2. The Agreement

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A contract consists of an actionable promise or promises. Every such promise involves at least two parties, a promisor and a promisee, and an outward expression of common intention and of expectation as to the declaration or assurance contained in the promise.

It has been previously pointed out\(^1\) that this outward expression of a common intention and of expectation normally takes the form of an agreement. In most cases, therefore, it will be necessary to ascertain at the outset whether or not an agreement has been concluded.

This chapter considers the establishing of an agreement by offer and acceptance; uncertain and incomplete agreements; and the intention to create legal relations.

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The fact that an agreement has been reached will sometimes be self-evident, since, although as a general rule English law has no requirements of writing or other form, the agreement will be set out in a document signed or initialled by both parties. But where there is no such document, it may be more difficult to discover whether the parties have agreed. The alleged agreement may, in whole or in part, have been concluded by word of mouth or by conduct. Difficulties of proof will then arise and the resultant questions of fact will have to be determined by the trial judge from the evidence given by the parties and their witnesses. We are not, however, here concerned with difficulties of proof, but rather with those problems that occur even where there is no dispute as to what the parties said or did. Such problems are not infrequent in practice, especially when the fact of agreement has to be elicited from correspondence, or from an exchange of other types of communication such as telex messages, fax, or e-mail.

(a) Offer and Acceptance

To determine whether an agreement has actually been concluded, it is normally necessary to inquire whether in the negotiations which have taken place between the parties there has been a definite offer by one party, and an equally definite acceptance of that offer by the other. For most contracts are reducible by analysis to the acceptance of an offer. If, for instance, A and B have agreed that A shall purchase from B a car for £10,000, we can trace the process to a moment at which B must have said to A, in effect, 'Will you give me £10,000 for my car?', and A has replied, 'I will'; or at which A has said to B, 'Will you let me have the car for £10,000?', and B has said, 'I will'. There are, however, cases to which this analysis does not readily apply. These include the signature of a prepared document, the acceptance by two parties of terms suggested by a third, and multiparty agreements. Where, however, a contract is alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, the Court should look at the correspondence to see whether there is an offer by one party and an acceptance by the other party. It would be a mistake to think that all contracts can thus be analysed into the form of offer and acceptance. The analysis is, however, a working method which, more often than not, enables us, in a doubtful case, to ascertain whether a contract has in truth been concluded, and as such may usefully be retained.
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(i) Offer and acceptance in unilateral and bilateral contracts

The process of ‘offer and acceptance’ may take place in one of two main ways:

(1) In the offer of a promise for an act: as when a person offers a reward for the doing of a certain thing, which being done that person is bound to make good the promise to the doer.

Illustration: A, who has lost her dog, offers by advertisement a reward of £25 to anyone who will bring the dog safely home; a promise is offered in return for an act; and when B, knowing of the reward, brings the dog safely home, the act is done and A is bound to pay the reward.

(2) In the offer of a promise for a promise: in which case, when the offer is accepted by the giving of the promise, the contract consists of an outstanding obligation on both sides.

Illustration: C offers to pay D a certain sum of money if D will promise to dig C’s garden for him within a certain time. When D makes the promise asked for, he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow the first to do it and to pay for it.

It will be observed that case (1) differs from (2) in an important respect. In (1), it is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In consequence, such a contract is termed ‘unilateral’ as only one person is bound. In (2), however, each party is obliged to some act or forbearance which, at the time of entering into the contract, is future; there is an outstanding obligation on each side. This is known as a ‘bilateral’ contract, and each party is both a promisor and a promisee. It is reasonable to presume in cases of doubt that a bilateral, rather than a unilateral contract has been concluded. Thus if G says to H: ‘If you will let me have that table you are making, when it is finished, I will give you £25 for it’, and H replies ‘All right’, there is a bilateral contract and H is bound to deliver the table.

(ii) Promises in deeds

In one exceptional situation, however, it is clear that a contract can come into existence without any need for an ‘offer and acceptance’. This is the case of a promise in a deed. For example, if a wealthy person, by a document executed as a deed, promises to pay a college £100,000 in order to establish a scholarship, the promise is binding without any need for an acceptance or even knowledge of the promise by the person to whom the promise is made.

(iii) Inferences from conduct

The description which has been given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words either in the offer or in the acceptance. An agreement may also be
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inferred from conduct alone; the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.\(^\text{10}\) In day-to-day contracts such inferences are frequent. For example, a person who boards a bus or who hires a taxi thereby undertakes to pay the fare to his destination even though he makes no express promise to do so.\(^\text{11}\) Again, a person who puts a coin in an automatic machine thereby enters into a contract with the supplier although no words have been exchanged on either side.

Sometimes the inference from conduct is not so clear, because the contract has assumed a less simple form. If more than two parties are involved, it may not be particularly helpful to look for a definite offer and acceptance. In Clarke v Earl of Dunraven, The Satanita:\(^\text{12}\)

The owners of two yachts, the Satanita and the Valkyrie, entered them in a club regatta. The rules of the regatta bound competitors to make good any damage caused by fouling. While preparing for the start of a race, the Satanita fouled and sank the Valkyrie.

Although the immediate relationship of each owner was not with the other, but with the secretary of the yacht club, it was held that a contract existed between them, and that the owner of the Valkyrie could recover damages. Lord Herschell said:\(^\text{13}\)

The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.

Similar principles mean that in the case of a company or other corporate entity there will, for certain purposes, be a contract both between the entity and its members and between each of the members themselves.\(^\text{14}\)

(b) The Test of Intention

In common with most European legal systems,\(^\text{15}\) the test of a person’s intention is not a subjective, but an objective one; that is to say, the intention which the law will attribute to a person is always that which that person’s conduct bears when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror’s own mind. Thus a person may be held to have made an offer although not appreciating that one was being made or not realizing that the terms of the offer embodied a mistake, as where a rent of £65,000 was mistakenly proposed by a landlord instead of £126,000.\(^\text{16}\) If a person’s words or conduct, when reasonably construed, amount to an offer or to an offer on particular terms, that person will be held to have made that offer provided that the offeree neither knew nor could
reasonably have known of the misunderstanding at the time the offer was accepted. The same objective approach applies to an acceptance. Although the approach is objective, the intentions of the parties are not entirely irrelevant so that a contract cannot be formed which is in accordance with the intention of neither party. It has been stated that ‘the judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other’.

2. The Offer

An offer is an intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance, or return promise on the part of the person to whom it is addressed.

(a) Offers And Invitations To Treat

It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to, result in any binding obligation from offers which admit of acceptance, and so become binding promises. A person advertises goods for sale in a newspaper, or announces that they will be sold by tender or by auction; a shopkeeper displays goods in a shop window at a certain price; or a bus company advertises that it will carry passengers from A to Z and will reach Z and other intermediate stops at certain times. In such cases it may be asked whether the statement or act made is an offer capable of acceptance or merely an invitation to make offers, and do business; one that contemplates that further negotiations will take place. A statement or act of this nature, if it is not intended to be binding, is known as an ‘invitation to treat’.

As the classification of any particular act or statement as being either an offer or an invitation to treat depends on intention to be bound rather than upon any a priori principle of law, it is not easy to reconcile all the cases or their reasoning. Where the intention is unclear, the Court will take account of the surrounding circumstances and consequences of holding an act or statement to be an offer as well as what is in fact said.

A statement of fact made merely to supply information cannot be treated as an offer, and accepted, so as to create a valid contract. In Harvey v Facey:

A telegraphed to B ‘Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid’. B replied by telegram, ‘Lowest price for Bumper Hall Pen £900’. A telegraphed, ‘We agree to buy Bumper Hall Pen for £900 asked by you’. Bumper Hall Pen was a
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plot of land, and A claimed that this exchange of telegrams constituted a valid offer and acceptance.

The Judicial Committee of the Privy Council pointed out that A's first telegram asked two questions, (1) as to the willingness of B to sell, and (2) as to the lowest price; and that the word ‘telegraph’ in it was addressed to the second question only. It was held that no contract had been made, that B in stating the lowest price for the property was not making an offer but supplying information, that A's second telegram was an offer by him—not the less so because he called it an acceptance—and that this offer had never been accepted by B.

In Gibson v Manchester City Council:21

The city council adopted a policy of selling council houses to its tenants. Gibson, on a printed form supplied by the council, applied for details of the price of the council house he was renting and mortgage terms. The council replied, 'The corporation may be prepared to sell the house to you at the purchase price of ... £2,180.'22 Gibson thereupon completed and sent off the application form to purchase the house.

The House of Lords held that there was no contract because the council’s letter was not an offer to sell (that is, although this terminology was not used, it was merely an invitation to treat). The words italicized were fatal to regarding the letter as an offer.

(i) Advertisements and displays of goods for sale

Generally speaking advertisements in newspapers or periodicals that the advertiser has goods for sale are not offers.23 Neither are catalogues or price lists.24 Again, a display of goods marked at a certain price by a shopkeeper in a shop window does not bind the shopkeeper to sell at that price or to sell at all. The display is merely an invitation to treat; it is for the customer to offer to buy the goods, and, subject to anti-discrimination legislation,26 the shopkeeper may choose either to accept or to refuse the offer. One reason given for this conclusion is that otherwise the advertiser, catalogue publisher, and shopkeeper would be obliged to sell to every person who accepted such an ‘offer’, even where supplies had run out. In the case of displays on shelves in a self-service shop, which are also generally invitations to treat, it is said that if the display were an offer, once an article was selected and placed in the receptacle, the customer would have no right to change his mind.27 Another reason given is that if a display was an offer a shopkeeper might be forced to contract with his worst enemy: a ‘shop is a place for bargains, not for compulsory sales’28 but this is less convincing in the light of modern regulation of trading practices, for example the prohibition of discrimination on grounds such as disability, race, religion, sex, and age,29 and the statutory protection of consumers.30 Where the
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display clearly states that the goods will be sold to a person who pays the required price it is, however, likely to be held to be an offer. For example, a notice stating ‘We will beat any TV HiFi and Video price by £20 on the spot’ was held to be ‘a continuing offer’ and the shop manager was criminally liable for a misleading indication as to the price at which goods may be available.\(^{31}\)

(ii) Transactions by machine

Different considerations apply where the transaction is effected through a machine,\(^ {32}\) as where the display is on a vending machine or where, as in many self-service petrol stations, the product purchased cannot easily be retrieved from the buyer’s property. In such cases the display is likely to be an offer. In Re Charge Card Services\(^ {33}\) an open offer to sell at pump prices was held to have been accepted by a motorist putting petrol in the tank.

(iii) Carriage of persons

The cases differ about the status of acts or statements about the carriage of persons. A statement in a railway timetable that a certain train will run at a certain time has been said to be an offer capable of acceptance by a passenger who goes to the station to buy a ticket,\(^ {34}\) although regulations\(^ {35}\) in effect provide that no contractual liability is to arise.

(iv) Tenders

An announcement inviting tenders is not normally an offer; unless accompanied by words indicating that the highest or the lowest tender will be accepted,\(^ {36}\) it is a mere attempt to ascertain whether an acceptable offer can be obtained.\(^ {37}\) In a case where there is no offer to contract with the highest or lowest bidder, if the invitation to tender prescribes a clear, orderly, and familiar procedure, it may be an offer to consider all conforming tenders. Thus, where, a local authority’s staff failed to clear a letterbox and the authority did not consider a tender submitted before the deadline, it was held liable for breach of contract.\(^ {38}\) In the case of tenders for major contracts for public works, supplies, and services the freedom to decide which tender to accept has been limited by European Union law.\(^ {39}\)

(v) Auctions

Where goods are put up for sale by auction upon an advertised condition that the sale shall be ‘without reserve’ the auctioneer thereby indicates to prospective buyers that the bid of the highest \textit{bona fide} bidder will be accepted, and that the goods will not at any stage be withdrawn, for example, on the ground that the reserve price has not yet been reached. An auctioneer who does so withdraw the goods is said to be liable for breach of contract with such a bidder. In \textit{Warlow v Harrison}:\(^ {40}\)
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An auctioneer advertised a brown mare for sale by auction ‘without reserve’. The owner’s name was not disclosed. The claimant bid 60 guineas; the owner bid 61 guineas, and the auctioneer knocked down the mare to him. The claimant sought damages from the auctioneer as being the highest *bona fide* bidder.

A majority of the Court of Exchequer Chamber considered that the auctioneer was liable on a contract that the auction sale was to be ‘without reserve’. Certainly there was no contract of sale. A bid at an auction is only an offer which can be retracted at any time before it is accepted by the auctioneer by the fall of the hammer, and an advertisement that goods will be auctioned on a certain day is a mere invitation to treat which does not bind the auctioneer to sell the goods. Accordingly, where an auctioneer withdraws the goods prematurely, refusing to knock them down to the highest bidder, there can be no possible action on any contract of sale because none has yet come into existence.

However, the Court’s conclusion that the claimant in *Warlow v Harrison* was not suing upon a contract of sale but on a different, collateral contract between the auctioneer and the highest *bona fide* bidder that the sale of the mare be ‘without reserve’, which was broken when a bid was made by or on behalf of the owner, has been criticized. First, if an advertisement that an auction sale will be held is merely an invitation to treat, how can a stipulation contained in it that the sale will be ‘without reserve’ be an offer? Secondly, if a bid may be retracted, or outbid, at any time before it is accepted, how can it be said that it is certain who is the highest bidder? Thirdly, what is the consideration for the promise, since the promisee is not bound to purchase but may withdraw the bid at any time?

But while there is a certain artificiality in treating the bidder as having provided consideration by bidding, that is, by exposure to the risk that the bid would be accepted by the auctioneer, this unilateral contract analysis accords with the modern approach to similar situations. It was applied in *Barry v Davies*, effectively ending the controversy over *Warlow v Harrison*:

Customs and Excise put up for sale by auction two new engine analyser machines. Each could be obtained from the manufacturers for £14,521 but they were being sold without a reserve price. After the auctioneer failed to obtain bids of £5,000 and £3,000, the claimant bid £200 for each machine. The auctioneer refused to accept these bids and withdrew the machines from the auction. The claimant brought an action against the auctioneer for breach of contract.
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The Court of Appeal, applying the majority’s view in Warlow v Harrison, held that the holding of an auction without reserve is an offer by the auctioneer to sell to the highest bidder so that the auctioneer was indeed contractually bound to sell to the claimant (who was entitled to damages of £27,600).

(b) General Offers

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

This proposition is best understood by an illustration:

An insurance company offers a reward to any person who finds and returns a valuable diamond brooch insured by them. X who knows of the offer, finds and returns the brooch. She is entitled to claim the reward.

An offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, prima facie creates a power of acceptance in every person to whom it is made or becomes known. But a contractual obligation to pay the reward only comes into existence when an individual person performs the stipulated services, and not before. A general offer may be susceptible of acceptance either by only one person or by a number of persons.

In some cases, such as the offer of a reward for information or the return of a lost possession, the offer is exhausted when once accepted. The offeror clearly does not intend to pay many times over for the same thing. So, where a reward is offered for information and the information asked for reaches the offeror from several sources, it has been held that the person who gave the earliest information is entitled to the reward.

In other cases the nature of the act asked for by the offeror and the circumstances in which the offer is made mean that it remains open for acceptance by any number of persons, such acceptance being signified by performance of its terms. In Carlill v Carbolic Smoke Ball Co.: The defendant offered by advertisement to pay £100 to any one ‘who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions’. It was added that £1,000 was deposited with the Alliance Bank ‘showing our sincerity in the matter’. Mrs Carlill used the smoke ball as required by the directions; she afterwards suffered from influenza and sued the company for the promised reward.
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The defendant was held liable. It was urged that a notification of acceptance should have been made to it but the Court held that this was one of the class of cases in which, as in the case of a reward offered for information or for the recovery of lost property, there need be no acceptance of the offer other than performance of the condition. The further argument that the alleged offer was merely an advertisement or puff which no reasonable person would take to be serious was rejected because the statement that £1,000 had been deposited to meet demands was regarded as evidence of the sincerity of the offer. The advertisement was an offer which was capable of being accepted by a number of persons, and which had been accepted by Mrs Carlill when she performed the stipulated conditions.

(c) Communication of the Offer

In general an offer is effective when, and not until, it is communicated to the offeree. It follows that there can in general be no acceptance in ignorance of an offer, and, despite one somewhat unsatisfactory contrary decision, this seems correct in principle.

(i) Cross-offers

The necessity for the communication of the offer, and for its consequent acceptance, appears to be the reason why two identical cross-offers do not ordinarily make a contract. Two manifestations of a willingness to make the same bargain do not constitute a contract unless one is made with reference to the other. In *Tinn v Hoffman & Co*,

On 28 November 1871, H wrote to T offering to sell him 800 tons of iron at 69s per ton, together with a further quantity at the same price. On the same day, T wrote to H offering to buy 800 tons at 69s, together with a further quantity at a lower price. The letters crossed in the post. T contended that there was, at all events, a good contract for 800 tons at 69s per ton.

A majority of the Court of Exchequer Chamber expressed the opinion that H would not be bound as a result of the simultaneous offers, each being made in ignorance of the other.

(ii) Offer by rendering services must be communicated

Although conduct such as the rendering of services can constitute an offer, where that offer is not communicated to the party to whom it is intended to be made there is no opportunity of rejection and no presumption of acceptance. Thus, if A does work for B without the request or knowledge of B, A can only sue in contract for the value of the work where there is evidence of a recognition or acceptance of the work by B. This is clearly illustrated by *Taylor v Laird*.
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T was engaged to command L's ship and to conduct certain explorers on an expedition up the River Niger. He threw up his command in the course of the expedition, but helped to work the vessel home, though without the knowledge of the defendant. He then claimed to be remunerated for the services thus rendered.

It was held that he could not recover. L never had the option of accepting or refusing the services while they were being rendered; and he repudiated them when he became aware of them. T's offer, being uncommunicated, did not admit of acceptance and could not give him any contractual rights against L. Pollock CB said:

Suppose I clean your property without your knowledge, have I a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?

(p. 42) In certain circumstances, for instance where the services rendered are necessary services, it may be that there is a liability to make restitution of an unjust enrichment but such liability is not contractual.

3. The Acceptance

If a contract is to be made, the offeree must accept the offer. Acceptance of an offer is the expression, by words or conduct, of assent to the terms of the offer in the manner prescribed or indicated by the offeror.

(a) Offer and Acceptance Must Correspond

The intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the coincidence of the terms of the acceptance with those of the offer. These requirements may be summed up in the general rule, sometimes called the 'mirror image' rule, that the acceptance must be absolute, and must correspond with the terms of the offer.

In determining whether or not an acceptance is conclusive, an alleged acceptance must be distinguished from (i) a counter-offer and rejection; (ii) an acceptance with some variation or addition of terms; or (iii) an acceptance which is equivocal, or which is qualified by reference to the subsequent arrangement of terms.

(i) Counter-offer and rejection

A counter-offer amounts to a rejection of the offer, and so operates to bring it to an end. In Hyde v Wrench, for example:
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W offered to sell a farm to H for £1,000. H said that he would give £950. W refused, and H then said he would give £1,000, and, when W declined to adhere to his original offer, H tried to obtain specific performance of the alleged contract.

The Court held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal followed by a counter-offer, and that no contract had come into existence. But making express what would otherwise be implied or inquiring whether the offeror will modify his terms does not necessarily amount to a counter-offer. So in Stevenson, Jacques & Co v McLean, the offeree could still accept an offer of a certain quantity of iron ‘at 40s. nett cash per ton’, even though he had telegraphed to the offeror requesting information as to possible terms of credit. It was held that this was not a counter-offer, but was ‘a mere inquiry, which should have been answered and not treated as a rejection of the offer’.

(ii) Change of terms

A purported acceptance of an offer may introduce terms at variance with or not comprised in the offer. Although, exceptionally in such a situation the response may be regarded as an acceptance with an offer to enter a further contract, generally, in such cases no contract is made, for the offeree in effect rejects the offer and makes a counter-offer.

In Jones v Daniel:

A offered £1,450 for a property belonging to B. In a letter accepting the offer B enclosed a contract for the signature of A. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer.

The Court held that there was no contract; B had not accepted A’s offer but made a counter-offer of his own, which was never accepted by A.

(iii) ‘Battle of the forms’

The problem of the ‘battle of the forms’ arises where, for example, a firm offers to buy goods from another on a form which contains or refers to its standard conditions of trade. The seller ‘accepts’ the offer by a confirmation on a form which contains or refers to its (the seller’s) standard conditions of trade. These may differ materially from those of the buyer. It may then deliver the goods. Two questions typically arise; is there a contract and, if there is, do the buyer’s or the seller’s conditions prevail?

One possible solution is by what might be called the ‘first shot’ approach. Under this the seller-offeree, by purporting to accept the buyer-offeror’s
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offer, is said to have waived its own conditions of trade, so that the contract is concluded subject to the buyer’s conditions. In Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd, however, a majority of the Court of Appeal (Lawton and Bridge LJJ) applied the ‘mirror image’ rule and stated that the seller’s confirmation amounts to a counter-offer. This is capable of acceptance by the buyer. The buyer may indicate that it accepts the counter-offer made to it by some act or performance; for example, the receipt and acceptance of the goods or by, for instance, the return of an ‘acknowledgement’ form containing the seller’s conditions. This can be called the ‘last shot’ approach. In our example such an acceptance would conclude a contract subject to the seller’s conditions, since it was the seller who fired the ‘last shot’ in the battle of the forms. Lord Denning MR, while arriving at the same result, advocated a more flexible, but less certain, approach, by which one should look at whether the documents revealed ‘an agreement on all material points’, but the Court of Appeal in Tekdata Interconnections Ltd v Amphenol Ltd confirmed that the majority in Butler Machine Tool Co Ltd v Ex-cell-o was correct. Except wherethere is a long-term clear course of dealing between the parties on particular terms, the normal rules of offer and acceptance must be applied; and, applying those rules, the standard result will be that the party which sends its terms last (the party which ‘fires the last shot’) will win because that will be the offer which is regarded as accepted by the other party’s conduct. What this approach lacks in flexibility it gains in terms of certainty.

In cases where there is no contract even though services have been rendered or goods delivered, the rendering of services or delivery of goods may give rise to a restitutionary non-contractual obligation in unjust enrichment to pay a reasonable sum. But in such cases, while restitution may protect the performer by the award of the reasonable value of the performance rendered, a recipient, who may have had certain requirements as to the time of performance or its quality, may be unprotected. This is because, in the absence of a contract, the party rendering the services or delivering the goods will not be liable in damages for delay or for defective performance. However, the better view is that this can be satisfactorily dealt with, within the non-contractual law of unjust enrichment, as going to the relevant enrichment of the recipient.

(iv) Equivocal or qualified acceptance

The acceptance must assent unequivocally and without qualification to the terms of the offer. For example, the reply ‘Your order is receiving our attention’ is too indefinite to amount to an acceptance. The acceptance may also be qualified by reference to the preparation of a more formal contract or by reference to terms which have still to be negotiated. In such a case the agreement is incomplete and there is no binding contract.
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(b) Communication of the Acceptance

(i) Mental assent insufficient

Acceptance means, in general, communicated acceptance, which must be something more than a mere mental assent. A tacit formation of intention is insufficient.

In an old case in the Year Books it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the contract was made and the property passed when he had seen and approved of the subject of the sale. But Brian CJ said:

> It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.

Lord Blackburn approved this decision in *Brogden v Metropolitan Railway Co.*

B (a supplier of coal) altered a draft coal supply agreement sent to him by M and returned it signed and marked ‘approved’. M’s agent put it in a drawer. The parties appear to have ordered and supplied coal upon the terms stated but, a dispute having arisen, B contended that he was not bound by the agreement.

It was held that there was a contract between the parties. This had not, however, come into existence at the time M’s agent acquiesced in the offer by putting the letter in his drawer but later, either when coal was ordered by M or supplied by B.

(ii) Communication to the offeror

Even if there is some overt act or speech to give evidence of the intention to accept, English law stipulates, in addition, that acceptance is normally not complete unless and until it is communicated to the offeror. In the words of Lindley LJ: ‘Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that acceptance should be notified’. Thus, if an offer is made by telephone, and in the middle of the reply the line goes dead, so that the offeror does not hear the words of acceptance, there is no contract. Again, if a person shouts to another across a river or courtyard, but the offeror does not hear the reply because it is drowned by an aircraft flying overhead, there is no contract at that
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moment and the offeree must repeat the acceptance in order that it might be effective.

(iii) Communication other than by offeree

The justification for the rule requiring communication is that the offeror is entitled to know whether a binding contract has been concluded by acceptance. In principle, therefore, there would seem to be no reason (other than one of certainty) why a contract should not come into existence if the offeror is made aware or is informed that the offer has been accepted even though the acceptance is not communicated to the offeror by the offeree. However, appears to hold that it is necessary that the acceptance be communicated by the offeree or by his duly authorized agent.

The managers of a school resolved to appoint the claimant as its headmaster. One of the managers, acting in his individual capacity, informed the claimant. The claimant received no other communication and subsequently the resolution was rescinded.

It was held that there was no concluded contract. It was said: ‘the mere fact that the [whole body of] managers did not authorize such a communication, which is the usual course to be adopted, implied that they meant to reserve the power to reconsider the decision at which they had arrived’. In the absence of facts giving rise to such an implication, however, communication by a third party should, it is submitted, suffice.

We now turn to the exceptions to the general rule that acceptance must be communicated before it can take effect.

(iv) Waiver of communication

The general rule that an acceptance of an offer made ought to be notified to the offeror is for the benefit of the offeror, who may expressly or impliedly waive the requirement of notification and agree that an uncommunicated acceptance will suffice. Thus acceptance may in certain circumstances be held to have been made even though it has not yet come to the notice of the offeror. In such a case two things are necessary. There must be an express or implied intimation from the offeror that a particular mode of acceptance will suffice. And there must be some overt act or conduct on the part of the offeree which is evidence of an intention to accept, and which conforms to the mode of acceptance indicated by the offeror.

In Carlill v Carbolic Smoke Ball Co, previously discussed, it will be remembered that the manufacturers of the smoke balls advertised inviting performance of a condition, and it was sufficient for the purposes of binding them that Mrs Carlill had performed the condition without communicating to them the acceptance of the offer. Bowen LJ stated:
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The person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular method of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

The nature and terms of the offer need to be considered carefully to ascertain whether they entitle the offeree to dispense with notice of acceptance. If A tells B by letter that he will receive and pay for certain goods if B will send them to him, such an offer may be accepted by sending the goods.  

(v) Promise for an act

In the case of general offers and other offers which indicate performance as a mode of acceptance so as to create a unilateral contract, as in Carlill v Carbolic Smoke Ball Co, it is performance, not notice of acceptance, that is contemplated. An offer of reward for the supply of information, or for the return of a lost dog, does not contemplate an intimation of acceptance from every person who, on becoming aware of the offer, decides to ascertain the information or to search for the dog. Indeed the offeree may already have the information or have found the dog, and can do no more than send it on to the offeror. The question as to whether it is the commencement of performance, or its completion, that constitutes the acceptance of an offer of a unilateral contract is discussed below in the context of revocation of the offer.

(vi) Acceptance by post

A distinction is drawn between acceptance by instantaneous methods such as telephone and e-mail, and acceptance by non-instantaneous methods such as post. Instantaneous methods, where the acceptor will generally know that his communication has not arrived at once and can try again, are subject to the general requirement that acceptance must be communicated to the offeror. Where, however, it is reasonable for the offeree to notify acceptance by post, the acceptance is completed when the letter is posted. The offeror is bound from that time although the acceptance has not been delivered and may never be delivered.

The postal acceptance rule was laid down in Adams v Lindsell.
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On 2 September 1817, L wrote offering to sell to A a certain quantity of wool, and added ‘receiving your answer in course of post’. If the letter containing this offer had been properly directed, an answer might have been received by the 7th; but it was misdirected and did not reach A until the 5th so that their acceptance, posted the same day, was not received by L until the 9th. On the 8th, however, that is before the acceptance had arrived, L sold the wool to another. A sued for breach of contract.

It was unsuccessfully argued on behalf of L that there was no contract between the parties until the letter of acceptance was actually received. The Court stated:96

If that were so, no contract could ever be completed by post. For if [L] were not bound by their offer when accepted by [A] until the answer was received, then [A] ought not to be bound till they had received the notification that [L] had received their answer and assented to it. And so it might go on ad infinitum.

The logic of this passage is questionable, but it was undoubtedly necessary for the Court to establish some definite rule as to the time of a postal acceptance.

One of the more obvious consequences of the postal acceptance rule is that the offeror must bear the risk of the letter of acceptance being delayed or lost. In Household Fire and Carriage Accident Insurance Co Ltd v Grant:97

The defendant offered to buy shares in the claimant company. The claimant sent a letter of acceptance to the defendant but it was lost in the post and never arrived. The liquidator of the company sued the defendant for the money owing for the shares.

The Court of Appeal held that, as an acceptance by post is valid when sent, there was a contract under which the defendant was bound to pay for the shares.

Where, however, the delay or loss is due to the fault of the offeree, as in the case of an acceptance which is improperly addressed or insufficiently stamped, it would seem that it only takes effect if and when it is received by the offeror, provided that this occurs within the time within which a regular acceptance would have been received.98
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(vii) Place of contracting

Whether the postal acceptance rule applies also determines where a contract is made. If the means of communication is by letter, the contract is complete when the letter is posted,\(^99\) (p. 49) and it is there that the contract is made. In other cases the general rule that the contract is made when and where the acceptance is received applies.\(^100\)

(viii) Rationale of postal rule

Various attempts have been made to justify the postal acceptance rule analytically.\(^101\) One line of reasoning attempts to eliminate any difficulties as to consensus by treating the post office as the agent of the offeror not only for delivering the offer, but for receiving the notification of its acceptance;\(^102\) yet the post office is clearly not an agent to whom acceptance is or could be communicated. Another is based on the fact that posting the acceptance puts it irretrievably out of the offeree’s control. The same can, however, be said of communication by telex which is not completed until receipt\(^103\) so this does not explain why posting exceptionally constitutes an acceptance without notification.

The better explanation would seem to be that the rule is based, not on logic, but on commercial convenience.\(^104\) If hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived is probably as satisfactory as any other would be.\(^105\)

First, it is always open to the offeror to secure protection by requiring actual notification of the acceptance.\(^106\) The nature of the offer or the circumstances in which it was made may indicate that notification is required and Courts may be willing to displace what has been termed an ‘artificial concept of communication’.\(^107\) Secondly, the rule is a pragmatic way of limiting the power to revoke an offer before acceptance,\(^108\) even where the offeror has promised not to.\(^109\) It also prevents the offeree from being able to nullify the acceptance while it is in transit and thus from speculating by watching the market and deciding whether to send an overtaking rejection.\(^110\) Further, in the event of delay or loss of the letter of acceptance, it is the offeror who is more likely to be the first to enquire why no reply has been received to the offer, rather than the offeree to enquire whether the acceptance has been received.

The rule has, however, been criticized.\(^111\) The number of different modes of communication now available\(^112\) has been said to give rise to an increasing number of problems of demarcation and it is argued that the law would be much more coherent if there were only one rule for all means of communication. It has also been said that the law should not, as the postal acceptance rule does, favour the offeree because, while the offeror is in ignorance as to the actions of the offeree, the offeree has full knowledge of what the position is. The offeree knows that the acceptance has been posted and knows or ought to know that mail is not infrequently delayed.\(^113\) Nevertheless, the ability of the offeror to control the method
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of acceptance, the offeror’s ability to revoke even a ‘firm’ offer before acceptance,\(^{114}\) and the desirability of preventing speculation by the offeree are, it is suggested, good reasons for the rule. It is significant that the Scottish Law Commission’s proposal to abolish it was made together with a proposal to prohibit the offeror from revoking a ‘firm’ offer.\(^{115}\)

The rule may in any event not be as anomalous as it appears when compared only with the rules governing instantaneous modes of communication. In a previous edition of this work, it was argued that the principles governing postal acceptance were merely examples of a wider principle that where the offeror either expressly or impliedly indicates the mode of acceptance and this, as a means of communication, proves to be nugatory or insufficient, he does so at his own risk.\(^{116}\) Suppose that A sends an offer to B by messenger across a lake with a request that B, if she accepts, will at a certain hour communicate her acceptance by firing a gun or lighting a fire. Why, it was asked, should B suffer if a storm renders the gun inaudible or a fog obscures the light of the fire? Although, as we have seen,\(^{117}\) this ‘risk’ approach does not apply where instantaneous communication is concerned, it is suggested that it has validity in cases where there is bound to be a substantial interval between the time when the acceptance is sent and the time when it is received.\(^{118}\)

(ix) Acceptance by silence

In principle, it is difficult to see how the silence or inaction of an offeree who fails to reply to an offer can operate as an acceptance, for there will have been no communication \(^{(p. 51)}\) of the acceptance to the offeror. Even if the offeror has waived\(^{119}\) communication by indicating that acceptance by silence will suffice, it is clear that the offeror cannot confront the offeree with the alternative of either refusing the offer or being subjected to a contractual obligation by reason of the failure to reply. Although a form or time of acceptance may be prescribed, an offeror cannot prescribe the form or time of refusal so as to impose a contract on the other party if the other party does not refuse in some particular way or within some particular time.\(^{120}\) In *Felthouse v Bindley*, for example:\(^{121}\)

F offered by letter to buy his nephew’s horse for £30 15s, adding, ‘If I hear no more about him I shall consider the horse mine at £30 15s’. No answer was returned to this letter, but the nephew told B, an auctioneer, to keep the horse out of a sale of his farm stock, as he intended to reserve it for his uncle F. B sold the horse by mistake, and F sued him for conversion of his property.

The Court held that as the nephew had never signified to F his acceptance of the offer before the auction sale took place, there was no bargain to pass the property in the horse to F, and therefore he had no right to complain of the sale. Willes J said:\(^{122}\) ‘It is clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s
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unless he chose to comply with the condition of writing to repudiate the offer’.

In more modern times this same principle may be illustrated by the practice of sending out unsolicited goods. A publisher may, for example, without previous order, send a book to a prospective customer with a letter saying, in effect, ‘If you do not return the book by a certain day, I shall presume that you have bought it’. It is clear that he cannot by these means impose a contract on the unwilling recipient. But persons with no knowledge of the law may well be misled into thinking that they are bound to pay for the book, and the subsequent letters which they receive may frequently be designed to foster this misapprehension. As a result, in 1971, the legislature enacted the Unsolicited Goods and Services Act whereby the recipients of unsolicited goods may, in certain circumstances, treat them as if they were an unconditional gift to themselves, and suppliers may be guilty of a criminal offence if they demand or threaten legal proceedings for payment. 123

On the other hand, circumstances can arise where acceptance could more legitimately be presumed from silence. Previous dealings between the parties may have been conducted on the basis, for example, that orders for goods have been fulfilled by the seller without any notification of acceptance other than the despatch of the goods, and the offeror has thereby been led to believe that the practice will continue. 124 It is even arguable by analogy with the cases we have noted on waiver by the offeror of the need (p. 52) for communication of acceptance, that, if the offeror stipulates that acceptance may be constituted by silence or inaction, an unequivocal manifestation of an intention to accept on the part of the offeree (or, possibly, detrimental reliance on the offer by the offeree), 125 should bind the offeror. This, however, would run counter to the decision in Felthouse v Bindley, where, it will be noted, the nephew made known his intention to accept his uncle’s offer. No doubt, in many cases, silence is ambiguous 126 and therefore cannot constitute an acceptance. But if, as in Felthouse v Bindley itself, the necessary intention to accept could be proved, there seems to be no convincing reason why a contract should not come into existence, particularly where the offeree has relied on the terms of the offer and it is the offeror who now denies that there is a contract. More recent dicta support this. Thus, it has been stated: 127

[W]here the offeree himself indicates that an offer is to be taken as accepted if he does not indicate to the contrary by an ascertainable time, he is undertaking to speak if he does not want an agreement to be concluded. I see no reason in principle why that should not be an exceptional circumstance such that the offer can be accepted by silence.
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(c) Acceptor Must Have Knowledge of Offer

If A offers a promise for an act and B does the act in ignorance of the offer, can B claim performance of the offer on becoming aware of its existence? As illustrated by the case of cross-offers,\(^{128}\) the answer appears to be that, if B has not heard of the offer before doing the act, it cannot be accepted.\(^{129}\) In *Gibbons v Proctor*,\(^{130}\) however, a Divisional Court held that a police officer was entitled to claim a reward, offered by handbills, for information given to a superintendent of police, although it seems the officer did not know of the handbills before giving the information. The decision, as reported, is an unsatisfactory one, for the facts of the case are by no means clear. Accordingly, it cannot be considered as of compelling authority, and a New York case, *Fitch v Snedaker*,\(^{131}\) is sometimes cited to the contrary. It was there laid down that a reward cannot be claimed by one who did not know that it had been offered. The latter decision seems correct in principle. A person who does an act for which a reward has been offered in ignorance of the offer cannot say either that there was a consensus of wills with the offeror, or that the act was done in return for or in reliance on the promise offered. If, however, the acceptor knows of the offer, but is inspired to performance by a motive other than that\(^{(p. 53)}\) of claiming the reward, such a motive is immaterial. So in *Williams v Carwardine*\(^{132}\) where the claimant, with knowledge of the reward, supplied information leading to the conviction of an assailant for murder, but only did this ‘to ease her conscience, and in hopes of forgiveness hereafter’, she was held entitled to claim the £20 offered. Her acceptance could be referred to the offer.

(d) Prescribed Mode of Acceptance

If the terms or the circumstances of the offer do no more than suggest a mode of acceptance, it seems that the offeree would not be bound to this mode so long as the mode used was one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or suggested method of communication would probably throw upon the offeree the risk that the acceptance would be delayed, but, subject to this, an offer delivered by hand could be accepted by post, or an offer made by post could be accepted by telex. Is, however, an offeror who expressly prescribes the method of communication free to treat any departure from this method as a nullity? In the American case, *Eliason v Henshaw*:\(^{133}\)

E offered to buy flour from H, requesting that an answer should be sent to him at Harper’s Ferry by the wagon which brought the offer. H sent a letter of acceptance by mail to Georgetown, thinking that this would reach E more speedily. He was wrong, and the letter arrived after the time that the reply might have been expected.

The Supreme Court of the United States held that E was entitled to refuse to purchase.\(^{134}\)
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It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it.

The same rule applies in English law: an offeror, who by the terms of the offer insists upon its acceptance in a particular manner, is entitled to say that he is not bound unless acceptance is effected or communicated in that precise way. Nevertheless, if the stipulation as to the mode of acceptance is inserted at the instance of and for the protection or benefit of the offeror, the offeror may by conduct or otherwise waive strict compliance with it, provided that the offeree is not adversely affected. Moreover, unless as a matter of construction that prescribed mode of acceptance is mandatory, another mode of acceptance which is no less advantageous to the offeror will suffice.
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(e) Revocation of the Acceptance

Since the general rule is that acceptance is not complete until it has been communicated to the offeror, it follows that an acceptance can be revoked at any time before this occurs, provided, of course, that the revocation itself is communicated before the acceptance arrives. But what is the position in relation to postal acceptances? Since the acceptance is complete as soon as the letter of acceptance is posted, a telephone call revoking the acceptance would be inoperative, though it reached the offeror before the letter. This, it is argued, is both the logical and fair conclusion; otherwise the offeree could blow both hot and cold, having the benefit of certainty in the postal acceptance, and the opportunity to revoke it if the offer turned out suddenly to be disadvantageous. On the other hand, it is contended that such a revocation can in no way prejudice the offeror, who could not know of the acceptance until it arrived, by which time he would already be aware of the revocation. There is no direct English authority on this point but it is probably the better view that the offeree cannot so revoke. If, for example, shares are offered on a fluctuating market, it would seem unfair if the offeree could bind the offeror by a postal acceptance when the shares advanced in price, but send off a revocation if the market fell. There is no reason why an offeree who chooses to accept by post should have an opportunity of changing his mind which would not have been available if the contract had been made face-to-face.

This solution should not, however, be operated to the detriment of the offeror. If the offeror acts on the purported revocation, for example by selling the shares which are the subject-matter of the offer, the offeree would not be permitted once again to change his mind which would not have been available if the contract had been made face-to-face.

4. Termination of the Offer

Once the acceptance has been communicated to the offeror, it cannot be recalled or undone. But until an offer is accepted, it creates no legal rights, and it may be terminated at any time. Termination of the offer may come about in a number of ways: it may be revoked before acceptance, or the offeree may reject the offer. Also, an offer may lapse by the passage of time or be determined by the death of the offeror or offeree.

(a) Revocation of the Offer

The law relating to the revocation of an offer may be summed up in two rules: (1) an offer may be revoked at any time before acceptance; and (2) an offer is made irrevocable by acceptance.

(i) Revocable before acceptance

The first of these rules may be illustrated by the case of Offord v Davies.
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D made a written offer to O that, if he would discount bills for another firm, D would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months. Some bills were discounted by O, and duly paid, but before the twelve months had expired D, the guarantor, revoked his offer and notified O that he would guarantee no more bills. O continued to discount bills, some of which were not paid, and then sued D on the guarantee.

It was held that the revocation was a good defence to the action. The alleged guarantee was an offer, for a period of 12 months, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, pro tanto, but the entire offer could at any time be revoked except as regards discounts made before notice of revocation.

(ii) Irrevocable after acceptance

The rule that an offer is made irrevocable by acceptance is illustrated by Great Northern Railway Co v Witham, which, like that in Offord v Davies, involved a continuing relationship:

The GNR company advertised for tenders for the supply of such iron articles as it might require between 1 November 1871, and 31 October 1872. W sent in a tender to supply the articles required on certain terms and in such quantities as the company ‘might order from time to time’, and his tender was accepted by the company. Orders were given and executed for some time on the terms of the tender but finally W was given an order which he refused to execute. The company sued him for breach of contract in that he had failed to perform this order.

It is important to note the exact relationship of the parties. The company by advertisement invited all dealers in iron to make tenders, that is, to state the terms of the offers which they were prepared to make. W’s tender stated the terms of an offer which might be accepted at any time, or any number of times, in the ensuing 12 months. The acceptance of the tender did not in itself make a contract; it was merely an intimation by the company that it regarded W’s tender as a standing offer, which on its part it would be willing to accept as and when it required the articles to be supplied. Each fresh order constituted an acceptance of this standing offer. If W wished to revoke his offer he could have done so, but only as to the future; in the meantime he was bound to perform any order already made. The Court therefore held that he was liable for breach of contract.
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(iii) Unilateral contracts

Some difficulty is experienced in the case of ‘unilateral’ contracts, where an act is done in return for a promise.\(^\text{142}\) If one person promises a certain sum to another on performance by that other of a stipulated act, at what point in time is the acceptance \((p. 56)\) of the offer complete? The traditional answer to this question is that the acceptance is complete only when the act has been completely performed. It therefore follows that up to this time the offeror is at liberty to revoke the offer. If, for example, a firm of breakfast food manufacturers were to offer to pay £100 to any person who consumed one hundredweight of their breakfast food within the next three months, they would be able to revoke their offer after two months had elapsed—to the detriment of those who had almost completed their part of the bargain, and with profit to themselves. Or to use a judicial example,\(^\text{143}\) if one man offers another £100 if he will go to York, he can revoke when the other is half-way there.

In order to avoid such an inequitable result,\(^\text{144}\) Sir Frederick Pollock argued that a distinction should be drawn between the acceptance of the offer and the performance of the stipulated act: the acceptance is complete once the offeree has unequivocally commenced performance (so that the offeror cannot effectively revoke the offer after this time), but the offeror is not bound to pay the £100 until the act has been completely performed.\(^\text{145}\) This view has some judicial support. In \textit{Errington v Errington},\(^\text{146}\) where a father promised his son and daughter-in-law that a house in which they were living should belong to them as soon as they had paid off the instalments of a mortgage on the premises, and they commenced to pay them to his knowledge, Denning LJ considered that this promise could not be revoked:\(^\text{147}\)

\begin{quote}
The father’s promise was a unilateral contractual 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.
\end{quote}

On this view, the offeror is unable to revoke his offer; but his duty to perform his obligation is conditional upon performance of the stipulated act by the offeree.

Denning LJ’s statement was approved by the Court of Appeal in \textit{Soulsbury v Soulsbury}.\(^\text{148}\)

\begin{quote}
The deceased former husband of the claimant promised her that she would receive £100,000 on his death if she did not enforce an order for periodical payments in her favour against \((p. 57)\) him or seek any other order for ancillary relief against him. The question
was whether that constituted a binding contract that could be enforced by the claimant against the estate of the deceased.

It was held that there was a binding contract. Although the discussion in the case focused on dismissing policy objections to enforcing this contract (e.g., that it ousted the jurisdiction of the courts), Longmore LJ, with whom Smith LJ agreed, pointed out that the facts involved a unilateral contract. Citing Denning LJ in *Errington v Errington*, Longmore LJ said that there could be no revocation once the claimant had refrained from suing for maintenance and that this was a stronger case than *Errington* because here the claimant, on the deceased’s death, had completed all possible performance of the act required for enforcement of the deceased’s promise.

To overcome the objection that the consideration for the promise (i.e., what the offeror has bargained for) is the completion rather than the starting of the performance, one might argue that there is a subsidiary unilateral contract under which the offeror promises not to revoke the offer of the main unilateral contract once the offeree has started to perform.

It may well be, of course, that the nature of the offer itself, or the circumstances under which it was made, indicate that it was never intended to be irrevocable by the offeror. But otherwise it is submitted that English law will not deny the offeree a remedy if the offer is revoked after the performance requested has been commenced.

(iv) ‘Firm’ offers

It will be noted that in *Offord v Davies*, discussed above, the mere fact that the defendants promised to guarantee payment for 12 months did not preclude them from revoking before that period had elapsed. It is a rule of English law that a promise to keep an offer open needs consideration to make it binding. The offeree in such a case is said to ‘purchase an option’; that is, the offeror, in consideration usually of a money payment, sometimes nominal, makes a separate contract not to revoke the offer during a stated period. The position is similar where the offeree expressly or impliedly promises to do or refrain from doing something in exchange for the offeror’s promise not to revoke the offer. For example, the offeree may promise not to negotiate with anyone else for a fixed period. Again, a builder tendering for a construction contract may have invited quotations for a fixed period (i.e., firm offers) from electricity or carpentry subcontractors and expressly or impliedly promised to use the figures contained in those offers in its tender. In these cases the offeror by its promise precludes itself from exercising its right to revoke the offer; but where it receives no consideration for keeping the offer open, it says in effect, ‘You may accept within such and such a time, but this limitation is entirely for my benefit, and I make no binding promise not to revoke my offer in the meantime’. The Law Revision Committee recommended reform of the law on firm offers so that ‘an agreement to keep an offer open for a definite period of time
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or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration.\footnote{This has not been implemented.}

A firm offer may, moreover, also become irrevocable where the transaction can be characterized as a unilateral contract and the offeree has relied on the offer by embarking on performance of the specified act.\footnote{We shall see that in its present state of development English law does not recognize a general principle based on the protection of reliance. Unless a unilateral contract can be found or the action in reliance has been requested by the offeror and amounts to consideration, an offeree who relies on a firm offer will not be protected by the law of contract. Similarly there is unlikely to be a remedy in tort for revoking an offer that has been relied on\footnote{but, where the offeree's action in reliance consists in the rendering of services or the delivery of goods, unless the offeree can be said to have taken the risk that the offer might be withdrawn, as may well be the case in the context of tendering, the offeror may be obliged by the law of unjust enrichment to pay a reasonable sum in respect of the services or goods.}}

\(v\) Revocation must be communicated

Revocation, if it is to be operative, must be communicated. In the case of acceptance we have seen that, in certain circumstances, it is not necessary that the acceptance should have actually come to the notice of the offeror; the posting of a letter, the doing of an act, may constitute an acceptance and make a contract. A revocation of an offer cannot, however, be communicated in the same way, by the posting of a letter of revocation, or by the sale to A of an article offered to B to purchase but must be brought to the notice of the offeree. The law on this subject was settled by \textit{Byrne & Co v Leon Van Tienhoven & Co.}\footnote{VT, writing from Cardiff on 1 October, made an offer to B in New York asking for a reply by cable. B received the letter on the 11th, and at once accepted in the manner requested. In the meantime, however, VT had, on 8 October, posted a letter revoking the offer. This letter did not reach B until the 20th. Lindley J held, first, that a revocation was inoperative until communicated, and secondly, that the revocation of an offer was not communicated by the mere posting of a letter; therefore B's acceptance on 11 October could not be affected by the fact that VT's letter of revocation was already on its way. He pointed out the inconvenience which would result from any other conclusion.}

If [VT's] contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing
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the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience require that 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 that the offer and acceptance constitute a contract binding on both parties.

It has been stated that a revocation must be ‘brought to the mind’ of the offeree but it is submitted that where it arrives at its address it will be effective when it would, in the ordinary course of business, have come to the offeree’s attention. Where the offeree refrains from opening a letter or neglects to pay attention to the telex or fax machine it should, therefore, be effective on arrival. The requirement that a revocation be communicated means that, in law, an offeror may be bound by an agreement which it does not believe itself to have made; but, again, if one of the two parties must suffer, there would seem no good reason why it should be the offeree rather than the offeror.

The case of Dickinson v Dodds establishes that an offeree who knows that an offer has been withdrawn cannot accept it even if the communication has not come from the offeror:

On 10 June 1874, Dodds made a written offer to Dickinson to sell certain premises for £800, and stating that this offer would remain open until 9 a.m. on 12 June. On the 11th, however, he sold the property to a third person without notice to Dickinson. Dickinson had in fact been informed of the sale, though not by anyone acting under the authority of Dodds. Nevertheless before 9 a.m. on the 12th he purported to accept Dodds’ offer. He then brought an action for specific performance of the contract.

The Court of Appeal held that there was no contract. James LJ, after stating that a promise to keep the offer open could not be binding, and that at any moment before a completed acceptance of the offer one party was as free as the other, went on to say:

In this case, beyond all question, 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’.

Is it then the case that information of the offeror’s intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? The inconvenience might be grave. Suppose a company receives an offer of a consignment of goods from a distant correspondent, with liberty to reserve an answer for some days. In the meantime an unauthorized person tells the offeree-company that the offeror has sold or
promised the goods to another. What is the offeree to do? The informant may be right, and then, if the offeree accepts, the acceptance may be worthless. Or the informant may be a gossip or mischief-maker and if, because of what the offeree has been told, it refrains from accepting it may lose a bargain. The answer might be that it is open to an offeror, who has revoked an offer without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer had been withdrawn. The Court would have to decide every such case on the facts presented, but the onus would be upon the offeror to establish that the information ought reasonably to have been believed.

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(b) Rejection of the Offer

An offer will be held to have terminated once it has been rejected by the offeree. The rejection need not be express, provided that the offeror is justified in inferring that the offeree does not intend to accept the offer. It would seem, therefore, that a rejection would not operate so as to destroy the power of acceptance until it comes to the notice of the offeror:

Suppose that A makes an offer to B by letter. Immediately on receiving the letter B writes a letter rejecting the offer. Before the rejection arrives, B changes her mind and telephones her acceptance.

There would be a contract between A and B. It should not be supposed, however, that an uncommunicated rejection would always be without effect. It would, in certain circumstances, preclude the operation of the rule that a letter of acceptance is complete when posted:

Suppose that C Ltd makes an offer to D. Immediately on receiving the offer D writes a letter rejecting the offer. Before the rejection arrives, D changes his mind and posts a letter accepting the offer.

Although there is no English authority on this point, it would not seem possible for D to claim that the normal rule as to postal acceptance applied. The letter of acceptance would only create an obligation if received by the offeror before the rejection.

(c) Lapse of the Offer

An offer may be considered to have lapsed owing to the passing of time.

(i) Offer for a fixed time

The parties may expressly fix a time within which an offer is to remain open. Where the offeror prescribes a specific time limit for acceptance, the offer is conditional upon acceptance within that time. For example, ‘This offer to be left open until Friday, 9 a.m. 12 June’, allows the offeree...
2. The Agreement

to accept the offer, if unrevoked, at any time up to the hour named, after which the offer would lapse. Similarly, an offer to supply goods of a certain sort at a certain price for a year from the present date, or an offer to guarantee the payment of any bills of exchange discounted for a third party for a year from the present date, are offers which may be revoked at any time, except as regards orders already given or bills already discounted, and which will, in any event, lapse at the end of a year from the date of offer.

(ii) No fixed time

In most cases, the offeror will not specify any particular time and it is left to the Court, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. We have already seen that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror. If the circumstances of the offer suggest that a reply is required urgently, the offer will be considered to have lapsed if the offeree does not quickly decide whether to accept, or chooses a means of communication which will delay the notification of the acceptance. In other cases, the effluxion of a reasonable time will terminate the offer. An instance of this is provided by *Ramsgate Victoria Hotel Co v Montefiore*: The defendant, M, offered by letter dated 8 June to purchase shares in the claimant company. No answer was received by him until 23 November, when he was informed that shares were allotted to him. He refused to accept them.

It was held that M’s offer had lapsed by reason of the delay of the company in notifying its acceptance, and that he was not bound to accept the shares.

(iii) Express or implied condition

The terms of the offer may expressly indicate that its continuance is conditional upon the existence of circumstances other than time; and a condition of this nature may also be implied. For example, where the contract requires for its performance the existence of a particular thing, and before acceptance the thing is destroyed or substantially damaged, the offer is terminated unless the offeror has assumed the risk of such mischance. Thus, in *Financings Ltd v Stimson*: S signed an ‘agreement’ whereby he undertook to buy a car on hire-purchase terms from F company. The agreement contained a clause which stated that it was to become binding only upon acceptance by signature on F’s behalf. Before F signed, the car was stolen by thieves. It was subsequently recovered in a damaged condition.
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It was clear that the ‘agreement’ was in fact only an offer by S since it contemplated acceptance by F. The Court of Appeal held that S’s offer was only capable of acceptance if the car remained in substantially the same condition as it was when the offer was made. Since this was not the case, the offer had lapsed and there was no binding contract.

(d) Effect of Death

In principle, an offeree cannot accept after being informed of the death of the offeror.\textsuperscript{180} An acceptance communicated to the offeror’s personal representatives will not bind them, unless the offer is one which could not have been revoked by the offeror during his lifetime.\textsuperscript{181} Where the offeree accepts in ignorance of the offeror’s death the position is less clear. One view is that the offer is terminated automatically and that knowledge is irrelevant.\textsuperscript{182} The alternative, and it is submitted better, view\textsuperscript{183} is that an offeree who does not know of the offeror’s death should be entitled to accept the offer, unless the offer on its true construction indicates the contrary,\textsuperscript{184} for example where the offer is personal to the offeror.

It would seem that an offer is determined by the death of the offeree;\textsuperscript{185} his personal representatives could not accept the offer on behalf of the offeree’s estate.

5. Uncertain and Incomplete Agreements

Although the parties may have reached agreement in the sense that the requirements of offer and acceptance have been complied with, there may be no contract because the terms of the agreement are uncertain or because the agreement is qualified by reference to the need for a future agreement between them. For ‘unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it’.\textsuperscript{186}

The terms of a contract must provide a basis for determining the existence of a breach and for giving an appropriate remedy.\textsuperscript{187} Nevertheless, as we shall see, although there are differences of approach in the cases, the law is generally anxious to uphold the contract wherever possible lest it should be criticized as the destroyer of bargains.\textsuperscript{188} In addition, where uncertainty or incompleteness prevent an agreement from constituting a contract the factual situation may give rise to liability in tort, for instance for misrepresentation,\textsuperscript{189} or in the law of unjust enrichment in respect of benefits received.\textsuperscript{190}

(a) Certainty of Terms

The law requires the parties to make their own contract; it will not construct a contract for them out of terms which are indefinite or
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unsettled. A vague or uncertain promise does not accordingly give rise to an enforceable contract. Thus:

C agreed to sell land to D. The agreement provided that the price was to be paid by instalments and that on each payment ‘a proportionate part’ of the land was to be conveyed. It was held that, since the part to be conveyed on each occasion could not be identified, the agreement as a whole was uncertain and unenforceable.191

Similarly when a van was to be bought on the understanding that part of the price should be paid on ‘hire-purchase’ terms,192 and when woollen goods were to be bought ‘subject to war clause’,193 there was no contract in either case, for ‘hire-purchase’ terms, and ‘war clauses’ may take many forms, and it is for the parties, and not for the Court, to define them.

On the other hand, in many transactions, particularly those for future performance over a period, the parties may neither be able nor desire to specify all matters. A transaction which at first sight seems to leave some essential term of the bargain undetermined may, by implication, if not expressly, provide some method of determination other than a future agreement between the parties. In that event, since it is a maxim of the law that (p. 64) that is certain which can be made certain, there will be a good contract.194 In every case the function of the Court is to put a fair construction on what the parties have said and done, though the task is often a difficult one. As Lord Wright stated:195

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*.196

The line between discovering the agreement of the parties and imposing an agreement on the basis of what the Court considers the parties ought to have intended can be fine. The Court must be satisfied that the parties have in fact concluded a contract, and not merely expressed willingness to contract in the future. It may have regard to what has been said and done, the context in which it was said or done, the relative importance of the unsettled matter, and whether the parties have provided machinery for settling it.
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If the contract contains an indefinite, but subsidiary provision, the Courts have felt at liberty to strike it out as being without significance, and to give effect to the rest of the contract without the meaningless term.\(^\text{197}\)

(i) Previous transactions; trade custom

In *Hillas & Co v Arcos Ltd*\(^\text{198}\) the terms were ascertained from previous transactions between the same parties and the custom of the particular trade:

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<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>1930</td>
<td>H agreed to buy from A a quantity of Russian softwood timber ‘of fair specification’. The contract contained a clause giving to H an option to purchase further timber in 1931, but the option gave no particulars as to the kind or size or quality of the timber, nor of the manner of shipment. When H sought to exercise the option, A pleaded that the clause was too indeterminate and uncertain to indicate an unequivocal intention to be bound, and that it was merely an agreement to negotiate a future agreement.</td>
</tr>
</tbody>
</table>

The House of Lords held that, in the light of the previous dealings between the parties, there was a sufficient intention to be bound: the terms left uncertain in the option could be ascertained by reference to those contained in the original contract and from the normal practice of the timber trade.\(^\text{199}\)

(ii) The standard of reasonableness

Alternatively, where the intention to buy and to sell is clear, incidents of the transaction may be determined by the standard of reasonableness, or by rules of law. Thus, in *Hillas v Arcos* the phrase ‘of fair specification’ was held to mean timber distributed over kinds, qualities, and sizes in fair proportions having regard to the season’s output, a matter which, if the parties failed to agree, could be ascertained by the Court determining what was reasonable.\(^\text{200}\) Similar principles apply to standards provided in the agreement such as ‘market value’\(^\text{201}\) ‘open market value’,\(^\text{202}\) and that hire shall be ‘equitably decreased’.\(^\text{203}\) In the case of price, in transactions for the sale of goods or the supply of services the matter is now governed by statute. By section 8 of the Sale of Goods Act 1979:\(^\text{204}\)

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
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<tbody>
<tr>
<td>8</td>
<td>The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.</td>
</tr>
<tr>
<td>8</td>
<td>Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.</td>
</tr>
</tbody>
</table>
2. The Agreement

In such cases, the Court will allow an action to recover a reasonable sum for what the goods or services are worth. 205

It has been held that section 8(2) provides for silence as to the price, and will not apply where an agreement states that the parties will subsequently agree the price to be paid. 206

(iii) Executed transactions

The Court will also have regard to what has been done by the parties. Where a transaction has been wholly or partially performed it will be:

- difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. 207

(p. 66) In the case of executed transactions, the basis of liability is not, however, always contractual. In some cases the objective test of intention 208 may mean that a contract comes into existence as a result of the performance and liability can be characterized as consensual. 209 In others, however, as noted in the context of ‘the battle of the forms’, 210 no contractual analysis is possible and, where it is held that there is liability, it is imposed by the Court in the form of an obligation in the law of unjust enrichment to pay a reasonable sum for the work done or the goods received. 211 In determining whether to give a restitutionary remedy, considerations of ‘risk’ and ‘fault’ in relation to the reason the transaction fails to come to fruition as a contract are taken into account so that a person who is held to have taken the risk of the transaction failing or to have been responsible for this will not be entitled to recompense for the services rendered. 212

(iv) Machinery for ascertainment

A contract will not fail for uncertainty even though a material term is to be agreed in future if the contract itself provides machinery for ascertaining it. So, for example, if the contract provides that the parties are to agree a price or quantities for delivery, but also contains an arbitration clause which covers a failure to agree the price or the quantities, the Courts will imply that, in default of agreement, a reasonable price is to be paid, such price to be determined by arbitration. 213 Moreover, in the case of a lease, if premises are let to a tenant for (say) a term of 10 years at a fixed rent for the first five years, but at a rent ‘to be agreed’ thereafter, the Court will itself determine by inquiry what is a reasonable rent for the premises should the parties fail to agree. 214 Unless the machinery is held to be an essential part of the agreement, 215 the Court will similarly intervene if, for any reason, its
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operation is stultified, for example, by the refusal of one of the parties to
appoint a valuer or an arbitrator.216

(v) Agreements to negotiate and not to negotiate

The position of agreements to negotiate and agreements not to negotiate
was considered by the House of Lords in Walford v Miles:217

On 17 March M agreed that, provided that W’s bank confirmed that
W had the necessary financial resources to purchase M’s
photographic processing business for £2 million, they would ‘break
off any negotiations with any third party and would not consider
any other alternative and would not accept a better offer but would
deal exclusively with W, with a view to concluding the deal as soon
as possible after April 6’. M continued to keep in touch with
another interested party and on 27 March withdrew from the
negotiations with W. M later sold the business to the third party. W
sued for breach of contract and for misrepresentation.

It was found that M had represented that they were not in negotiation
with the other interested party and W were awarded tortious damages for
misrepresentation.218 The contractual claims, however, failed.

It was held that an agreement to negotiate (a ‘lock-in’ agreement) is like
an agreement to agree and is unenforceable ‘simply because it lacks the
necessary certainty’.219 Two reasons have been given in the cases for this
conclusion. First, in Walford v Miles, Lord Ackner asked how the Court is
to police such an agreement and questioned whether it is possible to tell
whether it has been breached:220 ‘How can a court be expected to decide
whether, subjectively, a proper reason existed for the termination of
negotiations?’. The position of parties in negotiations was stated to be
adversarial and to entitle them to pursue their own interests so long as
they avoided making misrepresentations and, if they so wished, to
withdraw from the negotiations at any time and for any reason. It was
said not to be possible to cure this uncertainty by asking whether the
negotiations have been conducted ‘in good faith’ because a duty to
negotiate in good faith ‘is as unworkable in practice as it is inherently
inconsistent with the position of a negotiating party’. Secondly, it has
been said that ‘no court could estimate the damages because no one can
tell whether the negotiations would be successful or would fall through:
or if successful, what the result would be’.221

There are, however, difficulties with those reasons and with this
aspect of the decision in Walford v Miles.222 First, it is unlikely to give
effect to the reasonable expectations of business people which it is an
important object of the law of contract to facilitate.223 It appears to
require a higher degree of certainty and less willingness to use the
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standard of reasonableness to resolve ambiguity than some of the cases considered above. Secondly, it is not the case that it is a fundamental attribute of a negotiation that the parties should have absolute freedom to walk away from it for any reason or no reason at all. Thirdly, the objection that it would not be possible to assess damages is also open to question. As will be seen, in other contexts in which the transaction contains a large amount of chance, it has been possible to assess damages and the Court has not held that there is no contract.224 It is unfortunate that Lord Wright’s dictum in *Hillas v Arcos*,225 which recognized a contract to negotiate, has now been rejected by the House of Lords.

An agreement not to negotiate with any third party, a ‘lock-out’ agreement, has been held not to be enforceable where, as in *Walford v Miles*, it does not specify a time limit for its duration apparently on the ground that it would impose indirectly a duty to negotiate in good faith which, for the reasons given above, could not be a contract.226 But it was accepted in *Walford v Miles* that such an agreement is sufficiently certain if it is limited to a fixed period.227 The distinction between these two types of ‘lock-out’ agreement is difficult to justify. It is submitted that neither indirectly imposes a duty to negotiate in good faith, since the obligation is a negative one and that it should have been possible to resolve the uncertainty of there being no fixed period by applying the standard of a reasonable period.228

(p. 69) (b) Incomplete Agreement

The parties may agree on certain points, but nevertheless leave other points unresolved. The question then arises whether or not their agreement is complete. Difficulties of interpretation most frequently arise where there have been lengthy negotiations in correspondence. The parties discuss terms, approach, and recede from an agreement; proposals are made and met by the suggestion of fresh terms. Finally there is a difference, and one party asserts that a contract has been made, and the other that matters have never gone beyond the discussion of terms. Where such a correspondence appears to result, at any moment of its course, in an agreement, it is necessary to ask whether this agreement amounts to a completed agreement, or whether there are other terms of the intended contract, beyond and besides those expressed in the agreement, which are still in a state of negotiation only, and without the settlement of which the parties have no idea of concluding any contract.229 Where, however, the correspondence shows that the parties have definitely come to terms, even though certain material points may still be left open, a subsequent revival of negotiations cannot, except with the consent of both parties, affect the contract so made.230

(i) Effect of reference to further agreement

The classic statement of the issues involved in cases where the agreement is couched in general terms, but reference is made to a contract in which the intentions of the parties may be more precisely
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stated, is to be found in the judgment of Parker J in Von Hatzfeldt-Wildenburg v Alexander:\(^{231}\)

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

(ii) Letters of intent

Difficulties frequently arise where parties in negotiations reach ‘points of agreement’ or have a ‘memorandum of understanding’ or exchange ‘letters of intent’ or ‘letters of comfort’, but nevertheless contemplate that a formal document is later to be drawn up.\(^{232}\) In such situations the question whether or not a binding contract has been concluded is a matter of interpretation for the Court. While such a letter can have contractual effect where it contains an express promise as to future conduct,\(^{233}\) the Court may be unwilling to imply such a promise from a statement of present fact because the language is often vague or equivocal or because the surrounding circumstances, including previous negotiations, indicate that all that is assumed is a moral responsibility.\(^{234}\)

The position may be even further complicated by the fact that the parties often act on their informal agreement pending the execution of a formal contract. Where a formal contract is eventually concluded, the Court may be prepared to imply a term that, although the informal agreement is not legally binding, the formal contract is to have retrospective effect. It will, in consequence, apply to work done and services rendered before it was made.\(^{235}\) Where no formal contract is concluded, work done or goods delivered under a letter of intent which is not legally binding may give rise to an obligation in the law of unjust enrichment to pay a reasonable sum for the work or the goods.\(^{236}\)

(iii) Agreement ‘subject to contract’

The initial agreement for the sale or lease of land is usually entered into ‘subject to contract’ or ‘subject to formal contract’. Such an agreement gives rise to no contractual liability.\(^{237}\) Thus in Winn v Bull.\(^{238}\)
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A written agreement was drawn up whereby the defendant agreed to take a lease of a house for a definite period and at a fixed rent, but ‘subject to the preparation and approval of a formal contract’.

It was held there was no contract. Jessel MR explained:

> It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.

The insertion of the words ‘subject to contract’ renders the agreement nugatory in fact, and this is so notwithstanding that a deposit may have been paid. As a normal rule, a binding contract for the sale of land will come into existence only when a formal ‘exchange of contracts’ contained in writing signed by or on behalf of each party has taken place. Up to this time either party is free to renegotiate the price, or even to withdraw entirely from the transaction and to do so because of movements in the value of property. The express use of the words ‘subject to contract’ has also been held to preclude a claim in the law of unjust enrichment for expenses incurred in respect of the intended contract; the use of those words was said to mean that the parties had in effect expressly agreed that there should be no legal obligation by either party to the other unless and until a formal contract had been entered into.

But in other cases, restitutionary remedies for the return of money paid or for the value of work done under anticipated contracts concerning land have been granted.

On the other hand, an agreement for the sale or lease of land will be binding if the terms of the further formal contract are in existence and known to the parties, and not merely in contemplation. For example:

An offer was made to buy land, and ‘if offer accepted, to pay deposit and sign contract on the auction particulars’; this was accepted, ‘subject to contract as agreed’. The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.

Further, it has been held that if the parties use the phrase ‘a provisional agreement’, they then agree to be bound from the beginning, even though they stipulate that a formal document is to be drawn up later on.

(iv) Contracts subject to condition

There are situations which at first sight appear to be cases of incomplete agreement, but really turn out to be cases where there is an immediate binding contract, although some of the parties’ rights and obligations may...
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be dependent upon the happening of a particular event. For example, the agreement may contain such a term as ‘subject to the purchaser’s solicitors approving the title’. Until this approval is given, the contract need not be implemented, although neither party is free to withdraw from it unilaterally. Alternatively, the contract may be fully operative at once, but upon the happening of a particular event it is thereby discharged. The insertion of such conditions produces a quite different effect from a reservation like ‘subject to contract’ which prevents the formation of any contract at all. They are dealt with in Chapter 5, The Terms of the Contract.

6. Intention To Create Legal Relations

Although a separate requirement of intention to create legal relations did not exist until the nineteenth century, it is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences. A mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was made, and even negotiated agreements do not necessarily give rise to legal obligations. For example, a collective agreement between employers and trade unions is conclusively presumed not to have been intended by the parties to be legally enforceable unless it is in writing and contains a provision stating that the parties intend it to be a legally enforceable contract.

A recent and entertaining example of the requirement of an intention to create legal relations is provided by Blue v Ashley:

In a conversation in a pub, A said to B that he would pay him £15 million if B could get the price of shares in Sports Direct, which A owned, to £8. B alleged that that was a binding offer of a unilateral contract and that, when the shares did reach £8, A had broken the contract by refusing to pay him the £15 million.

It was held that there was no binding contract. This was essentially because A had had no intention to create legal relations when he made that ‘promise’. No one present thought that A had made a serious commitment. What he had said was merely jocular banter.

(a) Social Engagements

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. A prime example is a social engagement. This is not always because such engagements are not reducible to a money value, for they often may be. The acceptance of an invitation to dinner or to play in a cricket match, of an offer to share the cost of petrol used on a journey, or to take part in a golf club’s competition or between friends relating to musical performances...
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by them form agreements in which the promisee may incur expense in reliance on the promise. The damages resulting from breach might be ascertainable, but the Courts would hold that, if no legal consequences could reasonably have been contemplated by the parties, no action will lie.

In *Balfour v Balfour*, Atkin LJ stated:

It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract.

(b) Family Arrangements

Family arrangements are another category of agreement in which there may be no intention to create legal relations. In *Balfour v Balfour*:

A husband was employed in a government post in Ceylon. He returned with his wife to England on leave, but she was unable to go back to Ceylon with him for medical reasons. He consequently promised orally to make her an allowance of £30 a month until she rejoined him. He failed to make this payment and she sued him.

The Court of Appeal held that, although it was not impossible for a husband and wife to enter into a contract for maintenance, in this case they never intended to make a bargain which could be enforced in law. While that decision has been criticized, agreements between spouses and between parents and children are, as we shall see, presumed not to be enforceable contracts. Thus, it has been said that a parent’s promise to pay a child an allowance while at university ordinarily creates only a moral obligation.

(c) Determining Intention

The test of an intention to create legal relations is an objective one. It may be that the promisor never anticipated that the promise would give rise to any legal obligation, but if a reasonable person would consider there was an intention so to contract, then the promisor will be bound. It has therefore been contended that the common law does not require any positive intention to create a legal obligation as an element of contract, and that ‘a deliberate promise seriously made is enforced irrespective of the promisor’s views regarding his legal liability’. This view commands considerable respect, but it is submitted that there are difficulties in the way of its acceptance.
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In the first place, the parties to a business transaction may deliberately state that they do not intend to enter into any legal obligation, and the Court will then treat their promises as binding in honour only. Thus in *Appleson v Littlewood Ltd*, it was held that a competitor who claimed to have sent in a successful coupon in a football pool, of which one of the conditions was that the conduct of the pools and everything done in connection therewith was not to be ‘attended by or give rise to any legal relationship whatsoever’, could have no claim which a Court would enforce. As regards a ‘minister’ and his church, there is no longer any presumption of there being no intention to create legal relations but the circumstances may indicate that there was no such intention. Moreover, until recently the Crown and civil servants were held not to be in a contractual relationship because the Civil Service Pay and Conditions Code’s statement that ‘a civil servant does not have a contract of employment enforceable in the courts’ meant that the Crown did not have the requisite intention to contract. What was said when the agreement was made, and the vagueness of the language used may be held to be inconsistent with an intent to contract. Where the agreement is made in a commercial context, it has been said there that there is a presumption that there is an intention to create legal relations and that the onus on a party who asserts that an agreement was made without the intent is a heavy one. However, the better view is that that presumption applies only to *express* commercial agreements (that are certain and complete) and that in respect of contracts that are wholly or partly implied from conduct, there is no such presumption so that it is for the party alleging that there is a contract to prove that intention, without the benefit of any presumption. However, where a term is being introduced into a pre-existing contractual relationship, there is a strong presumption that it is intended to be legally binding.

Secondly, where the agreement falls into that class of cases where legal contracts are not normally made, exemplified by social engagements or family arrangements, it will be presumed that no intent to create an enforceable contract is present, even though there may have been an exchange of mutual promises and a ‘consideration’ moving from the promisee. On the other hand, this presumption may be rebutted upon proof of the true intention of the parties, which is to be inferred from the language they use and the circumstances in which they use it. Thus in *Parker v Clark*,

The defendants, an elderly couple, agreed with the claimants, who were 20 years younger, that if the latter would sell their cottage and come to live with the defendants, sharing household expenses, the male defendant would leave them a portion of his estate in his will. The claimants sold their cottage and moved in with the defendants. Difficulties developed between the two couples, and the defendants repudiated the agreement by requiring the claimants to
It was argued that the agreement amounted to no more than a family arrangement of the type considered in *Balfour v Balfour*, but Devlin J held that the circumstances indicated that the parties intended to affect their legal relations and that the defendants were therefore liable. Indeed *Balfour v Balfour* has been said to be an extreme example of this presumption, and there are several cases in which it has been held that a husband’s promise to his wife, from whom he was about to separate, that she could have the matrimonial home, was enforceable as a contract. Similarly, in *Radmacher v Granatino* a majority of the Supreme Court took the view, in *obiter dicta*, that pre-nuptial agreements are binding contracts. Again, an informal family arrangement, to share the winnings of a football pool entry, was enforceable since the necessary intention was present.

Thirdly, it has been clearly established that the distinction between a warranty, which is a term of a contract, and a ‘mere representation’ depends upon whether the parties intended the statement to have contractual effect. It would be somewhat curious if contractual intention could be dispensed with in proving the existence of a contract, but not in proving the terms of which it is necessarily composed.

The conclusion is that an intention to create legal relations is essential to the formation of a contract in English law.

**Further Reading**

HUDSON, ‘Retraction of Letters of Acceptance’ (1966) 82 LQR 169

HUDSON, ‘Gibbons v Proctor Revisited’ (1968) 84 LQR 503


MILLER, ‘Felthouse v Bindley Revisited’ (1972) 35 MLR 489

RAWLINGS, ‘The Battle of Forms’ (1979) 42 MLR 715

HEDLEY, ‘Keeping Contract in its Place—Balfour v Balfour and the Enforceability of Informal Agreements’ (1985) 5 OJLS 391


BERG, ‘Promises to Negotiate in Good Faith’ (2003) 119 LQR 357
2. The Agreement


Notes:

1 See above, p 2.

2 On such requirements, see below, Chapter 3.

3 Clarke v Earl of Dunraven, The Satanita [1897] AC 59, below, p 34.


5 Or forbearance. See also below, p 105.


7 ALI Restatement, Contracts (2d) para 31.

8 Although he cannot be compelled to accept the benefit: Townson v Tickel (1819) 3 B & Ald 31. On deeds, see generally below, Chapter 3.

9 Save in the most exceptional circumstances an offer or acceptance cannot be inferred from inactivity. On acceptance by silence, see below, pp 50–2. On the suggestion that an offer to abandon an arbitration can be inferred, where neither party has taken any steps in the proceedings for a very long time: Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1981] 2 Lloyd’s Rep 438, 439, [1983] 1 AC 854, 865, 885, 914, 916, 924. But the question here is whether a contract to arbitrate disputes between the parties which undoubtedly exists has been modified. Even in that context inactivity on its own, without some overt act, is almost always likely to be insufficient: Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1983] 2 Lloyd’s Rep 411, 417, [1985] 1 WLR 925, 937; Yamashita-Shinnihon SS Co Ltd v l’Office Cherifien des Phosphates [1994] AC 486. For legislative modification see (a) the Arbitration Act 1996, s 41(6) empowering arbitrators to dismiss a claim for want of prosecution, and (b) the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000 No 2334) reg 24 providing that the despatch of goods without any prior request (ie ‘inertia selling’) may constitute a gift rather than an offer.

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11 See Wilkie v London Passenger Transport Board [1947] 1 All ER 258. See also Steven v Bromley & Son [1919] 2 KB 722; Sullivan v Constable (1932) 48 TLR 369.

12 [1897] AC 59.

13 Ibid, 63.

14 Rayfield v Hands [1960] Ch 1 (company); Companies Act 2006, s 33; JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] Ch 72, 190, [1990] 2 AC 413, 515 (international organization whose members were states).


16 Upton-on-Severn RDC v Powell [1942] 1 All ER 220. But there the liability (to pay for the provision of fire-fighting services) is probably (see William Lacey (Hounslow) Ltd v Davis [1957] 1 WLR 932, 938) best regarded as non-contractual restitution for the value of the services rendered rather than being contractual because neither party believed it was entering into a contract: the fire brigade rendering the services (the ‘offeree’) believed it was under a duty to provide the service without charge. Cf Henkel v Pape (1870) LR 6 Ex 7.

17 Centrovincial Estates plc v Merchant Investors Assurance Co Ltd [1983] Com LR 158. See also Moran v University College Salford (No 2), The Times, 23 November 1993 (mistaken unconditional offer of university place); OT Africa Line Ltd v Vickers plc [1996] 1 Lloyd’s Rep 700 (payment of £150,000 mistakenly offered instead of $150,000). See also below, pp 272–4.


20 [1893] AC 552. See also Schuldenfrei v Hilton (IT) [1999] STC 821, 831, 833.


22 Author’s emphasis.
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25 Timothy v Simpson (1834) 6 C & P 499 (below, n 29); Fisher v Bell [1961] 1 QB 394 (on which, see now, Restriction of Offensive Weapons Act 1961, s 1); Esso Petroleum Ltd v Commissioners of Customs and Excise [1976] 1 WLR 1 (indication of price at which petrol to be sold at attended service station not an offer).

26 Above, p 5.

27 Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1952] 2 QB 795 aff’d [1953] 1 QB 401, criticized by Unger (1953) 16 MLR 369. Note (i) the context was whether the display constituted an unlawful ‘sale’ of drugs unsupervised by a registered pharmacist under the Pharmacy and Poisons Act 1933, s 18(1), and (ii) in the USA it has been held that there is no acceptance until the goods are presented at the checkout: Lasky v Economic Stores 5 NE 2d 305 (1946).

28 Winfield (1939) 55 LQR 499, 518. See Said v Butt [1920] 3 KB 497 (theatre manager refused entry to critic who had got someone else to buy a ticket for him to a first night performance).

29 Equality Act 2010, above, p 5. See also Quinn v Williams Furniture [1981] ICR 328; Gill v El Vino [1983] QB 425. Cf Timothy v Simpson (1834) 6 C & P 499 (a person who went into a shop was asked to pay 7/6d although item was marked at 5/11d and the shop assistant said ‘don’t let him have it, he’s only a Jew. Turn him out’).

30 Below, n 31.


32 Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163, 169 (machine controlling entry to car park); National Car Parks Ltd v HMRC [2019] EWCA Civ 854, [2019] 3 All ER 590 (analysis of offer and acceptance in relation to a parking ticket machine that does not give change).

33 [1989] Ch 497, 512. See also Chapelton v Barry UDC [1940] 1 KB 532 (display of deckchairs for hire an offer). On non-self service petrol sales, see above, n 25.
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34 Denton v Great Northern Railway Co (1856) 5 E & B 860 (Lord Campbell CJ and Wightman J; Crompton J dissenting). See also Wilkie v LPTB [1947] 1 All ER 258 (contract formed when passenger boarded bus, ie running the bus constituted the offer).

35 Made by the Railways Board and the independent railways contractors under the Transport Act 1962 and the Railways Act 1993. In the context of bus services, see Public Passenger Vehicles Act 1981 and regulations made under it.

36 Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd [1986] AC 207.

37 Spencer v Harding (1870) LR 5 CP 561. Contrast GN Ry v Witham (1873) LR 9 CP 16; Percival Ltd v LCC Asylums etc Committee (1918) 87 LJ KB 677.

38 Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 WLR 1195. See below, p 533 on the remedy for breach of this obligation.

39 See below, pp 241–2 (and above, p 21).

40 (1858–59) 1 E & E 295, 309; Johnston v Boyes [1899] 2 Ch 73. Contrast Fenwick v Macdonald, Fraser & Co Ltd (1904) 6 F 850 (Scotland). By the Sale of Goods Act 1979, s 57(4) the seller is now precluded without notification from the bidding himself or employing anyone to bid for him, and any sale contravening this rule may be treated as fraudulent by the buyer.

41 The minority held that the auctioneer would be liable for breach of warranty of authority: see below, pp 695–6. In fact, a new trial was ordered but never took place.

42 Payne v Cave (1789) 3 Term R 148. See now Sale of Goods Act 1979, s 57(2). See further Harris v Nickerson (1873) LR 8 QB 286 (auctioneer not liable upon a contract to indemnify those who have incurred expense in order to attend the sale).

43 At that time the Statute of Frauds required such a contract to be evidenced in writing: see below, p 81.

44 (1858) 1 E & E 309, 317.

45 See Slade (1952) 68 LQR 238; Gower (1952) 68 LQR 456; Slade (1953) 69 LQR 21; Cox (1982) 132 NLJ 719.

46 Above, p 32.

47 See, on tenders, Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd [1986] AC 207; Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 WLR 1195.

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A proposal not addressed to one or more specific persons is presumptively merely an invitation to treat under the Convention on the International Sale of Goods (CISG) art 14(2) but presumptively an offer under the Italian Civil Code, art 1336(1) and by judicial decision in French law: Nicholas, *The French Law of Contract* (2nd edn, 1992) 63-4.

For the position where X does not know of the offer, see below, p 52.

*New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, 168. See also *Williams v Carwardine* (1833) 4 B & Ad 621, below, p 53.

*Lancaster v Walsh* (1838) 4 M & W 16.

[1893] 1 QB 256. See also *Bowerman v ABTA* [1995] 145 NLJR 1815.

Below, p 47.

*Gibbons v Proctor* (1891) 64 LT 594, 55 JP 616. For criticism and contrary authority, see below, p 52.

If one is made with reference to the other, there is no reason why a contract should not be held to exist, even though it is expressed to be an ‘offer’ and not an acceptance: but see *Gibson v Manchester City Council* [1979] 1 WLR 294.

(1873) 29 LT 271, 275, 277, 278, 279; ALI Restatement, *Contracts (2d)* para 23.

(1856) 25 LJ Ex 329. See also *Forman & Co Pty Ltd v Ship Liddesdale* [1900] AC 190.

(1856) 25 LJ Ex 329, 332.

*Jenkins v Tucker* (1788) 1 Hy Bl 90 (burial of the dead); *Re Rhodes* (1890) 44 Ch D 94 (maintenance of a mentally incapable person, although no recovery on the facts because there was no intention to charge).


(1840) 3 Beav 334.

*Lark v Outhwaite* [1991] 2 Lloyd’s Rep 132, 139.

(1880) 5 QBD 346. See also *Gibson v Manchester City Council* [1979] 1 WLR 294, 302.

(1880) 5 QBD 346, 350.

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The position is similar in many European systems; see Lando and Beale, Principles of European Contract Law Parts I and II (2000) 179.

[1894] 2 Ch 332. See also Brogden v Metropolitan Ry Co (1877) 2 App Cas 666, below, p 45. Cf Global Tankers Inc v Amercoat Europa NV [1975] 1 Lloyd’s Rep 666, 671.

See also Chas Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd [1975] 2 Lloyd’s Rep 422, 425 (Donaldson J).


[1979] 1 WLR 401, 404. Support for similar forms of flexibility can be found in the Uniform Laws on International Sales Act 1967, Sched 2, art 7(2); CISG art 19; von Mehren (1990) 38 Am J Comp Law 265.


Peter Lind & Co v Mersey Docks & Harbour Board [1972] 2 Lloyd’s Rep 234. For the conditions of such liability, see below, pp 66, 70.


So, eg, goods delivered late to the defendant may not be as valuable to him as goods delivered on time and this will be reflected in measuring the defendant’s enrichment: see Burrows, The Law of Restitution (3rd edn, 2011) 375.

Rees v Warwick (1818) 2 B & Ald 113; ALI Restatement, Contracts (2d) para 57.

See below, p 69.

Anon (1477) YB Pasch. 17 Edw IV, f 1, pl 2.

(1877) 2 App Cas 666.


Entores v Miles Far East Corporation [1955] 2 QB 327, 332 (Denning LJ); Winfield (1939) 55 LQR 499, 514; ALI Restatement, Contracts (2d) para 65. But cf below, pp 47-50, for the different rule which applies to acceptance by post.
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[82] Levita’s Case (1867) LR 3 Ch App 36. See also Dickinson v Dodds (1876) 2 Ch D 463, below, p 59 (third-party notification of revocation of offer effective).

[83] (1908) 99 LT 284.

[84] Ibid, 286 (Channell J).

[85] [1893] 1 QB 256, above, p 40.


[90] For the view that the same rule should be applied to e-mails as for telex and fax, see Hill (2001) 17 JCL 151; Nolan, in Burrows and Peel (eds), Contract Formation and Parties (2010) ch 4.

[91] Before they fell out of use, telegrams were treated legally in the same way as letters.


[94] Adams v Lindsell (1818) 1 B & Ald 681; Dunlop v Higgins (1848) 1 HLC 381; Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216; Henthorn v Fraser [1892] 2 Ch 27; Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd’s Rep 5. For the equivalent rule for telegrams, see Stevenson, Jacques & Co v McLean (1880) 5 QBD 346; Bruner v Moore [1904] 1 Ch 305, 316.

[95] (1818) 1 B & Ald 681.

[96] Ibid, 683. The ratio decidendi of the case is complicated by the assertion that the delay was caused by the defendants’ negligence in misdirecting their offer. The effect of such delay appears to extend the permissible period within which the offer may be accepted (see below, p
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61) unless the offeree knows or has reason to know of the delay: ALI Restatement, Contracts (2d) para 51.

97 (1879) 4 Ex D 216.


99 *Cowan v O’Connor* (1888) 20 QB D 640.

100 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 approving *Entores v Miles Far East Corp* [1955] 2 QB 327 (acceptance by telex from Holland to London held to constitute a contract made in England).

101 Winfield (1939) 55 LQR 499; Nussbaum (1936) 36 Col L Rev 920.

102 *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, 221; *Hebb’s Case* (1867) LR 4 Eq 9, 12.

103 *Entores v Miles Far East Corp* [1955] 2 QB 327.

104 *Re Imperial Land Co of Marseilles (Harris’ Case)* (1872) LR 7 Ch App 587, 594; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34, 41, 48.

105 Winfield (1939) 55 LQR 499, 506. Three principal systems seem to be in operation in other countries: (i) *information*: when the offeror is actually informed of the acceptance; (ii) *expedition*: when the offeree despatches the letter of acceptance; and (iii) *reception*: when the acceptance is received at its destination, whether the offeror is actually informed or not. See Evans (1966) 15 ICLQ 553. Under CISG arts 18(2), 24, and 21(2) the acceptance becomes effective at the moment the indication of assent is delivered at the address of the offeror; if the letter is lost, there is no contract, but if it is delayed, there is normally a contract, unless the offeror has promptly informed the offeree that he considers his offer as having lapsed.


107 *Ibid*, 157, 158, 161; *New Hart Builders Ltd v Brindley* [1975] Ch 342 (rule displaced where contracts required ‘notice to …’ or ‘to notify’).

108 *Re Imperial Land Co of Marseilles (Harris’ Case)* (1872) LR 7 Ch App 587, 594.


110 Below, p 54.
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Apart from telex, fax, e-mail, and the various types of electronic document interchange, there are also couriers, private messenger delivery, and document exchange services.


Below, p 57.

Prevention of speculation by the offeree, who unlike the offeror has full knowledge, does not appear to have been considered by the Scottish Law Commission: Scot Law Com No 144 (1993) paras 4.4–4.7. See also paras 3.10–3.14.

Anson (20th edn, 1952) 36.


See above, p 46.


(1862) 11 CBNS 869, aff’d (1863) 7 LT 835. See also Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1985] 1 WLR 925, 937. See further Miller (1972) 35 MLR 489.

(1862) 11 CBNS 869, 875.

The Unsolicited Goods and Services Act 1971 has been amended, and partly replaced, by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000 No 2334).

ALI Restatement, Contracts (2d) para 72.

Cf Fairline Shipping Corp v Adamson [1975] QB 180; Schuldenfrei v Hilton (IT) [1999] STC 821, 831, 833. See also, below, p 119 (promissory estoppel).

Above, pp 33–4.


See Tinn v Hoffman & Co (1873) 29 LT 271, above, p 41.
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131 (1868) 38 NY 248. See also Bloom v American Swiss Watch Co 1915 AD 100 (South Africa); R v Clarke (1927) 40 CLR 227 (Australia); ALI Restatement, Contracts (2d) para 51 and Comment a.


133 (1819) 4 Wheaton 225.

134 Ibid, 228 (Washington J).


136 Ibid; Carlyle Finance Ltd v Pallas Industrial Finance Ltd [1999] All ER (Comm) 659.

137 Tinn v Hoffman & Co (1873) 29 LT 271, 274, 278; Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 WLR 241, 246; ALI Restatement, Contracts (2d) paras 29, 68; Winfield (1939) 55 LQR 499, 516.

138 In Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216, Bramwell LJ at 255 was of the opinion that the revocation would be effective. See also Dick v US 82 Fed Supp 326 (1949); Ellison Kahn (1955) 72 SALJ 246, 257; Hudson (1966) 82 LQR 169.

139 In Countess of Dunmore v Alexander (1830) 9 S 190 (Scotland), Lord Craigie (dissenting) held that an offeree could not revoke her acceptance, but the majority of the Court treated the case as one of the revocation of an offer. See also Wenkheim v Arndt (1873) 1 JR 73 (NZ); Kinch v Bullard [1999] 1 WLR 423.

140 (1862) 12 CBNS 748; Scammell v Dicker [2001] 1 WLR 631.

141 (1873) LR 9 CP 16. Contrast Percival Ltd v LCC Asylums etc Committee (1918) 87 LJKB 677.

142 See above, p 32.

143 Rogers v Snow (1573) Dalison 94; GN Ry v Witham (1873) LR 9 CP 16, 19.
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144 It has been contended that there is no injustice, since the offeree is not bound to go to York and may give up at any time. The offeror, it is argued, ought to have a similar right to give up his side of the transaction: Wormser (1916) 26 Yale LJ 136. This reasoning is not attractive.

145 Pollock, Principles of Contract (13th edn, 1950) 19; see also Offord v Davies (1862) 12 CBNS 748, 753; Law Revision Committee, Sixth Interim Report (Cmd 5449 1937) para 39; ALI Restatement, Contracts (2d) para 45; CISG art 16(2)(b).

146 [1952] 1 KB 290.

147 Ibid, 295. See also Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch 231, 239; Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd [1986] AC 207 (submitting bid in response to invitation to tender). For a slightly different view, see Morrison Steamship Co Ltd v The Crown (1924) 20 LJ R 283, 297 where Viscount Cave LC suggested that ‘when work is done and expense incurred on the faith of a conditional promise, the promisor comes under an obligation not to revoke his promise, and if he does so he may be sued for damages or on a quantum meruit’. On that view, it would appear that the claimant could not insist on completing performance and claiming the promised sum.


149 Luxor (Eastbourne) Ltd v Cooper [1941] AC 108.

150 Above, p 55. See also Dickinson v Dodds (1876) 2 Ch D 463, below, p 59; Routledge v Grant (1828) 4 Bing 653.


152 Pitt v PHH Asset Management Ltd [1994] 1 WLR 327, 332, below, p 68 although this is probably better explained as a unilateral contract.

153 Sixth Interim Report (Cmd 5449, 1937) para 38. CISG art 16(2) provides that an offer indicating that it is irrevocable or one that has been relied on by the offeree cannot be revoked.

154 An offer in a deed is an exception to the general law on firm offers: Beesly v Hallwood Estates Ltd [1961] Ch 105; ALI Restatement, Contracts (2d) para 25, Comment c.

155 Above, pp 55–7.

156 See below, p 126 (the limits of equitable estoppel).

157 Holman Construction Ltd v Delta Timber Co Ltd [1972] NZLR 1081 (negligent pre-contractual statement).

158 Above, p 44.
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(1880) 5 CPD 344. See also Thomson v James (1855) 18 D 1 (Scotland); Stevenson v McLean (1880) 5 QBD 346; Henthorn v Fraser [1892] 2 Ch 27. But in Shuey v United States 92 US 73 (1875), where a reward was offered in a newspaper, it was held that this offer could be ‘withdrawn through the same channel by which it was made’, even though the revocation did not come to the notice of the offeree.

160 (1880) 5 CPD 344, 348.

161 Henthorn v Fraser [1892] 2 Ch 27, 32 (Lord Herschell). See also ibid, 37 (Kay Lj) (‘actual knowledge’, ‘actually received’).

162 Tenax SS Co Ltd v The Brimnes (Owners) [1975] 1 QB 929, 945, 966, 969 (revocation by telex). See also CISG arts 16(1) and 24 (revocation effective if it ‘reaches’ the offeree’s place of business or mailing address before he has dispatched an acceptance).

163 Tenax SS Co Ltd v The Brimnes (Owners) [1975] 1 QB 929. But not where it arrives after or near the close of a working day and is not seen on that day; ibid, 970; Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34, 42.

164 (1876) 2 Ch D 463.

165 Ibid, 472; see also 474 (Mellish Lj).

166 Cartwright v Hoogstoel (1911) 105 LT 628; ALI Restatement, Contracts (2d) para 42.

167 Hyde v Wrench (1840) 3 Beav 334 (counter-offer, constituting a rejection, terminates the offer); Trollope & Colls Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333, 337 (counter-offer ‘kills’ the original offer). Cf Stevenson, Jacques & Co v McLean (1880) 5 QBD 346. See above, p 42.

168 ALI Restatement, Contracts (2d) para 37. The position is similar in many European systems, see, eg, Germany, BGB para 146; Lando and Beale, Principles of European Contract Law Parts I and II (2000) 168.

169 Winfield (1939) 55 LQR 499, 513; ALI Restatement, Contracts (2d) para 39.

170 ALI Restatement, Contracts (2d) para 39.

171 The offeror could nevertheless waive this condition, and treat the late acceptance as valid, provided he did not thereby adversely affect the offeree.

172 Dickinson v Dodds (1876) 2 Ch D 463, above, p 59.

173 GN Ry v Witham (1873) LR 9 CP 16.

174 Offord v Davies (1862) 12 CBNS 748.
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175 Above, p 53.

176 Quenerduaine v Cole (1883) 32 WR 185.

177 (1866) LR 1 Ex 109. See also Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 WLR 241, 247-9; Chemco Leasing SpA v Rediffusion Ltd [1987] 1 FTLR 201.

178 ALI Restatement, Contracts (2d) para 266.


180 Coulthart v Clementson (1870) 5 QBD 42.

181 Errington v Errington [1952] 1 KB 290, 295. Even in this case, death may terminate the offer where it is dependent on the personality of the offeror.

182 Dickinson v Dodds (1876) 2 Ch D 463, 475; ALI Restatement, Contracts (2d) para 48.

183 Bradbury v Morgan (1862) 1 H & C 249, often said to support this, was in fact a case where a contract had been concluded before death.

184 Harris v Fawcett (1873) LR 8 Ch App 866, 869; Coulthart v Clementson (1870) 5 QBD 42, 46.

185 Re Cheshire Banking Co (Duff’s Executor’s Case) (1886) 32 Ch D 301; Reynolds v Atherton (1921) 125 LT 690, 695, but see (1922) 127 LT 189, 191; Somerville v National Coal Board 1963 SLT 334 (Scotland).

186 Foley v Classique Coaches Ltd [1934] 2 KB 1, 13 (Maugham L.J).

187 ALI Restatement, Contracts (2d) para 33(2). See also Lando and Beale, Principles of European Contract Law Parts I and II (2000) 146, art 2:103.

188 Hillas v Arcos (1932) 147 LT 503, 512 (Lord Tomlin).


190 Below, pp 66, 70.

191 Bushwell Properties Ltd v Vortex Properties Ltd [1976] 1 WLR 591. See also Montreal Gas Co v Vasey [1900] AC 595; Jacques v Lloyd D George & Partners [1968] 1 WLR 625; Stabilad Ltd v Stephens & Carter Ltd (No 2) [1999] 2 All ER (Comm) 651 (performance left to discretion of promisor); Blue v Ashley [2017] EWHC 1928 (Comm) (see below p 72: in addition to there being no intention to create legal relations there was insufficient certainty not least because no time period was stated for the share price to reach the specified price).

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195 Hillas & Co v Arcos Ltd (1932) 147 LT 503, 514.

196 ‘Words are to be interpreted so as to give effect to the subject matter rather than to defeat it.’


198 (1932) 147 LT 503.

199 On the terms implied by trade custom see further, below, pp 166-8.

200 (1932) 147 LT 503, 512, 513, 516. See also Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD [2001] 2 Lloyd’s Rep 76, 91 (reasonable fees for services); Durham Tees Valley Airport Ltd v Bmibaby Ltd [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep 68 (long-term obligation to fly two planes from an airport held to be sufficiently certain). Cf Baird Textile Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 (no long-term contract to be supplied with garments because of lack of certainty consequent on there being no objective criteria by which the Court could assess what would be reasonable for the purchaser to acquire either as to quantity or price).


202 Gillatt v Sky Television Ltd [2000] 1 All ER (Comm) 46.


204 See also Supply of Goods and Services Act 1982, s 15(1). Cf CISG art 55 (‘current trade price’).

205 British Bank for Foreign Trade Ltd v Novinex [1949] 1 KB 623; Powell v Braun [1954] 1 WLR 401 (executed transactions); Hondly v M’Laine (1834) 10 Bing 482 (executory transaction).

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208 Above, pp 34–5.


210 Above, p 43.


215 As in Gillatt v Sky Television Ltd [2000] 1 All ER (Comm) 46.


218 These amounted to £700 and were in respect of the expenses of the negotiation and the preparation of the contract documents: [1992] 2 AC 128, 135. On damages for misrepresentation, see below, pp 340–4.


220 [1992] 2 AC 128, 138. As Millett LJ explained in Little v Courage (1995) P & CR 469, 475 (and see also Andrews J in Dany Lions Ltd v Bristol Cars Ltd [2014] EWHC 817 (QB), [2014] 2 All ER (Comm) 403) Lord Ackner’s reference to an agreement to use ‘best endeavours’ being different and sufficiently certain must be read as referring to best or reasonable endeavours to achieve a result other than the conclusion of a
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contract with the other party (as in Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417, [2012] 2 All ER (Comm) 1053 where the obligation to use reasonable endeavours to promote a low-cost airline was held sufficiently certain). There is no real difference between an agreement to negotiate in good faith and an agreement to use best or reasonable endeavours to agree. For a decision that an obligation to use best or reasonable endeavours to negotiate is too uncertain, see, eg, Multiplex Constructions UK Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 (TCC), (2007) 107 Con LR 1. But in Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm), (2018) 1 All ER (Comm) 547 (upheld by the Court of Appeal, without mentioning this point, [2018] EWCA Civ 2407, [2019] 1 All ER (Comm) 885) Leggatt J in an enlightened judgment (albeit without mentioning Walford v Miles) held that a term to use reasonable endeavours to make a contract with a third party (ie to secure borrowing from a third party) was sufficiently certain to be enforceable; and he cast doubt on there being any 'uncertainty' objection to upholding a term requiring reasonable endeavours to negotiate a contract with the other party or a term requiring negotiation in good faith.

221 Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 WLR 297, 301 (Lord Denning MR).

222 For persuasive criticism of Walford v Miles, see Neill (1992) 108 LQR 405; Berg (2003) 119 LQR 357; Peel, in Burrows and Peel (eds), Contract Formation and Parties (2010) ch 3. In Petromec Inc v Petroleo Brasileiro SA Petrobas [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep 161 at [121] Longmore LJ, obiter, suggested that it would be a strong thing to declare unenforceable an express clause to negotiate in good faith. In Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145 an express dispute resolution clause in an otherwise binding contract, requiring the parties to seek to resolve a dispute in good faith within a limited period of time prior to arbitration, was held enforceable. Note also that in Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd’s Rep 205, 209–10 (PC) an obligation to make reasonable endeavours to agree was implied; and in Re Debtors (Nos 4449 and 4450 of 1998) [1999] 1 All ER (Comm) 149, 157–8 an obligation to negotiate in good faith was imposed on Lloyds as it was performing functions in the public interest.


225 (1932) 147 LT 503, 515. A majority of the New South Wales Court of Appeal has rejected the view that every promise to negotiate in good faith is unenforceable: Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1, 26. In the USA the majority view gives contractual effect to
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227 For an example, see Pitt v PHH Asset Management Ltd [1994] 1 WLR 327.

228 Neill (1992) 108 LQR 405, 413. Bingham LJ, dissenting in the Court of Appeal, was of this view: (1990) 62 P & CR 410. The agreement provided a standard in stating that the transaction was to be concluded as soon as possible after 6 April: [1990] 1 EGLR 212.

229 Hussey v Horne Payne (1879) 4 App Cas 311.


228 For example, see Pitt v PHH Asset Management Ltd [1994] 1 WLR 327.

229 Neill (1992) 108 LQR 405, 413. Bingham LJ, dissenting in the Court of Appeal, was of this view: (1990) 62 P & CR 410. The agreement provided a standard in stating that the transaction was to be concluded as soon as possible after 6 April: [1990] 1 EGLR 212.

229 Hussey v Horne Payne (1879) 4 App Cas 311.


231 [1912] 1 Ch 284, 288.


234 Kleinwort Benson Ltd v Malaysia Mining Corp Bdh [1989] 1 WLR 379, 388, 391, 393 (letter of comfort not legally binding because it expressed the present policy of the company rather than containing a promise); Associated British Ports v Ferryways NV [2009] EWCA Civ 189, [2009] 1 Lloyd’s Rep 595 at [24] (per Maurice Kay LJ: ‘I regard a letter of comfort, properly so called, as one that does not give rise to contractual liability’). Cf Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar Industries Ltd [1986] 1 Lloyd’s Rep 378 (letter of intent for the supply of sugar specifying amount, price, and shipping details held to be an acceptance).


236 British Steel Corp v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504. See above, p 66.

237 See Law Com No 65, ‘Subject to Contract’ Agreements (1975) and Law Com No 164, Formalities for Contracts for Sale etc of Land (1987) paras 1.4, 4.15.

238 (1877) 7 Ch D 29. See also Galliard Homes Ltd v J Jarvis & Sons plc (1999) 71 Con LR 219, 235-6, 243.

239 (1877) 7 Ch D 29, 32.
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240 Coope v Ridout [1921] 1 Ch 291; Chillingworth v Esche [1924] 1 Ch 97; Eccles v Bryant and Pollock [1948] Ch 93; Tiverton Estates Ltd v Wearwell Ltd [1975] Ch 146.

241 Law of Property (Miscellaneous Provisions) Act 1989, s 2, on which see below, pp 85–91.

242 Cf Alpenstow Ltd v Regalian Properties Ltd [1985] 1 WLR 721 (exceptionally, agreement ‘subject to contract’ drawn up by a lawyer after five months of negotiation containing detailed and mandatory provisions of the approval, amendment, and exchange of contracts held binding). In A-G of Hong Kong v Humphreys Estates (Queens Gardens) Ltd [1987] 1 AC 114, 127–8, the possibility (said to be unlikely) of the parties being estopped from refusing to proceed was accepted. See also Akiens v Saloman (1992) 65 P & CR 364, 370.


244 Chillingworth v Esche [1924] 1 Ch 97 (restitution of deposit).

245 Cobbe v Yeoman’s Row Management Ltd [2008] UKHL 55, [2008] 1 WLR 1752 (quantum meruit for value of work done in obtaining planning permission in respect of an anticipated contract/agreement ‘subject to contract’).

246 Filby v Hounsell [1896] 2 Ch 737; Rossiter v Miller (1878) 3 App Cas 1124.


249 Head v Tattersall (1871) LR 7 Ex 7, below, p 149.

250 Below, pp 147–9.


252 Weeks v Tybald (1605) Noy 11; Guthing v Lynn (1831) 2 B & Ad 232. But these cases appear to turn on uncertainty and vagueness rather than lack of intent. There is a close link between uncertainty and lack of intention to contract.

2. The Agreement

[254] [2017] EWHC 1928 (Comm). Leggatt J also decided that the arrangement was not sufficiently certain to be enforceable: see above, n 191.


[260] Below, p 75.


[265] [1939] 1 All ER 464. See also Rose and Frank Co v Crompton & Bros Ltd [1925] AC 445; Jones v Vernons’ Pools [1938] 2 All ER 626. Cf Edwards v Skyways Ltd [1964] 1 WLR 349 (‘ex gratia’ payment); Home Insurance Co Ltd v Administratia Asigurarilor [1983] 2 Lloyd’s Rep 674, 677 (agreement to be ‘interpreted as an honourable engagement’).


2. The Agreement


270 Edwards v Skyways Ltd [1964] 1 WLR 349, 355; Esso Petroleum Co Ltd v Commissioners of Customs and Excise [1976] 1 WLR 1 (World Cup coins given to purchasers of petrol held to be given under a contractual obligation—because of an intention to create legal relations—and not as a gift); Orion Insurance Co plc v Sphere Drake Insurance plc [1992] 1 Lloyd’s Rep 239, 263, 292.


278 Simkins v Pays [1955] 1 WLR 975.