 642-646. Megarry and Wade *Law of Real Property* (5th edn, 1984) pp 806-808.

In *Daulia Ltd v Four Millbank Nominees Ltd*[4] the Court of Appeal stated unequivocally that once the offeree had embarked on performance it was too late for the offeror to revoke his offer. Unfortunately this statement was clearly obiter since the Court also held that the offeree had completed his performance before the purported revocation.[5]

Bankers' commercial credits

Perhaps the most important practical example of the problem is that of bankers' commercial credits. These are a device developed to facilitate international trade. Exporters and importers may find themselves dealing with merchants in other countries whose creditworthiness is unknown to them and may in any event be unable to finance the transaction themselves, the buyer being unable to pay for the goods until he has subsold them and the seller unable to obtain or manufacture the goods without a completely reliable assurance of payment.[6]

From the lawyer's point of view, and reduced to its simplest terms, the device involves three separate transactions.

(1) A clause is inserted in the initial contract of sale, whereby the seller requires payment in a particular manner. The buyer is to ask his bank to open a credit in the seller's favour, which shall remain irrevocable for a given time.

(2) The buyer makes an agreement with his bank, whereby the bank undertakes to open such a credit in return for the buyer's promise to reimburse the bank, to pay a small commission, and to give the bank a lien over the shipping documents.

(3) The buyer's bank notifies the seller that it has opened an irrevocable credit in his favour, to be drawn on as soon as the seller presents the shipping documents.

It is upon the third of these transactions that doubts have arisen. What is the legal position of the seller, should the bank refuse to honour its promise? He could sue the buyer on the original contract of sale, but this would be to abandon the credit scheme.

In earlier editions of this work we have treated this as a problem in privity of contract, that is, as to whether the seller derives rights under the undoubted contract between buyer and bank.[7] In practice however the seller does not seek to enforce the contract between buyer and bank but a direct contract between the banker and himself. Litigation on credits is by no means infrequent but no bank has yet argued that there is no contract between it and the seller. Several dicta support the existence of such a contract[8] and it seems safe to assume that any court would be reluctant to cast doubt on the efficacy of such a valuable commercial tool. Writers on the subject have devoted much care to analysing the theoretical obstacles to such a solution.[9] One such obstacle is the supposed revocability of offers of unilateral contracts. The bank's letter

4 [1978] Ch 231, [1978] 2 All ER 557; Harpum and Lloyd Jones [1979] CLJ 31.
5 Further, the difficulties discussed in the text were not explored in the judgment.
6 Davis *Law Relating to Commercial Letters of Credit* (3rd edn, 1963); Gutteridge and Megrah *The Law of Bankers' Commercial Credits* (7th edn 1984); Ellinger *Documentary Letters of Credit* (1970).
7 See eg 8th edn, pp 432-434.
8 See especially *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262; *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318.
9 *Davis* ch 7; *Gutteridge and Megrah* ch 3; *Ellinger* pp 39 ff.

of credit could easily be treated as an offer to pay if the seller presents the prescribed documents but commercial practice treats the bank's offer (where the credit is described as irrevocable) as irrevocable as soon as it is received by the seller.

B LAPSE OF TIME

If an offer states that it is open for acceptance until a certain day, a later acceptance will clearly be ineffective. Even if there is no express time limit an offer is normally open only for a reasonable time. So in *Ramsgate Victoria Hotel Co v Montefiore*:[10]

> The defendant had applied in June for shares in the plaintiff company and had paid a deposit into the company's bank. He heard nothing more until the end of November, when he was informed that the shares had been allotted to him and that he should pay the balance due upon them.

The Court of Exchequer held that his refusal to take them up was justified. His offer should have been accepted, if at all, within a reasonable time, and the interval between June and November was excessive. The American case of *Loring v City of Boston*[11] offers a further illustration:

> A reward was offered in May 1837, for the 'apprehension and conviction' of incendiaries. The advertisement continued in the papers for a week, but was never followed by any notice of revocation. In January 1841, the plaintiff secured an arrest and conviction for arson, and sued for the reward.

The offer was held to have lapsed by the passage of time, and the plaintiff failed.

C FAILURE OF A CONDITION SUBJECT TO WHICH THE OFFER WAS MADE

An offer, no less than an acceptance, may be conditional and not absolute; and if the condition fails to be satisfied, the offer will not be capable of acceptance. The condition may be implied as well as expressed. A striking illustration is afforded by the case of *Financings Ltd v Stimson*:[12]

> On 16 March the defendant saw at the premises of X, a dealer, a motor car advertised for £350. He wished to obtain it on hire purchase and signed a form provided by X. The form was that of the plaintiffs, a finance company, and stated: 'This "agreement" shall be binding on [the plaintiffs] only upon signature on behalf of the plaintiffs.' On 18 March the defendant paid the first instalment of £70 and took away the car. On 20 March,

10 (1866) LR 1 Exch 109. See also *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285; and *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 which contains an instructive examination by Buckley J of the rationale of the rule.

11 7 Metcalf 409 (1884).

12 [1962] 3 All ER 386, [1962] 1 WLR 1184.

dissatisfied with it, the defendant returned it to X, saying that he was ready to forfeit his £70. On 24 March the car was stolen from X's premises, but was recovered badly damaged. On 25 March, in ignorance of these facts, the plaintiffs signed the 'agreement'.

When the plaintiffs subsequently discovered what had happened, they sold the car for £240 and sued the defendant for breach of the hire-purchase contract. The Court of Appeal gave judgment for the defendant. The so-called 'agreement' was in truth an offer by the defendant to make a contract with the plaintiffs. But it was subject to the implied condition that the car remained, until the moment of acceptance, in substantially the same state as at the moment of offer. As Donovan LJ asked:[13]

> Who would offer to purchase a car on terms that, if it were severely damaged before the offer was accepted, he, the offeror, would pay the bill? ... The county court judge held that there must be implied a term that, until acceptance, the goods would remain in substantially the same state as at the date of the offer; and I think that this is both good sense and good law.

As the implied condition had been broken before the plaintiffs purported to accept, the offer had ceased to be capable of acceptance and no contract had been concluded.

D DEATH

The effect of death upon the continuity of an offer is more doubtful. It is clear that the offeree cannot accept after he has had notice of the offeror's death.[14] But is the offeror's estate bound if the offeree performs an act of acceptance in ignorance of the death? In *Dickinson v Dodds*[15] Mellish LJ, in an obiter dictum, expressed the opinion 'that, if a man who makes an offer dies, the offer cannot be accepted after he is dead'. The case of *Bradbury v Morgan*,[16] however, suggests that, in principle at least, this opinion does not represent the law:

> X had written to the plaintiffs, requesting them to give credit to Y and guaranteeing payment up to £100. The plaintiffs gave credit to Y. X then died, and the plaintiffs, in ignorance of this fact, continued the credit to Y. The plaintiffs now sued X's executors on the guarantee.

It was held that the defendants were liable. In the words of Pollock CB:

> This is a contract, and the question is whether it is put an end to by death of the guarantor. There is no direct authority to that effect: and I think that all reason and authority, such as there is, are against that proposition.

Channell B was equally emphatic:

13 Ibid at 390. Lord Denning MR and Donovan LJ (Pearson LJ dissenting) were also prepared to find for the defendant on the ground that, when he returned the car to the dealer, he revoked his offer and that the dealer had ostensible authority to accept the revocation on the plaintiffs' behalf.

14 See *Re Whelan* [1897] 1 IR 575, and *Coulthart v Clementson* (1879) 5 QBD 42.

15 (1876) 2 ChD 463 at 475. See also *Pollock on Contract* (13th edn) p 30.

16 (1862) 1 H & C 249.

> In the case of a contract death does not in general operate as revocation, but only in exceptional cases, and this is not within them.

The truth would seem to be that the effect of death varies according to the nature of the particular contract. If, as in the case of a guarantee, the offer is of a promise which is independent of the offeror's personality and which can be satisfied out of his estate, death does not, until notified, prevent acceptance. If, as in the case of agency[17] or in an offer to write a book or to perform at a concert, some element personal to the offeror is involved, his death automatically terminates the negotiations.[18]

Effect of death of offeree

Upon the converse case of the offeree's death there appears to be no English authority. The question was, indeed, considered obiter by Warrington LJ in *Reynolds v Atherton*.[19] He was of opinion that an offer ceases, by operation of law, on the death of the offeree, though he regarded the language of revocation in this context as inappropriate:

> I think it would be more accurate to say that, the offer having been made to a living person who ceases to be a living person before the offer is accepted, there is no longer an offer at all. The offer is not intended to be made to a dead person or to his executors, and the offer ceases to be an offer capable of acceptance.

The dictum, indeed, was coloured by an anachronistic reference to the *consensus* theory, and the point was expressly reserved by Lord Dunedin when the case reached the House of Lords.[20] But it is not unreasonable to suggest that an offer, unless made to the public at large, assumes the continued existence of a particular offeree, and that the destruction of this assumption frustrates the intention to contract. This view has been taken in Canada. In *Re Irvine* it was held by the Appellate Division of the Supreme Court of Ontario that an acceptance, handed by an offeree to his son for posting but not in fact posted until after the offeree's death, was invalid.[1]

5 Constructing a contract

The rules thus developed by the common law as to the making, acceptance and revocation of offers illustrate the almost self-evident truth that while contract is ultimately based upon the assumption of agreement, the courts, like all human tribunals, cannot peer into the minds of the parties and must be content with external phenomena. The existence of a contract, in many cases, is to be inferred only from conduct. To do justice, however, the courts may have to go beyond the immediate inferences to be drawn from words and acts and may be tempted or driven to construct a contract between persons who would seem, at first sight, not to be in contractual relationship with each other at all.

The classical example of this process is the case of *Clarke v Dunraven*:[2]

17 P 557, below.
18 See Ferson 10 Minn LJ 373.
19 (1921) 125 LT 690 at 695-696.
20 (1922) 127 LT 189 at 191.
1 [1928] 3 DLR 268.
2 [1897] AC 59, affirming the decision of the Court of Appeal, reported *sub nom The Satanita* [1895] P 248. See also *Ravfield v Hands* [1960] Ch 1, [1958] 2 All ER 194.

> The owners of two yachts entered them for the Mudhook Yacht Club Regatta. The rules of the Club, which each owner undertook in a letter to the Club Secretary to obey, included an obligation to pay 'all damages' caused by fouling. While manoeuvring for the start, the *Satanita* fouled the *Valkyrie* and sank her. The owner of the latter sued the owner of the former for damages.

The defendant argued that his only liability was under a statute whereby his responsibility was limited to £8 per ton on the registered tonnage of his yacht.[3] The plaintiff replied that the fact of entering a competition in accordance with the rules of the Club created a contract between the respective competitors and that by these rules the defendant had bound himself to pay 'all damages'. The vital question, therefore, was whether any contract had been made between the two owners: their immediate relations were not with each other but with the Yacht Club. It was held, both by the Court of Appeal and by the House of Lords, that a contract was created between them either when they entered their yachts for the race or, at latest, when they actually sailed.[4] The competitors had accepted the rules as binding upon each other.

The rôle of the judges in thus constructing a contract was accepted and explained in 1913 by Lord Moulton.[5]

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

The use of the title 'collateral contracts' to designate such creatures is thus sanctioned by high authority and, indeed, had been known to the law for the previous fifty years.[6]

The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is often, though not always, rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful. Its value has been attested by a number of cases. Thus in *Shanklin Pier Ltd v Detel Products Ltd*:[7]

3 Merchant Shipping Act, Amendment Act 1862, s 54(1).

4 See the judgments of Lord Esher [1895] P at 255, and of Lord Herschell [1897] AC at 63.

5 *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47. See Greig 87 LQR 179 at 185-190.

6 *Lindley v Lacey* (1864) 17 CBNS 578; and *Erskine v Adeane* (1873) 8 Ch App 756. See Wedderburn [1959] CLJ 58. It may be added that the case of *Collen v Wright* (1857) 8 E & B 647, seems to offer an early example of a 'collateral contract': p 551, below. *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484; on appeal [1893] 1 QB 256, p 34, above is another example of a collateral contract between manufacturer and consumer where the consumer bought the goods from a retailer relying upon the manufacturer's advertisements. In that area such a finding is unusual: *Lambert v Lewis* [1982] AC 225, [1980] 1 All ER 978. See also *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, discussed more fully at p 130, below.

7 [1951] 2 KB 854, [1951] 2 All ER 471.

> The plaintiffs had made a contract with X and Co to repair and repaint their pier. Under this contract the plaintiffs had the right to specify the materials to be used. The defendants induced them to specify the use of a particular paint made by the defendants by giving them assurances as to its quality. The paint was applied by X and Co with sad effect, and the plaintiffs had to spend £4,000 to put matters right.

The plaintiffs sued the defendants for breach of their undertaking. The defendants argued that there was no contract between the plaintiffs and themselves, because the paint had been bought from the defendants by X and Co. But it was held that in addition to the contract for the sale of the paint, there was a collateral contract between plaintiffs and defendants by which in return for the plaintiffs specifying that the defendants' paint should be used, the defendants guaran ed its suitability.

A series of hire-purchase cases is especially instructive.

In *Webster v Higgin*:[8]

> The defendant was considering the hire purchase of a car owned by the plaintiff, a garage proprietor. The plaintiff's agent said to the defendant: 'If you buy the Hillman we will guarantee that it is in good condition.' The defendant then signed a hire-purchase agreement containing a clause that 'no warranty, condition, description or representation as to the state or quality of the vehicle is given or implied'. The car, in the words of Lord Greene, 'was nothing but a mass of second-hand and dilapidated ironmongery'.

The plaintiff sued for the return of the car and for the balance of the instalments still due. Had the hire-purchase agreement stood alone, the clause quoted might have precluded the defendant from pleading the state of the car.[9] But the Court of Appeal held that not one but two contracts had been made by the parties. The hire-purchase agreement itself had been preceded by a s parate contract effected by an exchange of promises. The plaintiff, through his agent, had offered to guarantee the condition of the car in return for the defendant's promise to take it on hire-purchase terms. This separate contract the plaintiff had broken. In the result the parties gave mutual undertakings to the court, the defendant to return the car and the plaintiff to treat the hire-purchase contract as at an end; and the court orde ed the plaintiff to refund the deposit and the instalments which the defendant had already pa d.

In *Brown v Sheen and Richmond Car Sales Ltd*:[10]

> The plaintiff wanted to obtain a car. The defendants showed him one, saying that it was 'in perfect condition and good for thousands of trouble-free miles'. The plaintiff, relying on this statement, decided to take it, but could not pay cash. It was therefore agreed that the transaction should be financed through X and Co, a finance company. In accordance with the usual course of such business, the defendants sold the car to X and Co, and X and Co made a hire-purchase contract with the plaintiff. When

8 [1948] 2 All ER 127.

9 The plaintiff, however, might have been guilty of a fundamental breach: see pp 189-196, below.

10 [1950] 1 All ER 1102.

the car was delivered to the plaintiff, he found that it was not in good condition and had to spend money in putting it in order.

He sued the defendants for breach of their undertaking that the car was 'in perfect condition', and the defendants were held liable.

In *Andrews v Hopkinson*:[11]

> The plaintiff wanted to obtain a secondhand car. The defendant, a car dealer, recommended one, saying: 'It's a good little bus. I would stake my life on it.' Hire-purchase arrangements were then made. The plaintiff paid a deposit of £50 to the defendant; the defendant sold the car to X and Co, a finance company; and X and Co made a hire-purchase contract with the plaintiff. X and Co then delivered the car to the plaintiff, who signed a delivery note stating that he was 'satisfied as to its condition'. Up to this moment the plaintiff had not examined the car. A week later, when the plaintiff was driving it, it suddenly swerved into a lorry. The car was wrecked and the plaintiff was seriously injured. On examination it became clear that, when the car was delivered, the steering mechanism was badly at fault.

The plaintiff might have been precluded by the delivery note from suing X and Co on the hire-purchase contract. But he recovered damages from the defendant for breach of the undertaking given by the latter before the hire-purchase contract had been made.

In each of these cases the defendant had given an undertaking to the plaintiff which induced the plaintiff to make an independent contract. In each of them the court was able to construct a preliminary or 'collateral' contract, 'the consideration for which', in Lord Moulton's words, was 'the making of some other contract', and for whose breach an action would lie. Reciprocal promises could be spelt out of the dealings between the parties. 'If you will promise to specify my paint to be used on your pier or to enter into a contract for the hire purchase of a car, I will promise that the paint is of good quality, or the car in good condition.'[12] The device, like other judicial inventions, must not be abused. In 1965, in the case of *Hill v Harris*, Diplock LJ said that 'when parties have entered into a lease which has been the subject of negotiations between them over a period of something like six months, [a court] is unlikely to find the terms on which the premises are to be held, or the relevant covenants in relation to the premises, outside the terms of the negotiated lease itself'.[13] On the facts of this particular case the Court of Appeal was not prepared to discover the existence of any agreement other than that contained in the lease. But there is good authority for saying that, where the facts justify the conclusion, a court may properly 'construct a collateral contract' from things said or done during the preliminary

11 [1957] 1 QB 229, [1956] 3 All ER 422.

12 Readers of the judgments in these three cases will observe that the word 'warranty' is used to describe the undertakings given by the defendants. As will be seen (p 166, below), this word, in modern legal language, is used to denote a term of comparatively minor importance included in a contract. It would therefore seem inappropriate in the present context, where the task of the court was to construct an entirely independent contract, one side of which was the undertaking in question. But, though the language employed may be unhappy, the result of the cases is in line with previous developments, as described by Lord Moulton. See Diamond 21 MLR 177.

13 [1965] 2 All ER 358 at 362, [1965] 2 WLR at 1336.

negotiations.[14] Used with discretion, an instrument has thus been forged which, without offending orthodox views of contract, may enable substantial justice to be done.

6 Inchoate contracts

The account of contract formation given in this chapter reflects the rather rigid and formalistic stance which English law has taken on this question. It often looks as if English courts have committed themselves to the view that until there is a contract, the parties are under no obligation. This is not however the way that parties negotiate in practice. Except in the simplest cases, the parties do not move at once from total non-agreement to complete agreement; they proceed by agreeing on differing matters in turn and in general it would be regarded as disreputable for a party to go back on something which has already been agreed just because there are other matters not yet agreed. So it is perfectly possible while accepting the decision of the House of Lords in *Gibson v Manchester City Council*[15] as entirely correct as a technical application of private law contract principles to have sympathy with the view of Lord Denning that this is not the way in which a public body should negotiate.

The English approach clearly has important messages for contract negotiators. It is clearly risky to leave terms to be agreed later and so on and very desirable that, if this is done, some objectively operable machinery should be provided which the courts can take as a basis for finding a concluded agreement.[16] It is inevitable, however, that the parties will from time to time wish to leave question to be resolved at a later date. With careful drafting this can sometimes be done by the use of conditional contracts.[17] The trick here is to make sure that the condition is sufficiently certain that the court can hold it to have been satisfied. Sometimes Letters of Intent will pass this test though in the majority of cases they will not.[18]

Some legal systems handle this problem by imposing a duty to negotiate in good faith.[19] This is expressly provided by the Italian civil code and other civil law systems have developed a doctrine of *culpa in contrahendo* though in some systems this is regarded as tortious rather than contractual. There are signs of similar movement in American law. *Hughes Aircraft Systems International v Airservices Australia*[20] suggests that Australian law may develop in the same way. There is no explicit recognition of such a notion in English law though some of the cases discussed in this and the previous section could be regarded as examples of an undeveloped doctrine of this kind.

An important question is whether the parties can, by agreement, impose on themselves a duty to negotiate in good faith. A negative answer was given to this question by the House of Lords in *Walford v Miles*.[1]

14 *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733. See p 144, below.
15 [1979] 1 All ER 972, [1979] 1 WLR 294, see p 40, above.
16 See *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, discussed p 50, above.
17 See p 162, below.
18 See p 48, above.
19 Carter and Furmston, 8 JCL 1, 93. Furmston , Norisada and Poole ch 10.
20 (1997) 146 ALR 1; Furmston 114 LQR 362.
1 [1992] 1 All ER 453.

In this case the defendants, who were husband and wife, owned a photographic processing business which they were interested in selling. In 1985 there had been abortive negotiations with a company in which their accountants had a substantial interest. In late 1986 the plaintiffs, who were brothers, one of whom was a solicitor and the other an accountant, heard that the business might be for sale at about £2 million and the plaintiffs were very anxious to buy at this price which they regarded as a bargain. In March 1987 the plaintiffs agreed 'subject to contract' to buy the business.

On 18 March 1987 there was an oral agreement between one of the plaintiffs and Mr Miles, that if the plaintiffs obtained a comfort letter from their bankers, confirming that they were prepared to provide the finance of £2 million the defendants would terminate negotiations with any third party. The comfort letter from the bank was provided, but on 30 March the defendants' solicitors wrote to the plaintiffs stating that the defendants had decided to sell the business to the company in which their accountants were interested.

The plaintiffs claimed that, although there was no binding contract for the sale of the business, there was a binding preliminary contract. The argument was that in return for the provision of the comfort letter the defendants had bound themselves to a 'lock-out' agreement, that is, an agreement which would give the plaintiffs an exclusive opportunity to come to terms with the defendants. The House of Lords did not doubt that it was in principle possible to make a binding lock-out agreement. However, in order to make any commercial sense, such an agreement would have to have an express or implied time limit. If all that A does is to promise not to negotiate with anyone other than B, that in itself does not impose a legal obligation to negotiate with B; still less to reach an agreement with B. But, of course, if A has agreed not to negotiate with anyone but B for 6 months, this would put A under some commercial pressure, which may in some cases be very great, to make a serious attempt to reach agreement with B.

The agreement in this case had no express time limit. The plaintiffs argued that it was subject to an implied term that the defendants 'would continue to negotiate in good faith with the plaintiffs'. One answer to this claim would be that no such term would be implied. However, the answer given by the House of Lords was that even if such a term was implied it would not help the plaintiffs because a duty to negotiate in good faith was meaningless and without content.

This decision has not escaped criticism.[2] Other systems reveal that there is no necessary antipathy between the freedom to reach a concluded contract or not and a duty to negotiate in good faith. This is most obviously displayed in the case of a party who enters negotiations with no intention of reaching a result but simply to waste the other party's time. Of course, the fact that a duty to negotiate in good faith does not impose a duty to reach a concluded contract is important as to the remedy. The plaintiffs in this case claimed the amount of profit they would have made if a contract had been concluded. It is respectfully submitted that this contention was misconceived. The plaintiffs' loss, if there was a breach of an obligation to negotiate in good faith, was in the money they had wasted on the negotiations. In fact, a sum had been awarded in respect of this loss by the trial judge and was not the subject of an appeal.

The statement by the House of Lords that it was possible in principle to make a binding 'lock-out' agreement was applied by the Court of Appeal in

2 Carter and Furmston above and Neill 108 LQR 405.

Pitt v PHH Asset Management.[3] In this case, the defendant placed a property on the market through a firm of estate agents at £205,000. Both the plaintiff and a Miss Buckle were interested in buying the property. Miss Buckle made a written offer of £185,000. The plaintiff offered £190,000, which was accepted subject to contract. Miss Buckle increased her offer to £195,000 and the acceptance of the plaintiff's offer was then withdrawn. The plaintiff increased his offer to £200,000 and Miss Buckle made an offer of the same amount but the plaintiff's offer was accepted, subject to contract. Miss Buckle then increased her offer again to £210,000 and the acceptance of the plaintiff's latest offer was again withdrawn. The plaintiff threatened to seek an injunction to prevent the sale to Miss Buckle and also to tell Miss Buckle that he was withdrawing so that she should lower her offer.

It is quite clear legally that whatever one might think of the behaviour of all the parties, nobody was at this stage contractually bound to anyone else. However, the plaintiff and the selling agent acting on behalf of the defendant then reached an oral agreement that the defendant would sell the property to the plaintiff for £200,000 and would not consider any further offers, provided the plaintiff exchanged contracts within two weeks of receipt of a draft contract. That agreement was recorded in a letter from the plaintiff to the selling agent and the agreement was confirmed by the defendant in a letter of the same date to the selling agent, a copy of which was sent to the plaintiff.

The defendant sent a draft contract to the plaintiff and eight days later the plaintiff indicated that he was ready to exchange contracts. However, on the same day, the plaintiff received a letter saying that it had been decided to go ahead with the sale to Miss Buckle at £210,000 unless the plaintiff was prepared to exchange contracts on the same day at that price. This the plaintiff refused to do.

It is clear that on these facts there was no binding contract between the plaintiff and the defendant for the sale of the property but the plaintiff argued that the defendant was in breach of an agreement not to consider any further offers within the 14-day period. The trial judge and the Court of Appeal held that the plaintiff's claim succeeded.

Of course, the defendant could have waited for 14 days and then have reopened negotiations with other potential buyers but this would be commercially risky for the defendant since it would very likely lose the chance of selling to the plaintiff. In this situation, it is the possibility of playing two or more potential purchasers off against each other which provides the best chance of maximising the price received. What the case shows is that there are steps which potential purchasers may take to defend themselves against such behaviour.

The all or nothing approach is not in fact adopted by the courts in all cases. Sometimes the court will hold that although the main contract has not been concluded, nevertheless there is a collateral contract which gives rise to some rights during the negotiating process. A good example is *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council.*[4] In this case the defendant Council which owned and managed an airport invited the plaintiffs, together with six other parties, to tender for the concession for operating pleasure flights from the

3 [1993] 4 All ER 961.
4 [1990] 3 All ER 25, [1990] 1 WLR 1195; Phang 4 JCL 46.

airport. The invitation to tender required tenders to be submitted in an envelope which was provided and stated that the envelope was not to bear any identifying mark and that tenders received after 12 noon on 17 March 1983 would not be considered. The plaintiffs had successfully tendered for this concession on a number of previous occasions and delivered by hand to the letter box in the Town Hall at 11 am on 17 March a tender which would have been the highest. Unfortunately, the letter box was not in fact cleared until the following day and the Tender Committee therefore assumed that the plaintiffs' tender had not been delivered in time, put it on one side and awarded the concession to another tenderer. The plaintiffs were naturally much aggrieved but they appeared to have a major problem since it was clear that the Council had never agreed to accept the highest tender or indeed to accept any tender at all. Nevertheless, the Court of Appeal held that it was implicit in the adoption of a formal and elaborate tendering machinery of this kind that the Council implicitly undertook to operate it according to its terms. The Council should therefore have considered the plaintiffs' tender and had only failed to do so because of the inefficiency of their own servants, which was clearly no excuse. It followed that the plaintiffs were entitled to damages.[5]

Two later cases suggest that the *Blackpool* case is the origin of a general principle that, at least in the public sector, one who invites tenders, implicitly promises to adhere strictly to the rules of the game. In *Hughes Aircraft Systems International v Airservices Australia*[6] Finn J held that the defendant were under a contractual obligation scrupulously to apply the published criteria in regard to tendering for the Australian advanced air traffic system.

In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*[7] the claimant, a subsidiary of an American company, was the unsuccessful tenderer for the fenestration contract for the new parliamentary building in Bridge Street, Westminster. The trial judge held that the claimant was in fact the lowest bidder but that the bids had been manipulated so as to prefer another bidder, which was a consortium which included a British partner. This was held to be a breach of contract.[8] His Honour Judge Humphrey Lloyd QC said:

> In the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.[9]

Even though there is no contract, a party may be entitled to restitutionary relief on the grounds that the other party has derived benefit from the transaction for which he should compensate the plaintiff even though no contract has arisen. One example we have already met is *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd.*[10] Another example is *Marston Construction Co Ltd v*

5 Obviously there would be a problem about the amount of damage which the plaintiff could recover though he was certainly deprived of a substantial chance of being awarded the contract. In fact the amount of damages was not before the Court of Appeal.

6 (1997) 146 ALR 1.

7 (1999) 67 Con LR 1.

8 As well as of European procurement law.

9 In later proceedings the judge held that the claimant could recover as damages the costs of tendering and a substantial part of the profit it would have made on the contract

10 [1984] 1 All ER 504, p 48, above Jones 18 U of Western Ontario LR 447.

Kigass Ltd.[11] In this case the plaintiffs were invited, amongst others, to tender for the building of a replacement factory for the defendants. The plaintiffs were the only tenderers who were invited to discuss their tender further with the defendants. The defendants at all times made it clear that they would not go ahead with the project unless they received enough money from their insurance claim but asked the plaintiffs to go ahead with preparatory work. The plaintiffs did some £25,000 worth of preparatory work before it became clear that the defendants would not proceed with the building. It was held that in the circumstance the plaintiffs were entitled to a reasonable payment for the work which they had done at the defendants' request.[12] A different view was taken by Rattee J in *Regalian Properties plc v London Dockland Development Corpn.*[13] In this case, the plaintiffs in 1986 entered into negotiations with the defendant corporation for a residential development in the former London docks area. The plaintiffs offered £18.5 million for a licence to build the development. This was accepted 'subject to contract'. There followed long delays which were caused partly by the requirement of the Development Corporation for further designs of what was to be a high profile and high prestige project and partly by the need for the defendants to obtain vacant possession of all of the land which was to form part of the project. By October 1988, land prices had collapsed to such an extent that it became clear that the project was not viable and it was abandoned. The plaintiffs brought an action claiming some £3 million representing fees which they had paid to various professional firms in respect of the proposed development. Rattee J rejected the plaintiff's case. The dealings had all been 'subject to contract' and the Development Corporation had done nothing to encourage the plaintiffs to think that they would be paid for this work.[14]

Finally, it is possible in some cases that what is said and done in the course of negotiations may give rise to a claim in tort. It would certainly seem that someone who entered into negotiations for a contract fraudulently, never intending to bring them to a conclusion, should be liable for loss which this inflicted on the other party. It has certainly been held that what has been said in the negotiations may give rise to liability for negligent misrepresentation.[15]

11 (1989) 15 Con LR 116. See also *William Lacey (Hounslow) Ltd v Davies* [1957] 2 All ER 712, [1957] 1 WLR 932.

12 One might perhaps explain this case on an implied contract basis but the judge's reasoning is entirely in terms of restitution. In the interesting case of *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 [1987] 2 All ER 387, no claim on a restitutionary basis was made.

13 [1995] 1 All ER 1005. Mannolini 59 MLR 111.

14 Rattee J was critical of both the result and the reasoning in *Marston v Kigass*, above. He was critical of the reasoning in *William Lacey v Davies* n 11, above, but not the result.

15 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 [1976] 2 All ER 5. See p 306 below.