

CONTRACTS Semester 1

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Exchange and Bargains/Consideration

- Consideration is the crucial element in enforcing a legally binding contract in common law
- In an exchange for a promise, something of economic value has to be exchanged
- Before a promise can be enforced, there must be a benefit to the donor/promisor (ex. Name on a plaque) or a detriment to the promisee/receiver at the request of the promisor (something they otherwise would not have done – ex. spend money on the building)
 - Reliance is not a factor in the common law of consideration – it could be the same to detriment, but it would have to be requested
- Peppercorn theory: consideration needs to be sufficient (anything of value), does not have to be adequate

Dalhousie College v Arthur Boutilier [1934] SCR 642 (Gratuitous Promise)

Facts:

- Arthur promised to pay a sum of money to the College. He did not pay and after his death the College sues the estate of Arthur (deceased) for the promised sum, accusing Arthur of giving consideration for his promise
- The college said Arthur was their debtor because he contracted to pay \$5000 and therefore should be compensated before the beneficiaries get paid
 - Debts against a person/corporation survive their demise – estate is liable to pay these

Issue:

- Was there consideration in Arthur's promise? Or merely a gratuitous promise?

Decision:

- No consideration in his promise; no exchange for Arthur's promise
 - In the doctrine of mutual promises, each promise is consideration for the other

Analysis: (Crocket)

- These 3 promises are moral ethic principles; they may be reasons why promises are enforceable but they are not enforceable in common law
 - 1. The court was aware Arthur was seriously intended his promise
 - 2. Dalhousie said he made a serious promise which they relied on by spending the money
 - 3. Dalhousie relied on the promise to their detriment – would not have spent the money without his promise
- The promise here is empty (was a naked promise) → they do not promise to exchange and they do not promise to improve efficiency of their teaching
- The promise of the \$5000 did not obligate the University to do something they were not already going to do

Ratio:

- Gratuitous promises are those not supported by consideration, therefore are not enforceable
- In order for there to be consideration, there must be a benefit to Arthur, or a detriment to the College at the request of the promisor

Note:

- 3rd party consideration is not consideration – it must flow from the promisor

Brantford General Hospital v Marquis Estate [2003] Ont. SCJ (Requested benefit)

Facts:

- Mrs. Marquis pledged to give the hospital a million dollars over the period of five years commencing in December 1999, she made her first installment of \$200 000 on April 14, 2000. Then she died on May 16, 2000. Her estate refused to pay the balance.
- The Hospital believes there was consideration in the promise because they offered to name the unit after her

Issue:

- Whether Mrs. Marquis' pledge was a legal binding contract enforceable in law

Decision:

- They cannot enforce the agreement as there is no consideration, action is dismissed

Analysis:

- According to witnesses and Mrs. Marquis' nature, she was not interested in making the pledge in order to have the new unit named after her; it was also not stated in the pledge document that it would be named after her, and the formal approval by the board of directors was still required
- Naming the unit after her was most likely a benefit, however it was not a benefit she requested and it was not the price of her promise that the unit be named after her

Ratio:

- **For there to be consideration a benefit must have been requested**

*This is a straightforward application of *Dalhousie*

Wood v Lucy Lady Duff-Gordon 1917 (US NY) (Contract instinct with obligation)

* *Persuasive, not binding (US case)*

Facts:

- Wood was given an exclusive right to place Lucy's endorsements on the designs of others and to place her own designs on sale and in return she was to half one-half on all profits and revenues that he might make. Lucy placed her endorsements on other products without his knowledge and withheld the profits. She claims that Wood did not do anything to make profits/undertake to do anything, therefore there was no consideration

Issue:

- Wood sued Lucy for damages and the case comes on demurrer; determine whether contract lacks mutuality

Decision:

- Judgment of appellate court reversed, damages for Wood

Analysis: (Cardozo)

- Lucy gave an exclusive privilege, and the acceptance of this exclusive agency was an assumption of his duties. Unless he gave his efforts, she could not receive anything. There is an implicit obligation/ agreement here – **for Wood to use his best efforts**, and as long as he is using his best efforts the other agreement arises
- Here, it is necessary to imply that term for business efficacy (so it makes sense and is workable) and also must represent the implied intention of the parties (although this was not in the agreement, the parties must have intended it to be a part of the agreement)
- Duff said there was no corresponding request to her promise [she did not request anything, therefore no consideration], however Cardozo said Wood's promise to render accounts and keep half the profits implied he would use reasonable efforts to implement the agreement

Ratio:

- A promise may be lacking, and yet the whole writing may be '**instinct with obligation**' and if that is so then there is a contract – instinct with obligation may be implied with circumstances surrounding the contract

Definitions

- **Entire Contract Clause:** this represents the entire contract between the parties and there are no other promises or agreements other than what it is the document – based on consent; consent to agree represents the agreement (designed to stop the courts from making implicit assumptions)
- **Officious Bystander Test:** a term used to determine whether an unstated condition was originally implied at the time of writing the contract. What would have been the reply of the contracting parties if a by-stander asked if they intended to include term X into the contract, and if they said 'yes' then it is an implied term
- **Breach of contract:** still bound by a contract unless the breach is of a very serious nature; not exempt from your obligations simply by the other party breaching the contract
- **Contract under seal:** a contract under seal does not need consideration to be valid in law

Past Consideration

- An act performed prior to a promise being made – no mutuality
- Past consideration is for the most part not seen as good consideration
- If a promise is made following a bargain, it is not part of the contract and not binding
- An expressed promise made can in some circumstances revive consideration from the past
- However, when can this happen? – only when the original consideration could be enforced had in not been suspended by some positive rule of law
 - Ex. Bankruptcy – not liable for debts incurred at that time
 - Ex. Infant paid when come age of majority
- Take these cases as rare cases – where the contract was always enforceable but suspended by some positive rule of law
- These cases were seen as strange exceptions

Eastwood v Kenyon (1840) (QB)

Facts:

- Sutcliffe died and left his estate to his infant daughter Sarah. Eastwood acted as Sarah's guardian and borrowed money (100 pounds) to pay for Sarah's education. She promised she would pay Eastwood for this when she turned 21, and she subsequently paid off 1 year of interest payments. The defendant (Sarah's husband) also promised he would pay the amount, however he did not

Issue:

- Is this promise sufficient enough to form a contract? Is the husband bound by his promise to pay off the loan that Eastwood took out to fund Sarah's education?

Decision:

- No contract was found to have existed

Analysis: (Lord Mansfield)

- Found that there was nothing more than a benefit voluntarily conferred by Eastwood and an express promise by Kenyon to pay the money; there was no benefit to Kenyon
- To be consideration there must be a benefit to the promisor or a detriment to the promisee (here there is a detriment to Kenyon)
- When the money was expended, Kenyon was not connected with the property or the plaintiff
- **The borrowing of the money was not done at Sarah's husband's request nor motivated by him, therefore consideration had wholly passed; there was never a contract between Eastwood and Kenyon**
- Kenyon's promise was not enforceable because of past consideration – cannot make a promise about something done and completed in the past

Ratio:

- Promises are not sufficient enough to form a contract; past consideration is no consideration at all. Consideration cannot be enforced on past benefits or detriments [provides no link between the alleged consideration + the promise made]

Note:

- Would he have succeeded if he sued Sarah? – a minor is not liable for contracts they may enter (unless it is for necessary goods and services, required at the minor's request, and they agree to pay it when of age – only liable for a **contract of necessities**) → however, Sarah did reaffirm the contract after she became an adult

Executory contract: (a contract not yet performed) if a minor agrees to pay something but it has not yet been paid for, then the contract is not enforceable, however if they have already paid for something then the contract is complete

- If enter a contract as a child, then ratify it after the age of majority, then bound by it
- If the minor agrees to pay afterwards when age of majority, the contract is then binding

Infant contract: if under 18, then have limited capacity and the law protects them – General rule is infants are not obligated to the contracts they make; only binds if ratified or adopted as an adult

Contracts of necessities

- If enter into an agreement for necessities as a minor at the minor's request, and the minor agrees to pay it when reach the age of majority then it is a contract
- Contracts – for necessities while a minor, then agrees to pay at age of majority then it is a contract
- Sarah agreed to pay back the promissory note (not for the necessities)
- Was what Sarah's guardian used the money for necessities?
- Complicated – need to know they were **necessities** + required **at her request**
- If it were enforceable it would be an exception to the law of past consideration
 - (Usually promises are not enforceable because of a positive rule of law – ex. Infancy or bankruptcy)
- (If the goods bought were not necessities, and the contract was Sarah's against her guardian she would need to ratify the contract once she was age of majority in order for her to be bound by the contract)

Lampleigh v Brathwait (1615) KB [Exception to past consideration]

Facts:

- Braithwait killed a man and requested Lampleigh to seek a pardon from the king. After he attempted to obtain the pardon, B promised L 100 pounds in return. B is arguing past consideration – that a promise made after something is already done is not valid consideration

Issue:

- Cause of action – *assumpsit*: a promise/engagement where one person assumes or undertakes to do some act or pay something to another
 - Starting to recognize contracts not under deeds, therefore said the action was an *assumpsit*
- Whether there is consideration for B's promise to L even though the promise to pay was made after the request had been fulfilled

Decision:

- A binding contract was found, reward of 100 pounds for Lampleigh

Analysis:

- There was a reasonable expectation here that L would be paid for his services; most likely not doing this as a voluntary courtesy
- A voluntary act will not have consideration, however if it is motivated by a request of the party, then the later promise couples itself with the act, the promise is then not a *nudum pactum* (naked promise) but a binding contract
- This is not past consideration because there was always a reasonable expectation the services would be paid for

Ratio:

- A promise coupled with a prior request can be good consideration given it is not expected to be a voluntary act

A contract/action in quantum meruit:

- There was always an expectation that services would be paid for; the law infers the promise to pay a reasonable amount for labor/materials even in the absence of a specific legally enforceable agreement between the parties
- Ex. Hiring a plumber – there is an expectation that the services will be paid for at the beginning; it needs to be a reasonable value of the services
- Not past consideration since there was always an expectation of being paid for services
- In *Lampleigh* B's defence that L did not actually get him the pardon is warranted because the promise of L was that he would make reasonable efforts to obtain the pardon; and since he offered the payment afterwards he must have been somewhat satisfied with the results

Exception to Past Consideration:

- 1) Promisee was clearly asked to perform the act; 2) they performed it; 3) there was a reasonable expectation of payment; and 4) If the promise had been made prior to the act, a contract would have been formed
 - Lampleigh referred to this + so did Pao On [obiter]

Consideration Must be of Value in the Eyes of the Law

Thomas v Thomas (1842) 2 QB 851 (United Kingdom)

Facts:

- 'Whereas' clauses of agreement
- John Thomas orally expressed to his wife that she was to have the home they resided in (along with the possessions in it) or 100 pounds, along with the rest she was entitled to in his will, as long as she was alive and a widow. A contract was drawn between Mrs. Thomas and the executors (his brothers) that as long as she had the home she would pay them rent (1 pound/year) and keep it in good repair. After one of the executors died, the other one refused to execute the conveyance and brought an eviction to turn Mrs. Thomas out of possession

Issue:

- Was there consideration in the contract for Mrs. Thomas to keep her house, or was this a voluntary gift?

Decision

- Holding for Mrs. Thomas stands – there was a contract

Analysis:

- There are 2 sources of consideration because there was an agreement where **Mrs. T pay rent**, this was more than a gift and had sufficient consideration; the stipulation for the ground rent was not a condition but an express agreement, and **keeping**

it in good repair was a distinct agreement (she is undertaking a significant financial obligation, and relieving the executors of this obligation)

- Motive here is irrelevant (keeping the wishes of her deceased husband is not a contract) – this was a moral obligation of the wishes of the deceased. Also, an oral promise can never change a will – the will was not amended
- Motive is irrelevant in considering the wishes of deceased
- Was it part of the consideration that she remains a widow?
 - If this could be considered a detriment to her, then this could mean there was consideration in this condition as well
 - Nowhere, in the agreement, does widow Thomas agree to remain unmarried
 - Remaining unmarried *could* be consideration however in this case it is not, as it is not asked for by the estate and it is not asked for by widow Thomas
 - There are two references to remaining unmarried – the deceased asked that she should have the house for as long as she remains the widow
 - If she does choose to remarry, she does not get to keep the house
 - The executors say they would allow her to keep her house as long as she remains a widow and for the remainder of her life
 - There are two **'time agreements'** attached to this (it is a time limit and not active consideration)
 - She remarries or she dies – how the binding contract can expire
 - The estate never asked for her to remain a widow as part of the agreement

Ratio:

- Motivation is irrelevant and is not the same as consideration; as consideration needs to be sufficient, not adequate
- If do not request the act from someone it is not good consideration

Note

- If she would have sued for the 100 pounds she would not have succeeded because there would have been no benefit to the estate and no detriment to Mrs. Thomas
- Remaining unmarried is not consideration here, because it was not asked for by the estate nor by Mrs. Thomas
 - Estate: she was allowed to keep the house until she dies as long as she remains a widow
 - 2 'time agreements' here – it is a time limit and not active consideration (how the binding contract can expire) = condition subsequent

Bona Fide Compromises of Disputed Claims (Forbearance)

- **Compromises are valid unless someone is pursuing a claim known to be invalid or that they believe is invalid**
- These compromises are valid unless someone is pursuing a claim known to be invalid or that they believe is invalid – a bad faith consideration can concern the possibility of blackmail
- Consideration here is reflecting other values in society – to filter out contracts that should not be enforced and distinguish them from contracts that should be enforced
- If a man bona fide believes he has a fair chance of success, he has reasonable grounds [or a possibility of a valid claim] for suing, and his forbearance to sue will constitute good consideration

B (DC) v Arkin [1996] Man. QB

Facts:

- Plaintiff's 14-year old son stole items from Zeller's amounting to \$59.95. Later she received a letter from Zeller's counsel stating she was to pay restitution costs and damages (\$225) otherwise would be taken to court. She therefore paid the amount

Issue:

- Can the plaintiff be reimbursed on the basis of this being an invalid claim? Does the claim constitute valid forbearance?

Decision:

- Appeal allowed; plaintiff's claim allowed with interest and costs

Analysis:

- The defendant's claim was not only doubtful but invalid – there is no rule that parents are liable for the torts of their children by being their guardians (would be liable if they were negligent/involved in the act)
- The lawyers knew the mother did not have an obligation to pay the money, and she only paid because she thought otherwise she would get sued

Ratio:

- Forbearance to sue is good consideration and money paid in exchange for a promise not to sue is a valid and enforceable legal contract; however, a promise is not valid if the only consideration for it is a forbearance to enforce (or a promise to forbear from enforcing) a claim which is invalid or is known by the party forbearing to be invalid or not believed to be valid (if merely doubtful then forbearance is still good consideration)

Pre-Existing Legal Duty

1. A duty imposed by law – a **public duty** you are required to perform
2. A duty you are already obliged to perform under a contract with a **third party**
3. You are paid money to do something you are **already obliged** (contractually bound) to do

Public Duty – (major public policy argument)

- Example: *Glasbrook Bros Ltd. v Glamorgan County Council* (1924)
 - Pay to provide police officers to guard their building; what they got in exchange was something extra/more than would have otherwise been provided - this is not a threat of corruption
- Example: *Ward v Byham* (1956)
 - English law – when a child born out of wedlock, only mother had obligation to look after. The father was paying the mother to perform a duty that was already an existing legal duty therefore believed there was no consideration. However, there was something more – she promised to make sure the child was happy/well-maintained
 - An example of the ‘Hunt and peck’ to find consideration

Duty Owed to a Third Party

- Generally, duty owed to a third party is seen as good consideration – esp. in the family context
- Breach of promise to marry – if a person was engaged and broke off the contract, could be sued for breach of promise (still exists in Alberta)

Shadwell v Shadwell (1860)

- Uncle promised to pay nephew 150 pounds a year once he was married until his income reached a certain level, this was still considered good consideration even though he had a legal obligation to marry his fiancé; because the contractual duty was owed to Ellen, and he did not owe any duty to his uncle
- Promise to pay if break leg skiing – not enforceable as a contract – not hoping he breaks a leg; promise to pay if he marries Ellen – he is hopeful his nephew will do this action
- Had a pre-existing duty to marry however fulfillment of a pre-existing duty can be good consideration if it flows from a third party → nephews pre-existing duty was with his fiancé

Pao On v Lau Yiu Long [1980] (PC) (p. 180)

Facts

- Plaintiff's (Pao On) are the sole shareholders of Shing On; Shing On owns the property that the defendant (Yiu Long) want to buy; Fu Chip is the company, and the defendants (Yiu Long) are shareholders of the company
- The main agreement was that the plaintiff agreed to sell to Fu Chip all of their shares in Shing On in exchange for 4.2 million shares in Fu Chip
 - Since there was a strong chance the plaintiffs could artificially depress the value of the shares (by selling all shares, and the price would go down), there was an agreement they would hold onto 2.5 million shares for one year
- The subsidiary agreement was that the defendants would buy back the shares at \$2.5/share
- Pao On realized if the value of the shares raised to more than \$2.5, they would not capitalize on them therefore made a signed indemnity agreement that if the shares fell below \$2.5 the defendant would pay the difference. The defendants agreed as long as they performed the original contract (sale of all shares) with Fu Chip; this agreement was made with the defendant shareholders (Yiu Long) therefore there is a new contract. The original agreement is cancelled.
- The price of the shares fell to \$0.36 and the defendant shareholders refused to fulfill their guarantee since it was past consideration

Issue

- Was the consideration in the past? Was there duress in signing the agreement? Is the subsidiary agreement enforceable?

Decision

- Finding for the plaintiff; the real consideration was the promise to perform of the performance of the pre-existing contractual obligation to the defendant; by the defendant's giving indemnity they became contractually bound

Analysis

- The defendant shareholders did not want to pay the difference they owed to the plaintiff because they said they are merely performing a duty they already owed to Fu Chip, therefore no consideration
- The new indemnity agreement between the plaintiff and the defendant shareholders is legally enforceable because the plaintiffs are under a contractual obligation to both the shareholders and Fu Chip (and could be sued by either) therefore there is good consideration; in exchange for the benefit provided by the defendant shareholders, they incur a new obligation – the promise to perform/the performance of a pre-existing contractual duty to a third party can be valid consideration
- Past consideration argument – argued that when the original deal was torn, the original protection was taken away. The original protection was always there (it was always intended they would have this protection)
- Absence of economic duress – 1) the defendant's had an alternate remedy (could get the company to sue); 2) the other party had time to consider the issue; 3) had time to obtain legal advice
- Where business men are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of law.
- Commercial pressure does not equal **economic duress** – will enforce in absence of economic duress –
 - 1) the defendant's had an alternate remedy
 - 2) the other party had time to consider the issue (did not protest)
 - 3) had time to obtain independent legal advice

Ratio:

- An agreement to do an act which the promisor is under an existing obligation to a third party to do, may well amount to valid consideration. The promisee obtains the benefit of a direct obligation

Note:

- This differs from *Stilk v Myrick* in that they had a pre-existing duty with the captain to sail the ship; in *Pao* the original duty was with a third party (not the party who promised to pay the extra money) – all the captain got for his money was what the sailors were already contractual obliged to do.

Duty Owed to the Promisor – Promises to Pay More

Stilk v Myrick (1809) (England King's Bench) (Gratuitous promise)

Facts:

- Before the commencement of a voyage, the plaintiff was to be paid 5 pounds/month; during the voyage 2 seamen left and so the captain entered into an agreement with the crew that they should have the wages of the 2 men split equally if he was not able to find replacements for them

Issue:

- Was there sufficient consideration in the promise to allow the plaintiff the higher wage?

Decision:

- No consideration; plaintiff can only recover the initial 5 pounds/month

Analysis:

- This agreement was void of all consideration – the seamen had a pre-existing contractual duty to sail the ship; all the captain would have gotten for his extra money paid to them was what the sailors were already obliged to do – in the original contract they were to bring the ship in safely upon all emergencies (desertion of the crew = emergency; not the same as if the captain dismissed them)
- * The two different reporters mentioned this case to be decided on 1) Campbell (consideration), and 2) *Espinasse* (public policy) – the first reporter (consideration) was held to be more reliable
- Public policy argument was that it was contrary to public policy and would be a danger to the public if we allowed sailors to enforce these agreements

Ratio:

- The performance of a pre-existing obligation does not qualify as fresh consideration, therefore an agreement to vary an existing contract remains unenforceable

Port Philip Case [promise to pay more]

- 36 members, 17 deserted leaving 19 to bring back
 - Captain agreed to pay extra if ship got back
 - Not ordinary contractual duty – members gave extra → promise found to be enforceable

Gilbert Steel Ltd v University Const. LTD (1976) 12 OR (2d) 19 (CA)

Facts:

- Plaintiff entered into a written contract to deliver to the defendant fabricated steel for apartment buildings for 3 different sites. The price agreed upon was \$153 per ton for 'Hard Grade' and \$159 for 'Grade 60 000'. This was paid as agreed. Two more buildings needed fabricated steel however the owners of the steel mill announced an increase in the price (with a warning of even further increases to come)
- [Contract made during a time of economic stability, but performed over a time when inflation was increasing]
- Plaintiff + defendant created a new written contract for \$156 and \$165 per ton (this price did not reflect the full amount of the initial increase). While the building was still under construction, the owners announced another increase, then there was a verbal agreement the defendant would pay \$166 and \$178. Gilbert Steel submitted a written contract with the new prices which University Construction did not sign. The defendant made payments that were rounded down, and ended up totalling the price of the original contract

Issues:

- Whether the oral agreement was binding or if it failed for want of consideration

Decision:

- No consideration; agreement not binding

Ratio:

- A prior duty owed to a promisor is not legally sufficient consideration. In amending a contract, both sides need to provide fresh consideration. [ex. get the job done faster]

Analysis:

- In *Stilk v Myrick*, the subsequent agreement was held to be merely a variation of the earlier one and accordingly failed for consideration
- Consideration is not found in a mutual agreement to abandon the earlier written contract and assume obligations under the oral new one; here, they were promising to pay extra for something they were already entitled to get

Note:

- This is an example where an amendment to the contract only benefits one side, and since there is no consideration it is not legally enforceable
- **They needed to promise something extra in return for the promise to pay more**; if Gilbert Steel would have promised to deliver the steel one week early this would have been sufficient to enforce the contract

Williams v Roffey Bros. & Nicholls (Contractors) Ltd. [1990] 1 All ER 512 (CA) (practical benefits)

Facts:

- The defendant contractors entered into a contract with the owners to renovate 2 flats. The defendant contractors hired the plaintiff as a subcontractor to carry out the carpentry work for 20 000 pounds. During the course of the work the plaintiff encountered financial difficulties (the agreed price was too low and had problems of supervision in the plaintiff's work force).
- The contractors were worried the work would not be done on time (and might be liable to owners under an agreed damage clause) so they agreed to pay the plaintiff's an extra 10 300 pounds (575 for each flat). They had made interim payments for 16 000 and after the agreement made one payment of 1500 and failed to make any further payments. The plaintiff stopped the work after finishing 8 more flats and claimed over 10 000 in damages

Issues:

- Is there valid consideration in the second promise to pay more?

Decision:

- Consideration existed; appeal dismissed

Analysis: (Glidwell)

- Decided that since 8 further flats were finished, the plaintiff was entitled to receive the 575 for each flat and the remaining 2200 initially promised in the original contract
- Believed there was consideration in the second promise → if the original sub-contract price is too low and the parties subsequently agree that additional money shall be paid to the sub-contractor this agreement is in the interests of both parties
- The benefits for the defendant's in this situation were that:
 - Seeking to ensure the plaintiff would continue work, avoiding penalty for delay, and avoiding trouble/expense of hiring a new subcontractor to finish this work
- Present state of law:
 - I) if A has entered into a contract with B to do work for (supply goods/services to) B, in return for payment from B and II) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will complete his side, and III) B then promises A an additional payment in return for A's promise to perform contractual obligations on time, and IV) as a result of giving his promise B obtains in **practice a benefit** (or

avoids a disbenefit), and V) B's promise is not given as a result of **economic duress/fraud** on the part of A, then VI) the benefit to B is capable of being consideration for B's promise, so it will be legally binding

- Not dealing with the creation of a contract – dealing with the **variation of an existing contract**
 - Parties modify existing arrangements all of the time
 - When it comes to varying an existing arrangement, that is when they should not be too quick to trip up what the parties can do/the modifications

Russell

- Consideration remains a fundamental requirement before a contract is to be enforced, however the policy of law in its search to do justice has developed since *Stilk v. Myrick*
- *Stilk v Myrick*
 - Glidwell – where the promisor confers no practical benefit the promise is unenforceable
 - **Russell *** – remains under *Stilk v Myrick* is that a mere gratuitous promise remains unenforceable but in this case they gained an advantage by continuing a relationship with the promisee (less expensive to continue the promise then to end it and start a new one with different subcontractors) → now if promisor (to pay more) confers a practical benefit, then good consideration
- Believes consideration is no longer as rigid – need to determine the intention of the parties when the bargaining power is not equal and where the findings of consideration reflect the true intentions of the parties
- Courts should not be too easy to find a contract unenforceable, when the intention of both parties and their bargaining power is equal and where the findings of consideration reflect the true intentions of the parties
- No duress because the plaintiff initiated the agreement
- **A gratuitous promise remains unenforceable unless under seal** – however as in this case where a party undertakes to make a payment because by doing so it will gain an advantage out of the continuing relationship, there will be consideration

Ratio

- Where there are benefits derived by each party to a contract of variation even though one party did not suffer a detriment there can still be sufficient consideration
- It is good consideration in the variation of a contract if 1) the party promising to increase the payment confers a **practical benefit** (or avoids a dis-benefit) and 2) there is **no economic duress** or fraud on the party of the promise

Greater Fredericton Airport Authority v Nav Canada [2008] NB CA No. 108

Facts:

- In 2001 The Greater Fredericton Airport Authority was created and the duties and rights previously held by ASF were granted to it including the rights under the previous agreement between ASF and Nav Canada where Nav Canada assumed responsibilities for air navigation systems (including updating/paying for the equipment).
- As part of a runway extension project AA requested Nav to relocate the instrument landing system (ILS) to the runway being extended. Nav decided it would make better economic sense to replace a portion of the existing ILS with new distance measuring equipment (DME) rather than relocate the entire system.
- There was a dispute on who should pay for the DME and so Nav refused to relocate the ILS unless AA agreed to pay for it. AA promised by way of letter (under protest - wanted that recorded) to pay and therefore Nav acquired and installed the equipment. AA then refused to pay on the grounds that their payment was unenforceable. This was taken to arbitration where it was held that Nav was entitled to claim reimbursement, AA appealed to QB which overturned the arbitrator's ruling.
- [Important finding of fact: under the original contract Nav Canada was responsible for paying for the DME]

Issues:

- Whether the parties entered into an enforceable agreement when AA promised to pay for the DME
- Whether this case should be decided on failure of consideration

Decision:

- Appeal dismissed; finding for AA. Found there to be economic duress.

Analysis: (JT Robertson JA)

- Hallmark of every bilateral contract – Must determine whether the party who wants to enforce the post-contractual modification (Nav Canada) agreed to do more than originally promised (in the ASF agreement) in return for the agreement to modify the contract
- Courts should recognize that while some gratuitous promises are not bargains supported by consideration, they may be enforceable for other valid policy reasons without consideration
- Similar approach to *Williams v Roffey Brothers*:
 - Have a case dealing with the modification/variation of an existing contractual relationship

- The trouble with consideration is that it is not right that those that rely on a promise are subject to vagrancies on whether the court can find there to be consideration – find something extra ('hunt and peck' notion) - It is unpredictable whether this something extra would be found
- **Old fashion law (Stilk v Myrick) is less important now that the courts determine cases based on economic duress**
- Court says initially we find this subsequent agreement (the variation to the original contract) to be binding – there was consideration for it
 - However, it is not found to be binding as there was an element of economic duress
- Under the original contract Nav was responsible for paying for the DME
- Initially the variation of the original contract was found to be binding (there was consideration for it), however not binding because of economic duress

Ratio:

- There are valid policy reasons for refining the consideration doctrine to the extent that the law will recognize that a **variation to an existing contract, not supported by consideration, is enforceable** if not procured under economic duress
- 1) Promise made under pressure, 2) pressured party had no option but to agree → then 1) was a promise supported by consideration, 2) was promise made under protest, 3) were reasonable steps taken to disaffirm the promise

Note:

- Taking a turn now – consideration in variations to pre-existing contracts is no longer as rigid
- Does this make the law more specific now – have they made progress in this area?
 - As they are no longer 'hunting and pecking' to find something extra in order to determine there is consideration in the promise
 - NO, now they are 'hunting and pecking' for economic duress
- Now only have an English case (persuasive) and a NB CA case (although well-reasoned, still only a court of appeal case) – where the law is in flux, cannot make a definite decision about it

Similar approach to *Williams v Roffey Brothers*:

- Dealing with the modification of an existing contractual relationship. The trouble with consideration is that it is not right for those that rely on a promise are subject to vagrancies on whether the court can find consideration – find something extra ('**hunt and peck**' notion) - It is unpredictable whether this something extra would be found. Old fashion law (*Stilk v Myrick*) is less important now that the courts determine cases based on economic duress – now they are 'hunting and pecking' for economic duress

Duty Owed to the Promisor – Promises to Accept Less

- A promise to pay less is never consideration, however a promise to pay less with a hawk, a horse, or a robe is consideration – this is something different than the original duty and is a benefit to them
- **Example:** Owe \$100 to X, says he will accept \$75 paid on Saturday, on Saturday requests the full amount – he has a legal right to the full \$100
 - HOWEVER, if pay the \$75 on the Wednesday before this is a benefit to X beyond what he is legally entitled, therefore it is consideration
- **Example:** Owe X \$100 in Calgary on Saturday, X agrees to accept \$75 in Edmonton today
 - Payment in a different place can be a benefit (do not have to travel) – this **must be requested**
 - For a payment in a different place to count as consideration – need to understand what consideration is (a benefit to you or a detriment to me incurred at your request)
 - Cannot be purely incidental – a payment on the right day in the right place is not binding – need to find something extra
- The consideration cannot be incidental – payment on the right day in the right place is not binding (need something extra)
- If one party has fully performed (executed) the agreement, an '**accord and satisfaction**' is normally required to release the other party wholly or partially from the obligations
- **Accord and satisfaction:** the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

Foakes v Beer (1884) 9 App. Cas. 605 (HL)

Facts:

- Foakes owed Mrs. Beer 2090 pounds. He agreed to initially pay her 500, then 150 incrementally until the sum was paid off. Foakes paid everything off, however Mrs. Beer claimed interest. Foakes claimed there was a contract with no reference to interest which Mrs. B claimed to be invalid for lack of consideration
- Foakes was a judgment debtor of Beer (she could collect the money he owed her at any time)
 - In a judgment one is owed the amount + the interest accrued from the debt

Issues:

- Is this partial payment of a debt sufficient consideration for the original contract between F and B?

Decision:

- Appeal dismissed with costs; interest to be paid

Analysis:

- Not clear whether she is to forgo the interest – however, even if Mrs. Beer had forgone the interest she still would have been entitled to win because of *Pinne's Case (1602)*: 'That payment for a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum'

Ratio:

- An agreement to pay less than owed is only valid if accompanied by some fresh consideration

Re Selectmove Ltd. [1995] 2 All ER 531 (CA) [Hard to use practical benefits for consideration]

Facts:

- Selectmove failed to pay the Crown the required deductions from employee payments. In July a collector of taxes met the managing director of the company to discuss the situation and the company said it would make all of the current payments and pay the arrears (money owed that should have been paid) at 1000 pounds a month. The tax collector said he would seek approval and get back to them if it was not okay. In October, the Crown demanded payment of all arrears (24 650). The next September, the Crown brought a winding up petition and sought compulsory liquidation and payment of the arrears.
- It was accepted that the court would dismiss the winding up petition if the company disputed its debt in good faith and on substantial grounds, where they claimed the Crown had accepted their earlier offer

Issue:

- If Crown had accepted the July agreement, was it supported by consideration?

Decision:

- If there was an agreement, it was unenforceable for want of consideration

Analysis:

- 1) Did they accept the deal → it appears they may not have
- If say the agreement was binding:
- In *Williams v Roffey Brothers* it was decided that practical benefits can make a promise binding, here the Crown conferred a practical benefit in that they got some of the overdue payments along with the current payments
- Court said that they could not take this approach because it would overrule *Foakes v Beer* which is a fundamental rule of law – could not take a flexible view of consideration here [if this case is decided by *Williams*, then *Foakes* will have no room to operate]
- The use of *Williams* failed because that can only be used where the obligation is goods/services not an obligation to pay money

Ratio

- Even in a case where there may be a practical benefit to accepting a lesser amount in payment of a debt, this is not sufficient consideration to find a binding contract. *Selectmove's* attempt to use the notion in *Williams v Roffey Bros [1990]* failed as it was held that it was **only applicable only where the existing obligation which is pre-promised is to supply one with goods or services, not where it is an obligation to pay money**
- Payment of a lesser sum cannot serve as satisfaction for a larger amount

* In Canada the situation is complicated since most provinces have passed legislation focusing on past payment of a debt; the legislation is different in each province and does not cover every aspect of *Foakes v Beer*

Foot v Rawlings [1963] SCR 197 [Payment by a different mode]

Facts:

- The appellant owed the respondent a large sum of money under a series of promissory notes, dating from February 1952 to May 1958. The parties made an agreement for the payment of the debt in a letter sent by the respondent in May 1958. The letter stated the respondent could pay him \$300/month, 6-months-worth of post-dated cheques at a time, at a reduced interest rate of 5% (instead of 8%) until the debt was paid off. Both complied with the agreement, until November 1960 when the respondent sued the appellant for the balance of the debt

Issue:

- Whether there was consideration in the 1958 agreements; whether the action was premature

Decision:

- There was consideration; appeal allowed with costs
- Payment by cheque was taken as being 'payment in a different kind' therefore it was binding

Ratio:

- Lesser payment by a different mode can be seen as sufficient consideration (terms that benefit the creditor for convenience can amount to consideration)
- An agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken therefore is binding

Analysis:

- This is not a straight *Foakes v Beer* application – the setting up of the method of payment (a series of post-dated cheques at a time) was seen as consideration and it was clearly requested by the creditor [seen as a different kind of payment]
- Has always been law that consideration in a different manner can be provided by payment in a different manner – **here payment by cheques it deemed as being payment in a different kind**, there it is consideration
- Saying cheques is different than giving cash → Like the hawk, horse, robe – but it is in a promissory note instead of cash
- As long as the appellant continued to perform his obligation the respondent's right to sue was suspended therefore his action to sue was premature

Dissent:

- There was no consideration; doubts as to whether the appellant had promised to deliver cheques and cause them to be paid

Judicature Act (RSA 2000)

- 1 Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation
 - a. When **expressly accepted** by a creditor in satisfaction, or
 - b. When rendered pursuant to an agreement for that purpose though without any new consideration
- Ontario in 1988 – to undo the mischief of the *Foakes v Beer* decision
 - A more specific statement than the general principle of consideration
 - This is a very specific rule – stated by legislature, not the courts
 - Courts can reverse their own decisions, but are not free to reverse legislation
 - Helps in *Foakes v Beer* because he had made all of the payments, and then Beer was requiring the interest afterwards – therefore he did complete his part performance
 - Courts began interpreting this act almost immediately – the bulk of the interpretation of the act is reflecting in the 1888 case (3 on p. 207)

Bank of Commerce v Jenkins (1888) Ont. CA [Interpretation of JA]

- If a creditor offers to accept partial payment from the debtor in exchange for extinguishing the debt, is the creditor able to revoke this offer before the required partial payment has been tendered?
- To give effect to the latter part of the section – an agreement once entered into to accept part performance of an obligation is not revocable, otherwise a creditor might make the agreement and any time afterwards when the debtor tendered the part performance the creditor might refuse to accept + the provision would be ineffectual
- Suggest the agreement is binding so long as the debtor is paying in accordance to it
- Debtor is favored in this example
- However, under strict statutory interpretation of this Act – does not seem to protect the debtor while he is making the payments
 - Generally consistent interpretations across the country have expanded and bolstered this Act
- The Manitoba equivalent of s.13(1) is s.6 of the Mercantile Law Amendment Act
 - 6(4) A creditor may revoke an agreement under clause 6(1)(b)
 - When the debtor has not commenced performance
 - Or when he has commenced performance but fails to continue performance

- Does not say this agreement is binding, says there are two circumstances where a creditor may revoke an agreement - meaning there are other circumstances the creditor can revoke the agreement

Offer and Invitation to Treat

Canadian Dyers Association Ltd v Burton (1920), 47 CLR 259 (HC) – when was the contract made

Facts:

- In May 1918 the plaintiffs wrote the defendant 'with reference to purchasing your property kindly state your lowest price. We will then give the same our best consideration' On June 6, the defendant wrote 'the lowest price I would care to sell at for cash would be \$1650, as anything less would not bring me in as good a return on my money as my present rental. I would have sold before but being a director of the company then, I did not, for obvious reasons. This is the last link between me and my old associations.'
- On October 16, 1919 the plaintiffs wrote 'We would be pleased to have your very lowest price. Perhaps we could get closer together than the last figure given to us' – *Another inquiry, no offer yet*
- October 21st the defendant wrote 'I beg to acknowledge receipt of your favor of the 16th instant, and in reply would say that the last price I gave you is the *lowest I am prepared to accept*. In fact, I feel that under present conditions that this is exceptionally low and if it were to any other party I would ask more.' – *treated as an offer*
- This was treated as an offer and on the 27st a cheque for \$500 was sent and the defendant was asked to have a deed of conveyance prepared. No trouble occurred until the 5th of November when the solicitor for the defendant said there was no contract and sent back the cheque for \$500

Issues:

- Whether a contract has been made out

Decision:

- A contract has been made

Ratio:

- Objective test – would a reasonable person in analyzing the words and actions of the parties, conclude on a balance of probabilities that a contract was made out and an intention to be bound by the terms of the offer
- **Offer = a willingness to sell + subsequent conduct**
- The elementary principle is that there is no contract of sale unless there can be found an offer to sell and an acceptance of that offer
 - A mere quotation of price does not constitute an offer to sell
 - Should there not also be questions as to when they will sell and how will it be paid?
 - An offer turned into a binding agreement by acceptance can be determined by the **language used and the circumstances of the case**

Analysis:

- In determining a binding contract: 'We quote you ___' is not an offer to sell but an invitation to make a purchase, whereas 'Shall be happy to have an order from you, to which we will give prompt attention' was held to be an offer
- Here, there was far more than a quotation of price – 'if it were to any other party I would ask more' is considered to be an offer; the exchange of messages also constitutes more than a quotation; also submits a deed, suggests an immediate search of his title, and names an early date for closing – and retains the cheque sent'; If he had not made an offer, then he would have told them that this was not an offer
- Doubts as to whether this is an offer – does not include the key terms and suggest an unwillingness to sell
- Might be more satisfactory to say that on the 23rd the plaintiff made a counteroffer and then by the defendants conduct he accepted the offer
- ****This case suggests the test of intention is not cut and dry**
 - Easy to come up with a case that this was not an offer

Determining an Offer (Canadian Dyers Association)

- 1) Have the parties entered into an **agreement** (not every agreement is an offer)
- 2) Has one side made an **offer** and the other side (without reservation) **accepted** that offer
- 3) What is the **legal test to determine whether it was an offer?**
 - Statement of key terms including money, time, payment terms
 - Was it intended to be an offer?
 - Who judges that intention? – would an objective, reasonable person interpret as an offer [court does not care about subjective intention – would be bound by our words]

- 'Lowest I am prepared to accept' seems to indicate a willingness to go ahead
- Courts look at two things when determining an offer →
- 1) a **willingness to sell** and 2) the **subsequent conduct** – regarded as very relevant here (in an English court would have said it was up to how the letter was intended at the time; Canadian courts are more willing to look at underlying/subsequent conduct)
- Canadian Dyers Association suggests the test of intention is not cut and dry (here, there is doubt as to whether it was an actual offer; easy to come up with a case that this was not an offer)

Harvey v Facey (p. 18)

- Something that falls short of an offer is legally called '**an invitation to treat**' (telegram could not be a contract – there was no offer to be accepted). Depends on how it was intended - language used – to determine an offer. A mere quotation of price may not be an offer – a quotation of price can still be an offer dependant on how it was objectively intended (how a reasonable person would assume the document to be intended)

Hong Kong Bank of Canada (p. 20)

- Onus of proof lies on the person who made the deal, therefore lies on the Hong Kong Bank. Must establish the contract of the balance of probabilities, not beyond a reasonable doubt. (Establish that it was 'more likely than not')

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern Ltd.) [1953] QB 401 (CA)

Facts:

- Boots (the defendant) operated a self-service pharmacy with a certain section the 'chemists dept.' (sold proprietary medicine with an indication of the price of each, and in one section this department was devoted exclusively to drugs listed under s. 17(1) of the Pharmacy and Poisons Act). The chemists dept. was under personal control of the registered pharmacist who carried out all his duties subject to the directions of a superintendent in accordance with the provisions under s. 9 of the Act. **The pharmacist supervised every transaction which took place at the cash desk and could prevent at that stage of the transaction any customer from removing a drug from the premise.** Two customers purchased a bottle containing medicine which contained 0.01% W/V strychnine and a bottle containing medicine containing 0.23% W.V codeine, both are on the Poisons List

Issues:

- Was the sale of the medicine under the supervision of the pharmacist? When was the sale completed?

Decision:

- There was supervision as required by the Act; acceptance of the offer does not occur until some point between putting items on belt and paying

Analysis:

- Argument by plaintiffs → there is a contract once the customer places the article into the receptacle – drug on the shelf is an offer, putting it in the receptacle is the acceptance. If the plaintiffs are correct then once a person puts an item into their receptacle, then that person is bound and would have no right to substitute for a different item.
- Argument courts used → if the display is an invitation to treat, then they cannot reject any offer and would have to allow anyone to buy the goods; if a display of goods is an offer, then putting the goods in the basket is an acceptance and the customer cannot change her mind Here (self-service arrangement) the **display of goods is a mere invitation to treat** (can put back/substitute), when the customer brings the goods to the till this is an offer to buy the goods. The store (pharmacist) can accept or reject this offer
- Judges say - Biggest flaw is that putting the items in the basket is an acceptance
- Continuation of what has always gone on in old-fashioned shops
 - The display is a mere invitation to treat, there is no acceptance of offer by putting an item in one's basket
 - Until the customer gave an offer then the shop keeper accepted it
- **Acceptance: Unequivocal manifestation of your assent**
 - Putting items into basket is not acceptance – have the ability to change mind
 - It is common practice to substitute items
 - Taking the items out of the basket might be, but probably not – can still change mind up until the point that see the bill
 - No definite answer as to what acceptance here is – somewhere between placing items on the belt and paying
- **Offer:** was it intended to be an offer and from the stance of a reasonable person

Ratio:

- A display of goods is not an offer but merely an invitation to treat. The offer is not made until the goods are brought to the till and acceptance occurs some point between putting the goods on the belt and paying
- Display = an invitation to treat

Offer: was it intended to be an offer and from the stance of a reasonable person (a willingness to be bound on certain terms)

- The display is a mere invitation to treat, there is no acceptance of offer by putting an item in one's basket. Until the customer gave an offer then the shop keeper accepted it

Acceptance: Unequivocal manifestation of your assent

- Putting items into basket is not acceptance – have the ability to change mind (it is common practice to substitute items)
- Taking the items out of the basket might be acceptance, but probably not – can still change mind up until the point that see the bill. No definite answer as to what acceptance here is – *somewhere between placing items on the belt and paying*

Two Schools of Thought When a Contract is Made in a Store (both valid)

- Classical (Boots): display is an invitation to treat, customer makes an offer, shop accepts offer
- Modern: the offer is when the customer goes to purchase, acceptance is the taking of the money

Human rights legislation now addresses the tension between freedom of contract and freedom from discrimination – this applies to private action; cannot use the Charter in this situation – not a government action

Unilateral contract

- Only one side has any legal obligations under the agreement, **unless** the other side performs – no obligation to perform the act however once it is performed this is acceptance and a binding contract is performed (can revoke at any time prior to acceptance (the performance))
- Classic example: 'I will pay you \$500 if you walk to Calgary' – there is no legal obligation of the promisee, there is a detriment to the promisee, and no benefit to the promisor
- Many unilateral contracts are a promise made in exchange for an act
- In a unilateral contract an act = the consideration + acceptance
- 1) promise for an act; 2) performance of the act = acceptance = contract made out

Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256 (CA)

Facts:

- An advertisement for the Carbolic Smoke Ball held that if a person used this ball 3 times a day as directed for 2 weeks, and contracts influenza, colds, or any disease caused by taking cold, a 100-pound reward would be paid to that person. The plaintiff, on the faith of the advertisement, bought a ball and used it as directed 3 times a day from November 20 and on January 17, she caught influenza. (Offer was the ad, and the acceptance was doing the acts requested)

Issue:

- Did this advertisement constitute as an offer?

Decision:

- Held the advertisement was an offer

Ratio:

- 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
- Must read the advertisement in plain meaning as the public would understand it

Analysis:

- Offer – look at the intention/read the advertisement in its plain meaning as the public would understand it – an **ordinary person would probably understand** this to mean if a person used the ball 3 times a day for 2 weeks and caught influenza they would be compensated (**objective person test**)
- Consideration here = inconvenience sustained by one party at the request of another + promote sale (benefit)
- Shows there was intention because it stated there was 1000 pounds being held in the bank, therefore it is not a mere 'puff' (invitation to treat).
- Offer of a **unilateral contract** – here the offer was made to anyone; however, a contract is only made with those who perform the required act of acceptance (the conditions) – in a unilateral contract only one side has legal obligations (Mrs. Carlisle has no legal obligations under this agreement)
- There is still consideration in this type of contract – there was a detriment to Mrs. Carlisle in taking the ball 3 times a day (court also incidentally said there was a benefit in that it promoted the smoke ball)

Dissent:

- No contract because acceptance had not been communicated

- This offer is a continuing offer and it was never revoked
- In a case like this the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance

Note:

- If Mrs. Carlill bought the smoke ball and used it as directed from November 20th. On December 10 the defendant revoked the offer. On December 11th she caught the flu. If she can say she accepted before the revocation, then there is a contract. She used the smoke ball 3x a day for 2 weeks (this was asked for). They may revoke the offer for other people who may not have performed the act of acceptance; but cannot revoke an offer for people who have performed the required act of acceptance. Catching the flu is the condition that has to be satisfied to claim the money. The smoke ball company never asked her to catch the flu – this was not a requested act.
- **Act = consideration in a unilateral contract.** She had accepted the offer by December 10, therefore they could not revoke what is now a completed contract – therefore they must pay if the condition was met (if she caught the flu)

Goldthorpe v Logan [1943] OWN 215 (CA)

Facts:

- Mrs. Goldthorpe had hairs on her face she wanted removed. Logan had placed advertisements in a newspaper stating hairs could be removed safely and permanently, so G went to L and consulted with Fitzgerland (L's nurse/employee), who told G her face could be cleared, the hairs could be removed, and the result was guaranteed. She then submitted to the electrolysis treatment but the results were not satisfactory. G claimed negligence and that the defendants were under a contract to remove safely and permanently superfluous hairs in existence when the treatment was given, and guaranteed satisfactory results, and failed to carry out the contract. G's husband also claimed damages for loss/expense

Issue:

- Was there a contract and did it get breached?

Decision:

- There was an agreement enforceable in law and this agreement was breached; repay cost of treatments and \$100 for the loss/damage she sustained. G's husband's claim dismissed – had no contract with anyone (third parties cannot take benefit of a contract)

Analysis

- Offer – look at the advertisement and the intention behind it – read in its plain meaning, as the public would understand it. In law the statement is meant to be an offer and accepted by anyone willing to accept the terms/conditions. The nurse guaranteed results for a second time. The offer was clearly made to the public in the advertisement – she was a vendor seeking a purchaser
- Acceptance – G's acceptance was communicated by her conduct; the parties had a common intention, she paid for the treatment and submitted herself to the inconvenience of it

Notes:

- Generally, newspaper ads do not constitute an offer (In Carlill the money was put into a bank meaning they were serious about the offer). In order to say it is a unilateral contract must say it can be accepted by anyone in the world. Here, Logan must surely have been able to choose who she wanted to treat, there were also still details needed to be worked out (course/duration of treatment, etc.)
- This seems to be less like the Carlill advertisement – does not appear to manifest the intention of a unilateral contract.
- Could however be considered as a bilateral contract – ad (invitation to treat); going into the clinic and discussed details (offer); treatment paid for and attended (acceptance) – there are clearly duties on both sides

Tenders

- **'Option Contract'** – if want to bind someone to the offer, can give a deposit/something similar to keep the contract open
- Until *Ron Engineering*, an invitation to tender was treated as an invitation to treat – no contract until acceptance of the tender
 - Invitation to tender, submission of tender (offer), acceptance of one tender – now a contract
- *R v Ron Engineering* changed tenders:
 - Invitation to tender is now treated as the offer, the contractor accepts the offer by the submission of the tender (creating Contract A) – both sides must fulfill the conditions of Contract A (including cannot withdraw tender for fixed amount of time, if tender is selected must perform for fixed period of time or forfeit security deposit)
- When the owner selects the tender, Contract B is created – the construction contract

Note 3 – p. 35 (Zutphen Brothers 1994, After Ron Engineering)

- An invitation to tender to build a concrete bridge in Cape Breton. Alternative bids (material other than concrete) not considered unless show a substantial saving in cost over original design. All bidders submit bids for concrete bridge; except 1 bidding to build a steel bridge (costs a lot more to build this than the concrete). Steel plant in Sydney barely surviving – no business, therefore to keep it alive accept alternate bid to build steel
- Lowest concrete contractor’s legal argument – accepted the bid with the highest price – the steel bridge was a lot more expensive (**breaching contract A** that they chose the steel bridge even though it was not a substantial saving in cost)
 - We realize this is a bilateral contract – obligations on both sides (including treating bidders fairly and not entering into Contract B with a non-compliant bid)
- Contract A (supposed to be there to protect owners) now makes their situation worse

R v Ron Engineering & Construction (Eastern) Ltd. [1981] 1 SCR 111 (Contract A – unilateral)

Facts:

- The contractor submitted a tender to build a project for a price of \$2 748 000. In accordance with the Information for Tenderers, the contractor also submitted as a tender deposit a certified cheque in the amount of \$150,000 (bid security). The contractor’s employee who filed the tender learned that its tender was \$632,000 lower than the next lowest tender (actually did not include analysis for own provisions). The representative contacted the president of the company immediately (tenders closed at 3:00pm) and at 4:12pm the contractor sent a telex saying they forgot to add \$750 058.00, and that they wanted to withdraw their tender. In subsequent correspondence the contractor maintained they had not stated they wanted to withdraw its tender (in order not to lose the deposit) but that it could not be accepted by the inviting party because the owners knew it was mistaken. However, the owner offered them the construction agreement which was not executed by the contractor within the 7-day period (required by the Information for Tenderers that this would mean a forfeiture of the deposit)

Issues:

- Whether the contractor would have been entitled to withdraw tender and recover deposit

Decision:

- Dismissal for return of deposit confirmed; contractor not entitled to receive deposit; appeal allowed

Ratio:

- Invitation to tender (is an offer) – becomes a binding contract once a tender (bid) is filed in conformity with the terms and conditions of the call for tenders (this is the acceptance and formation of contract A)
 - The **principle term of contract A is the irrevocability (cannot be repealed) of the bid**
 - The corollary term is the obligation for both parties to enter into contract B upon the acceptance (by the owner/inviter) of the tender
- Under the provisions of the Invitation to Tender the owner can impose obligations
 - The deposit was required to ensure the performance of the contractor’s obligations under contract A

Analysis:

- Contract A is the initial contract – a contract is made, upon the invitation to tender (offer), submission of a tender (acceptance of the offer), between the contractor and the owner whereby the contractor could not withdraw the tender/deposit for 60 days after the date of opening the tenders. Contract A came into being once the submission of the tender was made
 - The principle term – irrevocability of the bid; corollary term – obligation of both parties to enter in Contract B (construction contract)
- The deposit was required to ensure the performance by the contractor of its obligations. The deposit was recoverable under certain conditions (none of which were met)

Reasoning in Ron Engineering seems bizarre:

- Contract A – unilateral
 - Reasoning by Estey: ‘I’ll pay you a dollar if you cut my lawn’ – this case however is not similar to that unless we get creative with what the dollar is here (what is the consideration) – could potentially be ‘if you bid in this offer I will select your offer based on a select group’
- It constructs a contract which seems to have problems of 1) characterization (is it truly unilateral) and problems with 2) consideration as well (what is the consideration)
- HOWEVER, if could revoke the tender then the entire system of tendering would become meaningless
- **Another example where consideration is found in order to prevent people from going back on their promises**
- The contractor did not argue to withdraw the tender (did not want to lose the bid); instead said there was an error that the owners were aware of before accepted (contractor told them), and compared to the other tenders (huge difference in pricing). Given context of surroundings – a person cannot accept an offer which they know is mistaken

- Judgment – there was no mistake known to anyone at the time contract A was formed; and since contract A creates the obligation to do the job at the tendered price or to forfeit the obligation
- Subsequent cases have usually found that contract A is a bilateral contract involving immediate contractual obligations on both the bidder and the owner – by this mechanism, rules set out in the Invitation to Tender can also become contractual obligations which bind the owner
- Virtually all invitations to tender contain a ‘privilege clause’ which states that the owner may not accept the lowest tender received and need not accept any tender for the project

MJB Enterprises Ltd. v Defense Construction (1951) Ltd. (1999) 1 SCR 619

Facts:

- The respondent invited tenders for construction and issued directions along with a ‘privilege clause’ which stated that they were not obligated to accept the lowest or any tender. There were 2 amendments to the original specifications (originally the tenderers were to submit bids on a basis which would make the final cost contingent upon the amount of the different fills required – gravel; native backfill; concrete) but in the amendments this was deleted and the effect was to require the tenderers to **submit only one price per lineal meter for the system regardless of the type of fill**. The tender submitted by Sorochan included the costs as contingent upon the type of material used (this is a qualification). The owners chose Sorochan’s bid (the lowest tenderer) and the work was carried out. The appellant, and other tenderers believed this to be an invalid tender however the respondent accepted the bid
- The appellant brought an **action for breach of contract**, claiming their bid should have been accepted as lowest valid bid – that there is an implied term to only accept valid tenders

Issues:

- Did contract A arise? Was there a breach of contract?

Decision:

- There was a breach of contract; the general damages for a breach are expectation damages (the profit they would have made had they been awarded the contract/put in position they would have been in had the other party performed their side of the contract properly)
 - How much money is MJB seeking? The profit they would have made had they been awarded the contract
- On the *balance of probabilities*, the record supports the appellant’s contention that it would have been awarded contract B had the Sorochan bid been disqualified therefore awarded damages of \$398,121.27
- Appeal allowed

Ratio:

- An implied term is something so obvious it is not stated; but it is implied by both parties
- Look at intentions of both parties

Analysis:

- Contract A arise: respondent offered to consider bids by inviting tenders; the appellant accepted the offer by submitting its tender; the submission was of good consideration because the tender was of benefit to the respondent as it was prepared at a not insignificant cost
- Contractual obligations: (for implied contractual term – *Canadian Pacific Hotels Ltd.*)
 - 1) Based on custom/usage; 2) as the legal incidents of a particular class/kind of contract; 3) based on the **presumed intentions** where the implied term must meet the ‘official bystander test’
- 1) If want to make amendments must make it known to public; 2) must look at express terms of the contract to see if the implied term fits – on Tender Form there was no room for negotiation so by this it was clear that the owner did not contemplate tenders including qualifications – reasonable to infer that only a compliant bid would be accepted
- The respondent was not under an obligation to award the contract to the lowest tender (privilege clause), however were under contract to choose a compliant tender (clause did not imply a non-compliant bid would be accepted)
- On the balance of probabilities, the record supports the appellant’s contention that it would have been awarded contract B had the Sorochan bid been disqualified – 1) they would not have awarded contract to Sorochan; 2) would have awarded contract to us; 3) we would have made our anticipated profit

Communication of Offer

- An offer must be properly communicated for there to be an offer → it cannot be effective until it is communicated to the offeree, therefore offeree cannot accept an offer he/she does not know about
- There must be knowledge of the offer being accepted
- There must be a ‘meeting of the minds’ or a common understanding that a contract has been formed

Blair v Western Mutual Benefit Assn. [1972] 4 WWR 284 (BCCA)

Facts:

- A resolution of the board of directors of the respondent on March 8, 1969 where Mr. Fedyk stated that he would like to make a suggestion if Miss Blair decided to relinquish her position with the Association in view of the fact she had given her life to the Association for almost 30 years, that she be granted at least 2 years' salary as retirement pay. Although she was not present at the time of the resolution, when the meeting was over the president or another director dictated the minutes of the meeting to her, where she then transcribed them and delivered them to the president who signed them. Miss Blair retired in June 1969 and in due course she claimed the \$8000 (approximately 2 years pay) pursuant to the resolution

Issues:

- Is Miss Blair entitled to the retirement pay?

Decision:

- The submission must fail; appeal dismissed – there was no communication/offer

Analysis:

- 1) No promise had been made/accepted for valid consideration; 2) there was no change in the existing relationship between the parties; 3) no evidence to change those relationships to create legal obligations
- A bare resolution to indicate the intention expressed in the resolution would be carried out cannot be considered to indicate an intention to create a legal obligation capable of acceptance – was no communication of the offer. The respondent showed no intention to communicate this offer.
- There is also no evidence that Miss Blair accepted the offer – did not mention the resolution was the inducing factor to retiring, it was an acceptance 'somehow motivated by the offer'

Ratio:

- Without communication of an offer, a binding obligation cannot be created.
- Even if an offer had been made there **must be a relationship between the offer and the acceptance**
 - She did not rely on the offer

Williams v Carwardine (1833) 4 B & Ad 621 (KB) (link between offer and acceptance)

Facts:

- Walter Carwardine, the brother of the defendant, was seen at a public-house on March 24 and was not heard of again until his body was found in the river on April 12. Mary Anne Williams (plaintiff) was at the house with Walter on the night he was supposed to have been murdered, she was examined before the magistrates but did not give any information which led to the apprehension of the real offender. On April 25 the defendant caused a handbill (an offer of reward) to be published stating that 'whoever would give such information to lead to the discovery of the murderer would, *upon conviction*, be paid 20 pounds' William Williams was apparently aware Mary Williams witnessed him commit the murder, and so she made a voluntary statement believing she had not long to live

Issues:

- Whether Mary Williams was entitled to the reward?

Decision:

- Mrs. Williams is entitled to the payment

Ratio:

- This is a **unilateral contract** – Carwardine made an offer and Williams fulfilled the conditions of the offer (by giving the information) and was therefore entitled to the payment
 - Mutual consent to the terms is not necessary
- Motivation is irrelevant if the act is done (and knew about reward)

Analysis:

- The learned judge believed that the plaintiff had performed the condition on which the reward was to be payable and therefore was entitled to recover it; he directed the jury to find a verdict for the plaintiff but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found she was not induced by the offer of reward, but **by other motives** (not long to live/wanted to ease her conscience)
- (*She must have known of the reward – it was posted everywhere in the town she lived in*)
- This is a **unilateral contract** – Carwardine made an offer and Williams fulfilled the conditions of the offer (by giving the information) and was therefore entitled to the payment
- The court hints that in a unilateral contract there must be *some* relationship/link between the offer and the acceptance – there **must be at least some knowledge of the offer**

R v Clarke (1927) 40, CLR 227 (Aust HC)

Facts:

- The Crown offered a reward for information that 'shall lead to the arrest and conviction of the person or persons who committed the murders'
- Clarke gave evidence which was of the greatest value to the Crown in the prosecution of Coulter and Treffene – Clarke cannot succeed unless he can establish a contract between himself and the Crown

Issues:

- Is Clarke entitled to claim the reward?

Decision:

- Held he is not entitled to claim the reward

Analysis:

- Clarke was an accessory to the murders and **gave up information for protection against a false charge of murder** – he did not say he was induced by the reward to give the information. Could potentially think he was motivated by the reward aside from his 'candid confession' that he was not
- When Clarke gave the information he was not intending to accept the offer of the Crown, and did not give information on the faith of, or relying on the proclamation; there can be no communication of assent until there is assent. Although he had seen the offer it was not present in his mind when he gave up the information
- Also did not lead to the arrest and conviction, only the conviction for one murder (did not fulfill the conditions)

Ratio:

- There cannot be assent (agreement) without knowledge of the offer; and ignorance of the offer is the same thing – whether it is due to never hearing it or forgetting it
- Must act on the good faith of the offer or in the reliance of it. Need not be motivated by it – should be aware of it

p. 52 (#3) – Reward for finding dog; man finds dog but did not see the offer

- From Williams/Clarke – he would most likely not be entitled to get the reward
- **HOWEVER, in *Gibbons v Proctor*** – police officer was given the reward without ever having seen the handbill
- The **policy behind rewards** will be undermined if this stands – people will not be induced to properly give information if they are not given rewards for issues such as these. Policy suggests these types of rewards should be binding
- Civil Code of Quebec provides that the offer of a reward, when the act is performed, is deemed to be accepted and is binding when performed, even if the person does not know of the offer

Principle: Must give equal notoriety to the retraction as you did to the offer, even though the individual may not have seen the retraction

Acceptance

Livingstone v Evans [1925] 3 WWR 453

Facts:

- Evans offered to sell land to Livingstone for \$1800. L responded with 'send lowest cash price. Will give \$1600 cash.' Evans responded with 'cannot reduce price' (this is an offer followed by a counter-offer then a renewal of original)

Issues:

- Whether Evan's response that the price cannot be reduced was a rejection of the plaintiff's counter-offer or a renewal of the original offer?

Decision:

- This was a renewal of the original offer; therefore, there was a binding contract for the sale of the land to the plaintiff and he is entitled to specific performance

Ratio:

- If a purported acceptance varies the terms of any offer in any respect, it will be treated as a proposal of new terms and classified as a counter-offer.
- **However, if there is an indication that they are still willing to treat, then this would be a renewal of the original offer instead of a rejection of the counter-offer**

Analysis:

- *Hyde v Wrench* established that the making of a counter-off is a rejection of the original offer
- Here, the plaintiff's telegram was clearly a counter-offer + must determine whether 'cannot reduce price' was a renewal of the original, or a rejection of the counter-offer
 - Believe it was a renewal of the original offer, or an indication he was still willing to treat
 - His statement showed he was still standing by his offer and therefore still open to accept it

- Seller revived the original offer by saying ‘cannot reduce price’ therefore if the buyer says ‘yes’ then a contract is formed

Counter-offer: a rejection of the original offer, followed by a new offer on different terms – its effect is to kill the original offer

- If respond with a question (‘would you take less for cash?’) – then would not be a counter-offer, but instead a **mere inquiry** and therefore the ball is back in the court of the would-be seller

Stevenson v McLean (1880) (p. 53) [mere inquiry]

- Seller wants \$80 cash. Buyer asks if he would accept payments for \$80 over two months, and if not the lowest limit you’d give. Court says here it is a **mere inquiry** asking the seller if he would give some time to pay.
- If the seller would have said ‘yes’ then this would have been considered a counter-offer
- Asking a question about the offer is permissible without killing the offer
- ‘Does the response effectively refuse/reject the original offer’ – if so it is a counter-offer
 - Leaves room for interpretation – common sense interpretation of the words
- It could have been interpreted here as a counter-offer

Battle of the Forms

- The traditional approach is that each successive form is a counter-offer and perhaps no consensus is ever reached if only forms have been exchanged
- **Last shot rule:** if the last form utilized is followed by the other side which amounts to acceptance, there is a contract and the terms are on the last form. The party who ‘fires’ the last document before performance prevails. In the typical case of a sale of goods based on conflicting forms, performance of the contract either by delivery of the goods or by the acceptance of delivery of goods may be considered to constitute the conduct amounting to acceptance.
- **First blow:** Party who offers terms first prevails unless the other side draws material changes in their terms to the attention of that first party
- **Shots from both sides:** ‘The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all is well and good. If the differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implications’ (Butler) → **this approach has not been followed in Canada**

Butler Machine Tool v Ex-Cell-O Corp [1979] 1 WLR 401 [English] (last form sent)

Facts:

- On May 23, in response to an inquiry with the buyers, the sellers quoted a price for a machine tool with a number of terms/conditions which said they ‘were to prevail over any terms and conditions of the buyers’ order’ [one condition allowed the seller to charge the buyers the price for the machine prevailing at the time of delivery]; On May 27, the buyers replied with a purchase order for the machine w/ a stipulation that the order was **subject to a number of terms different from those of the seller** which made no provision to an increase in price
- On June 5, the sellers completed the buyers’ order form with a letter stating the buyers’ order was being entered in accordance with the sellers’ quotation of May 23. When the sellers delivered the machine, they claimed an additional 2892 pounds under the price of the original offer (list price on the date of delivery); the buyers took the position that their order prevailed + there was a fixed price contract

Issue:

- On which of the terms was the contract concluded?

Decision:

- Held it was the acknowledgement of the June 5th was the decisive document, therefore the contract was on the buyers’ terms; judgment for the buyers

Ratio:

- In most cases when there is a ‘battle of the forms’ there is an offer once the last of the forms is sent and there is no objection to that offer. As long as the document is decisive and clear that it was on the buyer’s terms and not the seller’s.

Analysis: (Lord Denning)

- Quotation of May 23 was an offer by the sellers to the buyers containing the terms + conditions on the back; the order of the May 27 was an acceptance of that offer but it contained additions such as the cost of installment, delivery date, etc. → was a rejection of the offer + constituted a counter-offer
- The letter of the sellers of June 5th was an acceptance of the counter-offer, therefore the contract was on the buyer’s terms and the reference to the ‘order being entered in accordance with May 23’ referred only to the price + identity of the machine (only to the specifications of the machine tools) [literal approach]
- In most cases there is an offer after the last form is sent and there are no objections to that offer

- **Counter-offer rule difficulty:** where parties have communicated in a series of communications ('the battle of the forms') once a form is sent it might be a quotation/inquiry; then there is a response by the other party
- Custom machine – in a time of inflation → 'reserve the right to charge for the machine, the price prevailing at the time'
- The buyer is making a counter-offer (they are doing business on a different set of terms)
- **Other possibility** → look at all documents and terms/conditions and see if they have reached an agreement on all of the material points, even if some terms + conditions may be different [both sides]

Notes: P. 58; Q.1

- (Convention in international sale of goods – deals with Canada + foreign buyer – not common law)
- This convention only applies to a contract involving two different states, however sets out a good rule
- 1) A reply to an offer which seems to be an acceptance but contains additions, limitations, modifications, is a rejection of the offer and constitutes a counter-offer
- 2) A reply to an offer which seems to be acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes acceptance; unless the offeror objects orally to the discrepancy
- 3) Additional terms relating to the price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms materially
- "There may be minor differences on the back of the form and as long as they are not material, it is still an acceptance and does not constitute as a counter-offer] – this puts the onus on the seller
- Changes in material terms = counter-offer
- Trouble with common law – requires an unequivocal acceptance
- All Canadian jurisdictions now have legislation addressing e-commerce contract issues
 - Including that offer and acceptance are permitted through electronic means

Tywood Industries v St. Anne-Nackawic Pulp & Paper Co Ltd. (1979) (Ont. HC)

Facts:

- The defendant's invitation to tender set forth the goods required and set forth the 13 'terms and conditions' none of which dealt w/ arbitration; the plaintiff responded with a quotation in a letter form which also included 12 terms + conditions (none of which made reference to arbitration); however, one of the conditions stated that 'no modifications of the above conditions shall be effected by acknowledgement of a purchase order containing additional/different conditions
- In Jan, 2 purchase orders came from the defendant which contained 19 new terms + conditions; one stating that issues with the contract should be settled by arbitration; the plaintiff never signed nor returned this (technically the 'last shot fired') in the battle of the forms
- The plaintiff's action is for the price of goods sold; the defendant has moved to stay the action under s. 7 of the Arbitrations Act upon the ground that the agreement of the sale contained a clause for submission to arbitration

Issues:

- Whether the parties agreed on arbitration – whether the clause was part of the contract

Decision:

- Defendant's application for the stay of proceedings dismissed

Ratio:

- Terms cannot be added after an agreement has been reached; can use conduct of the parties to determine what they have agreed upon

Analysis: (Grange J)

- At no time did the plaintiff acknowledge the supremacy of the defendant's terms; the defendant drew no particular attention to the term with the arbitration clause; and also did not complain when the plaintiff failed to return the purchase order with an acknowledgement of the new terms
- Here, neither party considered any terms other than those found on the face of the documents important
- Argument for the defendant – the last offer made was not rejected; seller accepted by fulfilling the contract on the buyer's terms. HOWEVER, they behaved on the **conduct** of the previous agreement – arbitration clause was an ambush; neither party considered this clause

ProCD v Matthew Zeidenberg and Silken Mountain Web Services, Inc. (US CA 7th Cir., 1996)

Facts:

- ProCD (plaintiff) has compiled information for more than 3000 telephone directories into a computer database, it sells a version of the database, called SelectPhone on CD-ROM discs. ProCD decided to sell its database to the general public for personal use at a lower price while selling information to the trade for a higher price. Every box containing the consumer product declares that the software come with restrictions stated in an enclosed license which limits the use of the program

to non-commercial purposes (encoded on the CD, printed in the manual, and appear on the screen every time the software runs)

- Z (defendant) bought a consumer package, ignored the license, and formed his own services to sell the information in the selectphone database
- ProCD filed a suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses; the district court held the licenses were ineffectual because the purchaser cannot be bound by terms that were secret at the time of purchase

Issues:

- Are purchasers who buy computer software with shrink wrap licenses bound by the terms?

Decision:

- Shrink wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general; because no one argued the terms of the license at issue were troublesome, judgment is entered for the plaintiff

Ratio:

- Shrink wrap licenses are treated as ordinary contracts accompanying the sale of products subject to terms + conditions, therefore they are enforceable unless their terms are objectionable on grounds applicable to contracts in general. If do not agree to them afterwards, can return for full price
- A buyer accepts the goods when after an opportunity to inspect, he fails to make an effective rejection (Uniform Commercial Code)

Analysis:

- First contract was made between the retailer and Z (the actual CD product subject to limits); the second was between the manufacturer and Z (limiting commercial use)
- Here, shrink wrap licenses are treated as ordinary contracts accompanying the sale of products and therefore are governed by the common law of contracts
- A contract only includes terms that parties have agreed to and one cannot agree to hidden terms, however one of the terms Z agreed to was that the transaction was subject to a license – those terms + conditions are technically binding [Z could have rejected the terms and conditions and returned the software if did not want to be bound by them]
- Transactions where the exchange of money precedes the communication of detailed terms are common [insurance; concert tickets] → in these transactions we know conditions are present but not available at the time entered into the contract – there is an ability to leave the contract if do not agree with the terms
- A contract for a sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract
- Here, the license was enforced because it would not let Z proceed unless he indicated acceptance of the license

Dawson v Helicopter Exploration Co. [1955] SCR 868

Facts:

- In 1931 D had discovered and staked a mineral deposit in a remote area in BC. In 1951, received a proposal from Mr. Springer of the respondent Mining Company in January 1931, saying he was interested in the land and would pay D 10% for them to stake the claims. D responded that proposal seemed fair and he would like to meet with him [to discuss detail – likely not an offer yet]
- On March 5 the respondent wrote that it would be best if D showed them the property and this would depend on whether R could get a pilot; also, that if D takes him and the claims are worth staking he would give him a non-assessable interest (offer); On April 12 D responded that R should inform him when he finds a pilot so he can immediately take a leave from work (acceptance)
 - [Acceptance need not be in express terms and may be found in the language and conduct of the acceptor]
- Nothing was exchanged until June 7, 1951 when the respondent wrote that someone had flown over D's showings and that it would be impossible to operate there + they had work lined up/pilot trouble so they did not think they would have time to visit the showings; D never responded to this + on August 1, an exploration party for R investigated the area and located the showings reported by Dawson – D did not become aware of this until later
- R said this is a unilateral contract dependant on D actually showing them the mineral deposit

Issues:

- Was there a contract and if so, was it breached?

Decision:

- There was a contract, and it was breached – D was entitled to the 10%

Ratio:

- Courts can regard a contract as bilateral in order to protect the offeree pending complete performance

- A contract may contain within itself elements of its own discharge in the form of provisions (either express or implied) for its determination in circumstances

Analysis:

- **Promissory construction:** even though the contract was worded in a way to make it unilateral, and R had the choice not to perform its end, the court inferred a bilateral promise because R had agreed to pay D if it was to stake the land following D's showing it to them.
- Because the terms involve such complementary action/obligations on both parties – the interpretation of the correspondence follows the tendency of courts to treat offers as calling for bilateral rather than unilateral action when the language can be so construed, in order that the transaction has 'business efficacy as both parties must have intended that all events it should have'; In this case it was implied that D make reasonable efforts to participate in his own proposal (business efficacy)
- Such an offer contemplates acts to be performed by the person only to whom it is made and in respect of which the offeror remains passive – it was necessarily implied that Dawson would participate in his own proposal; Dawson's response on April 12 was similarly an **unqualified promissory acceptance**
- If were truly unilateral it would only require an act by Dawson to create the contract – however, acts by Springer were also required
 - In a bilateral contract – both parties are obliged to do something
 - If this is a contract at all it creates obligations on the mining party
- Both of them **had 'conditions subsequent'** – a provision that the fulfillment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract
 - 1) R not being able to get a pilot – was a condition + if not able to find a pilot = contract is off [implied that he would take reasonable steps to obtain a pilot]
 - 2) D not being able to get leave from work – another condition if not performed = contract off
- Therefore, this was a contract [Mar. 5 = offer; Apr. 12 = unqualified promissory acceptance; w/ 2 conditions subsequent]
- What is effectuated is the **real intention of both parties** to close a business bargain on the strength of which they may plan their courses – 'a promise may be lacking and yet the whole writing may be 'instinct with obligation' – this applies to both offer + acceptance
- R promising Dawson that the company would cooperate, he impliedly agreed that the company would not prevent the complementary performance by Dawson. By doing this the company violated its engagement and also brought to an end the subject matter of the contract
- Their later letter (June 7) is them trying to reject the offer – however the offer has already been made – breach for time of performance:
 - Either a **repudiation of the contract** – when the time comes, they do not perform
 - Or, an **anticipatory breach** – the time of performance is not yet there, but when it is they will not do it. When one side says they will not perform → do not have to wait until the time passes, an action can be started right away. [even before it is breached]

Notes:

- **Example: Bilateral contracts can often look like unilateral contracts on paper**
 - 'I will pay you ___ to build me a garage' – looks as though there are only obligations on the part of the builders
 - There are most definitely obligations for the buyer – access to the garage; considerations to be made; permits to be signed by the owner; cooperate to answer issues that arise etc.
 - If unilateral then the buyer has no obligations except to pay for the garage when it is finished
- Contracts that are possible unilateral (look unilateral) – is it really just a promise for an act with absolutely no obligations on the part of the promisor
 - **If there are any obligations are both side, then it cannot be unilateral** – and both sides have obligations that can be breached
- In cases of doubt, tend to be construed as a bilateral contract → in a unilateral contract the promisor can revoke promise at any time before the act is actually completed/finished – most likely the parties do not agree to this

Felthouse v Bindley (1862) 11 CB (NS) (Ex.Ch.) (no acceptance until communicated)

Facts:

- The plaintiff, Paul Felthouse, had discussed with his nephew John Felthouse, the purchase of a horse belonging to the nephew
- There was a misunderstanding and the plaintiff thought he purchased the horse for 30 pounds, whereas the nephew thought the price was 30 guineas [was worth slightly more], so the uncle offered to split the difference and wrote to him on

Jan 2 'you can send him at your convenience, between now and the 25th of March. If I hear no more about him, I consider the horse mine at 30 pounds and 15 shillings' The nephew did not respond.

- On February 25 an auction sale was held and Bindley (the auctioneer) was instructed to reserve the horse from the sale however he forgot and the horse was sold for 33 pounds. On February 27 the nephew wrote the uncle that the horse is sold; the auctioneer also wrote the uncle explaining that he forgot is promise to reserve the horse.
- The uncle brought an action against the auctioneer for conversion; at trial a verdict was found for the uncle with damages set at 33 pounds. For him to prove the horse was in his possession he had to show that there was a contract between him and the nephew.

Issues:

- Was there a contract between the nephew + uncle? Did the nephew accept the offer?

Decision:

- No communicated acceptance; therefore, no contract. Uncle cannot recover damages

Ratio:

- Acceptance is not complete until it is communicated to the offeror: to ensure the offeror knows he is in a contract. Also ensures an offeree does not have to reject every offer received
- Acceptance must be communicated clearly and not be imposed due to silence by one of the parties

Analysis: (Willes J)

- It is clear that there was no complete bargain on January 2 and the uncle also had no right to impose the price on his nephew – at this point it stood an open offer therefore everything remained as is until Feb 25
- The nephew did tell the defendant not to sell the horse – therefore the nephew most likely intended the uncle to have the horse for his said price but he had not yet communicated this or done anything to bind himself
- The letter by the nephew on Feb 27 may be treated as an acceptance for the first time by him – if so, the uncle cannot recover
- However, had the letter been a memo of the bargain being complete and not a bargain concluded for the first time then it would be contrary to the Stockhold decision which held that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with property by them in the interim

Notes:

- **Foisting:** forcing a contract onto someone who may wish not to have it – silence is not acceptance
 - Acceptance requires a voluntary act to create a contract → someone cannot impose a contract onto a person saying they cannot avoid the contract
- HERE – there was not actually silence – nephew told the auctioneer not to sell the horse because it is already sold
- If we examine this situation where nephew sues uncle – takes horse to uncle with bill + uncle says there is no contract
 - (Did not formally retract his offer – offeror can revoke offer at any time before acceptance)
 - 8 weeks later – if nephew sues uncle for failing to take the horse; the nephew must lose – because if there is no contract one way there can be no contract the other way
 - Nephew would argue there was no silence – it was not communicated to the uncle; however, there was no doubt that he accepted

Saint John Tug Boat v Irving Refinery Ltd. [1964] SCR 614 (silence + conduct can be acceptance)

Facts:

- Since the early 1960s the respondent (Irving) has operated an oil refinery bordering on the harbor of St. John NB and as an incident of this operation it is supplied with crude oil brought by large tankers which are owned and chartered by the California Shipping Company which was represented in St. John by Kent Lines Limited
- It was important to the respondent that tugs should be available when required to guide the incoming tankers into the harbor – could not use the tugs by Kent Lines therefore it was necessary to employ the services of the appellant's tug boats which were the only other boats available in the harbor
- On March 24, 1961 no firm arrangements had been made regarding the employment of the tugs by the respondent therefore the appellants wrote to Kent Lines stating that they would only have 2 tug boats and if they did not hear back they would assume they are making arrangements elsewhere. Also wrote to Irving (chairman of respondent company and president of Kent Lines) saying that if they were to need more than two tug boats to advise them now and they could see if they could arrange something with agreed upon special rates
- The respondents use one of the special rate boats after receiving an email which stipulated the price and conditions of it including a 10% deduction for handling charges– this deal expired on August 15, however they used it from June until February, and all of the appellant's invoices for the services remained unpaid and the respondent denies liability for all charges passed the middle of August

Issues:

- Whether or not the respondents course of conduct during the months in question constituted a continuing acceptance of these offers?

Decision:

- Yes, the respondent was accepting the special charges on the terms proposed – appellant entitled to recover the sum of the charges

Ratio:

- **Silence can be an acceptance when combined with conduct** – when the offeree has taken the benefit of the offered performance which he has had reasonable opportunity to reject. Plaintiff must show that 1) the circumstances show that the offeror expected to be paid, 2) the offeree took the benefit of an offered performance, and 3) the offeree had reasonable opportunity to reject the benefit
- An obligation exists not to remain silent if you do not wish to be bound

Analysis: (Ritchie J)

- The stand-by service of the tug (after Aug. 15) was making a new offer and the invoices make it clear that it was an offer for the same services/same rate – R was not bound by this offer [until he used the boat]
- The test of whether conduct, unaccompanied by verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to fulfill the contract: → is an **objective** not a subjective one – the intention to which the law will attribute to a man – not that which was present in his own mind
- Mere failure to disown responsibility to pay compensation for services rendered is not of itself enough to bind the person who has had the benefit of those services – the circumstances must give rise to an inference that **the alleged acceptor has consented to the work being done** on the terms upon which it was offered before a binding contract will be implied
- If a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, and he allows it to be done, taking the benefit, he will be taken to have requested it being done and that will import a promise to pay for it
- The respondent must have known that the boat was being kept for ‘stand-by use’ until the end of February and that the appellant expected to be paid for this service at the rate specified in the monthly invoices

Eliason v Henshaw (1819) 4 Wheaton 225, 4 US (L. Ed.) 556 (acceptance compliant w/ method specified)

Facts:

- An action brought by the defendant to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs for the purchase of flour at a specified price
- The evidence for the contract is a letter from the plaintiff to the defendant (Feb 10, 1813) stating that they would buy flour from the defendants and to write by return of wagon whether they accept the offer
- The defendant responded in a letter dated the next day that he would accept the offer for 300 barrels of flour at \$9.50 a barrel and would send the flour by the first boats that pass down; mailed the letter + was sent to Georgetown (5-day gap between receiving letter + went it was mailed)
- The plaintiffs responded that they requested an answer the next day and not receiving one they bought flour elsewhere – the wagoner did not return to Harper’s Ferry
- The flour was sent and the delivery of it was refused

Issues:

- Was a contract formed?

Decision

- No contract concluded between the parties – wrong place, too late

Ratio:

- An acceptance communicated at a different place from that pointed out by the offeror and forming part of their proposal imposes no binding obligation upon the offeror
- **Acceptance must be compliant with any mandatory method of acceptance specified** → however, an ‘equally effective’ method of acceptance would suffice

Analysis: (Washington J)

- Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation upon either
- There was no uncertainty to the place which the answer was to be received, the place the answer was sent constituted an essential part of the offer – no answer was sent to the plaintiffs at Harper’s Ferry
- Their offer was accepted by the terms of a letter addressed ‘Georgetown’ and received by the plaintiffs at that place; but an acceptance communicated at a different place from that pointed out by the plaintiff’s and forming a part of their proposal imposed no obligation binding upon them, unless they had accepted doing it which they did not – the place constituted an essential part of the offer

- The plaintiffs had the right to dictate the terms upon which they were to purchase flour and unless those were complied with they were not bound by them
- *To accept – the right place + within the time stipulated*

Communication of Acceptance

Acceptance (universal): a contract is formed when + where acceptance is received → only exception is mailed acceptance
It is the acceptors job to ensure acceptance is communicated

A) Mailed Acceptances

Household Fire & Carriage Accident Insurance Co v Grant (1879) 4 Ex. D. 216 (CA) [THE POSTAL ACCEPTANCE RULE**]

Facts:

- D had negotiated to purchase shares in P. His application was accepted and his name was added to the list of registered shareholders. The secretary for P made out the letter of allotment in favor of D which was addressed to the plaintiff at his residence – this letter of allotment never reached the defendant
- The defendant never paid the 5 pounds mentioned in his application but the plaintiff's company credited the defendant's account for 5 pounds; then continued to credit his account for the shares.
- The company went into liquidation and on December 7, 1877 the official liquidator applied for the sum sued for from the defendant; he declined to pay on the ground that he was not a shareholder

Issues:

- Was the letter of allotment of October 20 in fact posted? Was the letter of allotment received by the defendant?

Decision:

- Considered a binding contract – the defendant was a liable shareholder

Ratio:

- A **contract becomes binding the instant that the acceptance is put into the mail**, so long as the parties have contemplated the mail as a viable means of communication for their dealings [rationale – fraud/commercial delay]
- If trust the post for means of communication and no answer is received, then that person can believe that person had received the mail

Analysis: (Thesigner LJ)

- D made an application for shares in the plaintiff's company under circumstances from which we must imply that he authorized the company that in the event of their allotting to him the shares applied for, to send the notice of allotment by post
- In order to the effecting of a valid and binding contract, the minds of the parties should be brought together at one and the same moment; the minds of the two parties must be brought together by **mutual communication** – an acceptance which has not by legal implication communicated to the offeror is not binding acceptance
- For **contracts formed by mail** → [Postal office is an agent] as soon as the letter of acceptance is delivered to the post office, the contract made complete and final and binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself
- An offeror, if he chooses, can choose to make the contract binding by stipulating it will be only on his receipt of notification of the acceptance; and if he trusts the post then he trusts a means of communication which does not fail and if no answer is received to his offer then the door would be open to fraud – the acceptor would never be entirely safe in acting upon his acceptance until he had received notice his letter of acceptance reached its destination
- Upon balancing – to consider the contract complete and binding on the transmission of the notice of allotment through the post; instead of postponing its completion until notice had been received by the defendant

Dissent: (Bramwell LJ)

- Where a proposition is made to enter and accepted to enter into a contract it is necessary to constitute the contract that there should be a communication of that acceptance to the proposer
- If the defendant is to be bound, he must be bound by some general rule which makes a difference when the post office is employed as the means of communication. This is simply arbitrary – if a man sent a letter by hand that was not accepted it would not be considered binding

Holwell Securities v Hughes [1974] 1 WLR 155, [1974] 1 All ER 161 (CA) [The postal rule can be excluded by terms of the offer**]

Facts:

- The plaintiffs sent a letter stating they wished to purchase the defendants property – they accepted the option to buy intending vendor's land, however the intending vendor never received the letter
- What was required to make the contract was **the notice in writing** – was only received by the solicitors

Issues:

- Did the plaintiffs exercise an option to purchase the premises by posting a letter to the defendant which he never received?

Decision:

- No – appeal dismissed
- Only if intending vendor would have received the notice in writing within the 6 months

Ratio:

- Postal rule does not apply if terms of the contract point to the necessity of actual communication, even if the post was the desired medium of communication
- Postal rule does not apply when 1) express terms of the offer specify that the acceptance must reach the offeror and 2) [probably does not operate] if its application would produce manifest inconvenience/absurdity

Analysis: (Lawton LJ)

- 'When the parties can reasonably contemplate that the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted'
- **This rule does not apply in all cases**
 - 1) Does not apply when the express terms of the offer specify that the acceptance must reach the offeror
 - 2) It probably does not operate if its application would produce manifest inconvenience and absurdity
- Having regard to the circumstances, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had communicated the acceptance or exercise to the party **who requested it**
- (Obiter → would have been sufficient if delivered to vendor's house)

B) Instantaneous Method of Communication

- Common law treated the telegram the same as mailed acceptance → up to the offeror – if did not want this could make it explicit
- **Order for service *ex juris***: to use process of the law of one jurisdiction in another jurisdiction – need to convince the courts that what happened really happened in the former jurisdiction
- [Rules → property in Alberta; tort committed in Alberta (controversial); contract made in Alberta]

Brinkibon Ltd. v Stahag Stahl Und [1983] 2 AC 34 [1982] [Instantaneous methods of communication – contract complete when acceptance is received by offeror**]

Facts:

- The appellants (buyers) want to sue the respondents (sellers), an Australian company, for breach of an alleged contract for the supply of steel. To do so they must obtain leave to serve notice of their writ on the sellers under the provisions – one being to show that the contract was made within the jurisdiction

Issues:

- Where was the contract made?

Decision:

- This acceptance took place when the bank in Vienna notified the sellers – in neither case can it be said that the contract was made within the jurisdiction therefore the condition must fail

Ratio:

- Acceptance by telex is to be assimilated to other methods of instantaneous communication – the contract is complete **when received by the offeror**
- [If acceptance had been sent by Post – place/time of acceptance is complete when in the hands of the post office]

Analysis: (Lord Wilberforce)

- The place of making a contract is usually irrelevant as regards to validity, or interpretation, or enforcement → if need to determine where it was made it is logical it would be at the place the acceptance was communicated
- 1) There was a telex dated May 3 1979 from the sellers in Vienna (a counter-offer) followed by a telex from the buyers in London to the sellers in Vienna on May 4 (acceptance)
 - Does this cause a contract to be made in London or in Vienna?
 - A phone call would have been completed in Vienna when the offer was heard; by post would have been in London when the acceptance was mailed
 - Decide that a telex is to be assimilated to other methods of instantaneous communications – like the phone call (then would have been May 4 in Vienna)
 - Where the condition of simultaneity is met and where it appears to be within the mutual intention of the parties that contractual exchange should take place in this way

- 2) The telex on May 3 was followed by action by way of opening a letter of credit said to have amounted to acceptance by conduct [acceptance would have been May 4 in the UK]
 - This could not have amounted to an acceptance – this conduct does not = communication of acceptance to the offeror
- In the event of **defective communication** (p. 88), no universal rule can cover all communications – intentions of parties, sound business practices, and in some cases judgments of courts of where the risks should lie
 - Must be flexible in dealing with that
 - General rule – must be communicated – however there is no universal rule/must retain flexibility (a judgement needs to be made sometimes)
- Contrasted to 19th century courts – have a rule and every answer depends on logical deduction from that rule

Note:

- Approaching an acceptance problem → 1) look for the default rule that applies, 2) ask if there is any reason to deviate from these rules [if an email does not reach the offeror (who has the risk)]; courts can also look at who was best to catch the miscommunication. Then look at what is convenient on the facts

*Rudder v Microsoft Corp. (1999) 2 CPR (4th) 474, 40 CPC (4th) 394 (Ont. SCJ) [*Not having all terms displayed on screen at the same time does not = fine print]*

Facts:

- This is a motion by MSN (defendant) for a permanent stay of this intended class proceeding
- The plaintiffs were subscribers of MSN – the intended class is estimated to include about 89 000 MSN subscribers. The ‘contract’ is a ‘Member Agreement’ which requires members to electronically execute prior to receiving the services. Each contains a provision – (choice of law clause) ‘this agreement is governed by the laws of the State of Washington...in all disputes arising out of or relating to your use of MSN or your MSN membership’ – also chose the forum (Courts in King County, Washington)
 - The defendant relies on this to support that the class proceeding should be stayed

Issues:

- The plaintiffs claim damages for breach of contract, among other things; for allegedly charging members of MSN and taking payment from their credit cards in breach of contract and failing to provide reasonable/accurate information concerning accounts as the terms of the contract were ‘fine print’

Decision:

- Action brought by the plaintiffs permanently stayed; contract terms were not in ‘fine print’

Ratio:

- Fine print clauses in contracts should be brought the attention of the party accepting the terms, however requiring the party to scroll through the terms [similar to flipping pages of paper] does not constitute ‘fine print’

Analysis: (Winkler J)

- Forum selection clauses are generally treated with deference by Canadian courts
- The court is not bound to give effect to an exclusive jurisdiction clause, however **the choice of the parties should be respected unless there is strong cause to override the agreement** – this burden rests on the plaintiff and the threshold to be surpassed is beyond the mere ‘balance of convenience’
- The plaintiffs say the clause should be treated as if it were the **fine print in a contract** and must be brought specifically to the attention of the party accepting the terms
- Disagree that because only a portion of the agreement was presented on the screen at one time, the terms which were not on the screen are essentially in ‘fine print’ [As part of the sign-up routine, potential members of MSN were required to acknowledge their acceptance of the terms by clicking ‘I Agree’ at the same time the terms of the Member Agreement were displayed; All of the terms were readily viewable using the scrolling function where the MA was presented]
- There were no fine print terms or physical differences which make some terms more difficult to read than others – the scrolling required is no different than having to flip pages in a document; must signify acceptance twice, both times the terms are presented
- Rule of electronic contracting is offer + acceptance

Termination of Offer

A) Revocation

Dickinson v Dodds (1876) 2 Ch D 463 (CA) [Once the person the offer was made to finds out the offeror made a contract w/ someone else – the open offer to sell terminates]

Facts:

- On Wednesday June 10, the defendant (Dodds) gave the plaintiff the offer that he agreed to sell Dickinson his whole dwelling-houses, garden ground, stable, and outbuildings for 800 pounds; and that the offer will be available until Friday the 12th at 9am
- On the Thursday afternoon the plaintiff was informed (by his agent – Barry) that Dodds had been offering to sell the property to Thomas Allan (the other defendant)
 - [This does not necessarily mean he no longer wants to deal with Dickinson]
- That evening he went to Dodd's mother-in-law's house and left with her a formal acceptance in writing of the offer to sell the property – the mother in law forgot to give Dodds the letter. On the Friday morning at 7am Dickson's agent found Dodds and handed him a duplicate of the notice of acceptance; but Dodds said it was too late and that he'd already sold the property
- On the day before (Thursday the 11th) Dodds signed a formal contract for the sale of the property to Allan and received a deposit

Issues:

- If an offer is made for the sale of property and before that offer is accepted the person who has made the offer enters into a binding agreement to sell the property to someone else, and the person to whom the offer was first made receives notice in some form that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer?

Decision:

- No, there is no binding contract between Dickson and Dodds

Ratio:

- Once the person the offer was made to finds out the property has been sold to someone else, it is too late for him to accept the offer
- [Communication need not come from the offeror] If hear from reliable source that property is already sold – cannot accept the offer still
- A mere promise to hold an offer open for a period of time is not binding and an offeror is free to withdraw the offer

Analysis:

- There is a clear rule of law that a mere offer does not bind the offeror and he can revoke it at any time before it is accepted
- Even if Allan knew about the offer to Dickinson, that would not prevent him from making a more favorable offer and at once enter into a binding agreement
- A person who has given to another a certain time within which to accept an offer is **not bound by his promise to give that time**
- [If a man who makes an offer dies, the offer cannot be accepted after he is dead → similarly, once the person who the offer was made to finds out the property has been sold to someone else, it is too late for him to accept the offer
- Even had there been a binding contract between D+D, the sale to Allan was first in point of time

Byrne v Van Tienhoven (1880) 5 CPD 344 [An offer cannot be revoked after it has been accepted; a letter of revocation can only apply once communicated to the offeree**]

Facts:

- On October 1st, the defendants (In Cardiff) mailed an offer to sell to the plaintiffs (in New York) 1000 boxes of tin plates at a fixed price. The offer was received on October 11 and the plaintiffs immediately accepted by telegram on the 11th and confirmed by letter on the 15th
- HOWEVER, on October 8, the defendant mailed a revocation of the offer which was received on October 20th – [the plaintiffs had already sold the tin to a third party thinking they had purchased the plates]

Issues:

- Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent?
- Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

Decision:

- The withdrawal of the letter was inoperative; and a complete contract was entered into on the 11th when the plaintiffs accepted the offer of the 1st → the revocation had no impact; revocation was only effective once it was communicated to the buyers in NY (at this point acceptance had already been sent)

Ratio:

- A letter of revocation can only apply once it is communicated to the offeree [postal rule does not apply to revocation]

- Can revoke an offer by communicating revocation any time before it is accepted; and if do not, then are bound by the offer

Analysis: (Lindley J)

- There is no a doubt an offer can be withdrawn before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not
- **Uncommunicated revocation is for all practical purposes and in point of law no revocation at all**
- When an offer is made and accepted by letters sent through post, the contract is completed the moment the letter accepting the offer is sent → here, can find no evidence of any authority given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter
- Before the letter of revocation had reached the plaintiffs they had accepted the offer [both by telegram and by post]
- A person who has accepted an offer not known to him to have been revoked; shall be in a position safely to act upon the footing of that offer and acceptance constitute a contract binding on both parties

Barrick v Clark [An offer expires after a reasonable amount of time]

Facts:

- B owned farmland that C wanted to buy. They entered into negotiations, which resulted in C making an offer of \$14 500. B wrote back stating that the price was \$15 000 and if the price was satisfactory the deal could be closed immediately. At this time C was away on a hunting trip. His wife received the letter and responded asking B to hold the offer open until her husband returned in around 10 days. B did not reply. 13 days later, B sold the property to someone else for \$15 000. C did not return until 20 days after his wife received the offer. C sought specific performance of the alleged contract between him and B. Dismissed at trial, found for C on appeal

Issues:

- What is a reasonable amount of time that the offer must be left open for?

Decision:

- Appeal allowed. A reasonable amount of time had passed + the offer was closed.

Ratio:

- An offer which states it will expire at a certain time cannot be validly accepted after that time. If no time condition provided for, the offer is open for a reasonable amount of time.
- Reasonable time → 1) an offer contains the implied term that it is automatically withdrawn by offeror after reasonable time; 2) when an offer is not accepted within a reasonable time, it has impliedly been rejected by the offeree

Analysis: (Estey J)

- The reasonable time that this specific offer must be left open for is longer than for goods that fluctuate in price (stocks) or for perishable goods. Here, the land could not be used until the spring. However, through C's actions + insistence on replying to B's letters by wire C indicated that he did not have a spring date in mind, but wanted to get the sale done [or go off to pursue other options]
- Further, B did not respond to Mrs. Clark's letter, so he was not bound to any particular period of offer. Leaving the offer open for 13 days was a reasonable time, as C had indicated that he wanted to accept and close the sale as soon as possible
- Here, offer lapses because 'conduct lead us to believe, not going to accept it' – time fuse had passed by December 10
- [Concurring] Indications in the terms of the offer that 'speed' was being looked for – difficult to get the documents, etc. to be done in time before January 1 (December 10th was too late)
- [Look at case through different lens – letter from wife; reason for the silence to not imply that the offer was rejected (was out of touch for a prolonged period of time)]

Notes:

- 1) Look at the **terms of the offer + see if there are indications** of speed/how much speed
- 2) Did not hear in reasonable time + assumed the contract was rejected – offerees **conduct**
- SCC takes an '**implied revocation theory**' – has an implied term + if not accepted in this time, then there is a rejection
- SCA – offer is not over when it is impliedly rejected
- P. 106 note – better theory is implied rejection (allows us to take into account the conduct of both parties after the offer was made)
- Common law deals when there are 2 contracts made selling same land → remedy is not damages but '**specific performance**' (must do what said you would do – convey land to one of the parties; person who first made the completed contract is probably who gets the land; the other party gets **expectation damages** – put in same position would have been in had the contract was performed) – based on theory that all land is unique