

CASES ON FORMATION OF A CONTRACT

OFFER

***Payne v Cave* (1789)**

The defendant made the highest bid for the plaintiff's goods at an auction sale, but he withdrew his bid before the fall of the auctioneer's hammer. It was held that the defendant was not bound to purchase the goods. His bid amounted to an offer which he was entitled to withdraw at any time before the auctioneer signified acceptance by knocking down the hammer. Note: The common law rule laid down in this case has now been codified in s57(2) Sale of Goods Act 1979.

***Fisher v Bell* (1960)**

A shopkeeper displayed a flick knife with a price tag in the window. The Restriction of Offensive Weapons Act 1959 made it an offence to 'offer for sale' a 'flick knife'. The shopkeeper was prosecuted in the magistrates' court but the Justices declined to convict on the basis that the knife had not, in law, been 'offered for sale'.

This decision was upheld by the Queen's Bench Divisional Court. Lord Parker CJ stated: "It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract."

***PSGB v Boots* (1953)**

The defendants' shop was adapted to the "self-service" system. The question for the Court of Appeal was whether the sales of certain drugs were effected by or under the supervision of a registered pharmacist. The question was answered in the affirmative. Somervell LJ stated that "in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed."

***Partridge v Crittenden* (1968)**

It was an offence to offer for sale certain wild birds. The defendant had advertised in a periodical 'Quality Bramblefinch cocks, Bramblefinch hens, 25s each'. His conviction was quashed by the High Court. Lord Parker CJ stated that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. In a very different context Lord Herschell in *Grainger v Gough (Surveyor of Taxes)* [1896] AC 325, said this in dealing with a price list:

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

Carlill v Carbolic Smoke Ball Co (1893)

An advert was placed for 'smoke balls' to prevent influenza. The advert offered to pay £100 if anyone contracted influenza after using the ball. The company deposited £1,000 with the Alliance Bank to show their sincerity in the matter. The plaintiff bought one of the balls but contracted influenza. It was held that she was entitled to recover the £100. The Court of Appeal held that:

- (a) the deposit of money showed an intention to be bound, therefore the advert was an offer;
- (b) it was possible to make an offer to the world at large, which is accepted by anyone who buys a smokeball;
- (c) the offer of protection would cover the period of use; and
- (d) the buying and using of the smokeball amounted to acceptance.

Harvey v Facey (1893)

The plaintiffs sent a telegram to the defendant, "Will you sell Bumper Hall Pen? Telegraph lowest cash price".

The defendant's reply was "Lowest price £900".

The plaintiffs telegraphed "We agree to buy ... for £900 asked by you".

It was held by the Privy Council that the defendant's telegram was not an offer but simply an indication of the minimum price the defendant would want, if they decided to sell. The plaintiffs' second telegram could not be an acceptance.

Gibson v MCC (1979)

The council sent to tenants details of a scheme for the sale of council houses. The plaintiff immediately replied, paying the £3 administration fee. The council replied: "*The corporation may be prepared to sell the house to you at the purchase price of £2,725 less 20 per cent. £2,180 (freehold).*" The letter gave details about a mortgage and went on "This letter should not be regarded as a firm offer of a mortgage. *If you would like to make a formal application to buy your council house, please complete the enclosed application form and return it to me as soon as possible.*" G filled in and returned the form. Labour took control of the council from the Conservatives and instructed their officers not to sell council houses unless they were legally bound to do so. The council declined to sell to G.

In the House of Lords, Lord Diplock stated that words italicised seem to make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by G's written acceptance of it. It was a letter setting out the financial terms on which it may be the council would be prepared to consider a sale and purchase in due course.

Harvela v Royal Trust (1985)

Royal Trust invited offers by sealed tender for shares in a company and undertook to accept the highest offer. Harvela bid \$2,175,000 and Sir Leonard Outerbridge bid \$2,100,000 or \$100,000 in excess of any other offer. Royal Trust accepted Sir Leonard's offer. The trial judge gave judgment for Harvela.

In the House of Lords, Lord Templeman stated: "To constitute a fixed bidding sale all that was necessary was that the vendors should invite confidential offers and should undertake to accept the highest offer. Such was the form of the invitation. It follows that the invitation upon its true construction created a fixed bidding sale and that Sir Leonard was not entitled to submit and the vendors were not entitled to accept a referential bid."

***Blackpool Aero Club v Blackpool Borough Council* (1990)**

BBC invited tenders to operate an airport, to be submitted by noon on a fixed date. The plaintiffs tender was delivered by hand and put in the Town Hall letter box at 11am. However, the tender was recorded as having been received late and was not considered. The club sued for breach of an alleged warranty that a tender received by the deadline would be considered. The judge awarded damages for breach of contract and negligence. The council's appeal was dismissed by the Court of Appeal.

ACCEPTANCE

***Brogden v MRC* (1877)**

B supplied coal to MRC for many years without an agreement. MRC sent a draft agreement to B who filled in the name of an arbitrator, signed it and returned it to MRC's agent who put it in his desk. Coal was ordered and supplied in accordance with the agreement but after a dispute arose B said there was no binding agreement.

It was held that B's returning of the amended document was not an acceptance but a counter-offer which could be regarded as accepted either when MRC ordered coal or when B actually supplied. By their conduct the parties had indicated their approval of the agreement

***Gibson v MCC* (1979)**

Lord Denning said that one must look at the correspondence as a whole and the conduct of the parties to see if they have come to an agreement.

***Trentham v Luxfer* (1993)**

T built industrial units and subcontracted the windows to L. The work was done and paid for. T then claimed damages from L because of defects in the windows. L argued that even though there had been letters, phone calls and meetings between the parties, there was no matching offer and acceptance and so no contract.

The Court of Appeal held that the fact that there was no written, formal contract was irrelevant, a contract could be concluded by conduct. Plainly the parties intended to enter into a contract, the exchanges between them and the carrying out of instructions in those exchanges, all supported T's argument that there was a course of dealing between the parties which amounted to a valid, working contract. Steyn LJ pointed out that:

- (a) The courts take an objective approach to deciding if a contract has been made.
- (b) In the vast majority of cases a matching offer and acceptance will create a contract, but this is not necessary for a contract based on performance.

***Hyde v Wrench* (1840)**

6 June W offered to sell his estate to H for £1000; H offered £950

27 June W rejected H's offer

29 June H offered £1000. W refused to sell and H sued for breach of contract.

Lord Langdale MR held that if the defendant's offer to sell for £1,000 had been unconditionally accepted, there would have been a binding contract; instead the plaintiff made an offer of his own of £950, and thereby rejected the offer previously made by the defendant. It was not afterwards competent for the plaintiff to revive the proposal of the defendant, by tendering an acceptance of

it; and that, therefore, there existed no obligation of any sort between the parties.

***Stevenson v McLean* (1880)**

On Saturday, the defendant offered to sell iron to the plaintiff at 40 shillings a ton, open until Monday. On Monday at 10am, the plaintiff sent a telegram asking if he could have credit terms. At 1.34pm the plaintiff sent a telegram accepting the defendant's offer, but at 1.25pm the defendant had sent a telegram: 'Sold iron to third party' arriving at 1.46pm. The plaintiff sued the defendant for breach of contract and the defendant argued that the plaintiff's telegram was a counter-offer so the plaintiff's second telegram could not be an acceptance.

It was held that the plaintiff's first telegram was not a counteroffer but only an enquiry, so a binding contract was made by the plaintiff's second telegram.

***Butler Machine Tool v Ex-Cell-O Corporation* (1979)**

The plaintiffs offered to sell a machine to the defendants. The terms of the offer included a condition that all orders were accepted only on the sellers' terms which were to prevail over any terms and conditions in the buyers' order. The defendants replied ordering the machine but on different terms and conditions. At the foot of the order was a tearoff slip reading, "We accept your order on the Terms and Conditions stated thereon." The plaintiffs signed and returned it, writing, "your official order ... is being entered in accordance with our revised quotation ...".

The Court of Appeal had to decide on which set of terms the contract was made. Lord Denning M.R. stated:

In many of these cases our traditional analysis of offer, counteroffer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co Ltd v AM Satterthwaite*. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns L.C. said in *Brogden v Metropolitan Railway Co* (1877):

... there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description.

Applying this guide, it will be found that in most cases when there is a "battle of forms" there is a contract as soon as the last of the forms is sent and received without objection being taken to it. Therefore, judgment was entered for the buyers.

***GNR v Witham* (1873)**

GNR advertised for tenders for the supply of stores and W replied 'I undertake to supply the company for 12 months with such quantities as the company may order from time to time'. GNR accepted this tender and placed orders which W supplied. When W later refused to supply it was held that W's tender was a standing offer which GNR could accept by placing an order. W's refusal was a breach of contract but it also revoked W's standing offer for the future, so W did not have to meet any further orders.

Lord Denning in ***Entores v Miles Far East Corp*** (1955)

If a man shouts an offer to a man across a river but the reply is not heard because of a plane flying overhead, there is no contract. The offeror must wait and then shout back his acceptance so that the offeror can hear it.

Powell v Lee (1908)

The plaintiff applied for a job as headmaster and the school managers decided to appoint him. One of them, acting without authority, told the plaintiff he had been accepted. Later the managers decided to appoint someone else. The plaintiff brought an action alleging that by breach of a contract to employ him he had suffered damages in loss of salary. The county court judge held that there was no contract as there had been no *authorised* communication of intention to contract on the part of the body, that is, the managers, alleged to be a party to the contract. This decision was upheld by the King's Bench Division.

Felthouse v Bindley (1862)

The plaintiff discussed buying a horse from his nephew and wrote to him "If I hear no more about him, I consider the horse mine ..." The nephew did not reply but wanted to sell the horse to the plaintiff, and when he was having a sale told the defendant auctioneer not to sell the horse. By mistake the defendant sold the horse. The plaintiff sued the defendant in the tort of conversion but could only succeed if he could show that the horse was his.

It was held that the uncle had no right to impose upon the nephew a sale of his horse unless he chose to comply with the condition of writing to repudiate the offer. It was clear that the nephew intended his uncle to have the horse but he had not communicated his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff. There had been no bargain to pass the property in the horse to the plaintiff, and therefore he had no right to complain of the sale.

Entores v Miles Far East Corp (1955)

The plaintiffs in London made an offer by Telex to the defendants in Holland. The defendant's acceptance was received on the plaintiffs' Telex machine in London. The plaintiffs sought leave to serve notice of a writ on the defendants claiming damages for breach of contract. Service out of the jurisdiction is allowed to enforce a contract made within the jurisdiction. The Court of Appeal had to decide where the contract was made.

Denning L.J. stated that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received. The contract was made in London where the acceptance was received. Therefore service could be made outside the jurisdiction.

The Brimnes (1975)

The defendants hired a ship from the plaintiff shipowners. The shipowners complained of a breach of the contract. The shipowners sent a message by Telex, withdrawing the ship from service, between 17.30 and 18.00 on 2 April. It was not until the following morning that the defendants saw the message of withdrawal on the machine.

Edmund-Davies L.J. agreed with the conclusion of the trial judge. The trial judge held that the notice of withdrawal was sent during ordinary business hours, and that he was driven to the conclusion either that the charterers' staff had left the office on April 2 'well before the end of ordinary business hours' or

that if they were indeed there, they 'neglected to pay attention to the Telex machine in the way they claimed it was their ordinary practice to do.' He therefore concluded that the withdrawal Telex must be regarded as having been 'received' at 17.45 hours and that the withdrawal was effected at that time.

Note: Although this is a case concerning the termination of a contract, the same rule could apply to the withdrawal and acceptance of an offer.

***Brinkibon v Stahag Stahl* (1983)**

The buyers, an English company, by a telex, sent from London to Vienna, accepted the terms of sale offered by the sellers, an Austrian company. The buyers issued a writ claiming damages for breach of the contract.

The House of Lords held that the service of the writ should be set aside because the contract had not been made within the court's jurisdiction. Lord Wilberforce stated that the present case is, as *Entores* itself, the simple case of instantaneous communication between principals, and, in accordance with the general rule, involves that the contract (if any) was made when and where the acceptance was received. This was in Vienna.

***Adams v Lindsell* (1818)**

2 Sept. The defendant wrote to the plaintiff offering to sell goods asking for a reply "in the course of post"

5 Sept. The plaintiff received the letter and sent a letter of acceptance.

9 Sept. The defendant received the plaintiff's acceptance but on 8 Sept had sold the goods to a third party.

It was held that a binding contract was made when the plaintiff posted the letter of acceptance on 5 Sept, so the defendant was in breach of contract.

***Household v Grant* (1879)**

G applied for shares in the plaintiff company. A letter of allotment of shares was posted but G never received it. When the company went into liquidation G was asked, as a shareholder, to contribute the amount still outstanding on the shares he held. The trial judge found for the plaintiff.

The Court of Appeal affirmed the judgment. Thesiger LJ stated that "Upon balance of conveniences and inconveniences it seems to me ... it was more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant."

***Holwell Securities v Hughes* (1974)**

The defendant gave the plaintiff an option to buy property which could be exercised "by notice in writing". The plaintiffs posted a letter exercising this option but the letter was lost in the post and the plaintiffs claimed specific performance. The Court of Appeal held that the option had not been validly exercised. Lawton LJ stated that the plaintiffs were unable to do what the agreement said they were to do, namely, fix the defendant with knowledge that they had decided to buy his property. There was no room for the application of the postal rule since the option agreement stipulated what had to be done to exercise the option.

***Tinn v Hoffman* (1873)**

Acceptance was requested by return of post. Honeyman J said: "That does not mean exclusively a reply by letter or return of post, but you may reply by telegram or by verbal message or by any other means not later than a letter written by return of post."

***Yates v Pulleyn* (1975)**

The defendant granted the plaintiff an option to buy land, exercisable by notice in writing to be sent by "registered or recorded delivery post". The plaintiff sent a letter accepting this offer by ordinary post, which was received by the defendant who refused to accept it as valid.

It was held that this method of acceptance was valid and was no disadvantage to the offeror, as the method stipulated was only to ensure delivery and that had happened.

***R v Clarke* (1927) (Australia)**

The Government offered a reward for information leading to the arrest of certain murderers and a pardon to an accomplice who gave the information. Clarke saw the proclamation. He gave information which led to the conviction of the murderers. He admitted that his only object in doing so was to clear himself of a charge of murder and that he had no intention of claiming the reward at that time. He sued the Crown for the reward. The High Court of Australia dismissed his claim. Higgins J stated that: "Clarke had seen the offer, indeed; but it was not present to his mind— he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing."

***Williams v Carwardine* (1833)**

The defendant offered a reward for information leading to the conviction of a murderer. The plaintiff knew of this offer and gave information that it was her husband after he had beaten her, believing she had not long to live and to ease her conscience. It was held that the plaintiff was entitled to the reward as she knew about it and her motive in giving the information was irrelevant.

TERMINATION OF THE OFFER

***Byrne v Van Tienhoven* (1880)**

1 Oct. D posted a letter offering goods for sale.
8 Oct. D revoked the offer; which arrived on 20 Oct.
11 Oct. P accepted by telegram
15 Oct. P posted a letter confirming acceptance.

It was held that the defendant's revocation was not effective until it was received on 20 Oct. This was too late as the contract was made on the 11th when the plaintiff sent a telegram. Judgment was given for the plaintiffs.

***Dickinson v Dodds* (1876)**

Dodds offered to sell his house to Dickinson, the offer being open until 9am Friday. On Thursday, Dodds sold the house to Allan. Dickinson was told of the sale by Berry, the estate agent, and he delivered an acceptance before 9am Friday. The trial judge awarded Dickinson a decree of specific performance. The Court of Appeal reversed the decision of the judge.

James LJ stated that the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This was evident from the plaintiff's own statements. It was clear that before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It was impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement.

***Shuey v U.S.* (1875)**

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

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

***Errington v Errington and Woods* (1952)**

A father bought a house on mortgage for his son and daughter-in-law and promised them that if they paid off the mortgage, they could have the house. They began to do this but before they had finished paying, the father died. His widow claimed the house. The daughter-in-law was granted possession of the house by the trial judge and the Court of Appeal.

Denning LJ stated: "The father's promise was a unilateral contract – a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been."

***Daulia v Four Millbank Nominees* (1978)**

The defendant offered to sell property to the plaintiff. The parties agreed terms and agreed to exchange contracts. The defendant asked the plaintiff to attend at the defendant's office to exchange. The plaintiff attended but the defendant sold to a third party for a higher price. It was held that the contract fell foul of s40(1) Law of Property Act 1925 and the plaintiff's claim was struck out. However, Goff L.J. stated *obiter*:

In unilateral contracts the offeror is entitled to require full performance of the condition imposed otherwise he is not bound. That must be subject to one important qualification – there must be an implied obligation on the part of the offeror not to prevent the condition being satisfied, an obligation which arises as soon as the offeree starts to perform. Until then the offeror can revoke the

whole thing, but once the offeree has embarked on performance, it is too late for the offeror to revoke his offer.

***Ramsgate v Montefiore* (1866)**

On 8 June, the defendant offered to buy shares in the plaintiff company. On 23 Nov, the plaintiff accepted but the defendant no longer wanted them and refused to pay. It was held that the six-month delay between the offer in June and the acceptance in November was unreasonable and so the offer had 'lapsed', ie it could no longer be accepted and the defendant was not liable for the price of the shares.

***Financings Ltd v Stimson* (1962)**

The defendant at the premises of a dealer signed a form by which he offered to take a car on HP terms from the plaintiffs. He paid a deposit and was allowed to take the car away. He was dissatisfied with it and returned it to the dealer, saying he did not want it. The car was stolen from the dealer's premises and damaged. The plaintiffs, not having been told that the defendant had returned the car, signed the HP agreement.

It was held by the Court of Appeal (a) that the defendant had revoked his offer by returning the car to the dealer. (b) In view of an express provision in the form of the contract that the defendant had examined the car and satisfied himself that it was in good order and condition, the offer was conditional on the car remaining in substantially the same condition until the moment of acceptance. That condition not being fulfilled, the acceptance was invalid.

***Bradbury v Morgan* (1862)**

JM Leigh requested Bradbury & Co to give credit to HJ Leigh, his brother. JM Leigh guaranteed his brother's account to the extent of £100. Bradbury thereafter credited HJ Leigh in the usual way of their business. JM Leigh died but Bradbury, having no notice or knowledge of his death, continued to supply HJ Leigh with goods on credit. JM Leigh's executors (Morgan) refused to pay, arguing that they were not liable as the debts were contracted and incurred after the death of JM Leigh and not in his lifetime. Judgment was given for the plaintiffs, Bradbury.