
LAW 108A | private law: contracts
midterm outline | 2012-2013

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INTERESTS PROTECTED & CONSEQUENCES OF CONTRACT

REMEDIES

Remedies reveal the interests that the law is designed to protect:

- a) **Equitable remedies** - normally the remedy for breach of contract is expectation damages, but in some cases courts will move toward a more equitable remedy...
 - i) *Injunction*
 - (1) Negative order, can't do something.
 - (a) In cases of nuisance.
 - (b) Courts will enforce a negative covenant so long as an injunction does not amount to specific performance or effectively require the plaintiff to remain idle or starve – *Warner Brothers v. Nelson*
 - ii) *Specific performance* – *Falcke v. Gray*
 - (1) Requires defendant to perform a specific act, usually what is stated in the contract.
 - (a) Contract was for a specific car → you get that car.
 - (b) Restitution of specific property.
 - b) **Substitutionary remedies**
 - i) Plaintiff suffered harm, so should receive a sum of money to make it right.
 - (1) Compensatory damages
 - (2) Restitution for unjust enrichment
 - (3) Punitive damages
 - (4) Attorney's fees
 - c) **Constitutional remedies**
 - i) Can have government actions overturned if against the provisions of law. (Released from jail, etc.)

DAMAGES

1) 4 General Types of Damages:

- a) *Restitution (deals with unjust enrichment) – most important*
 - i) Recovery of benefits that the defendant has received instead of plaintiff.
 - ii) Contract breaker must return the value he has received from the other party.
- b) *Reliance*
 - i) Recovery of a loss or inconvenience suffered on basis of reliance.
 - ii) Costs that have been incurred as a result of relying on the fulfilment of the contract.
- c) *Expectation – Hawkins v. McGee*
 - i) Not only a loss as a result of a promise, but litigant wants fulfilment of promise.
 - ii) Best way to protect expectations is through specific performance.
 - iii) If there's no reliance or unjust restitution, expectation gives the promisee the value of where he would have been had the promise been fulfilled.
- d) *Punitive*
 - i) Very rare in contract law, but not so in tort law.
 - ii) Not based on protection of victim, but in the punishment of wrongdoing.

KINDS OF PROMISES LEGALLY ENFORCED

OFFER & ACCEPTANCE

1) What is a contract?

- a) *Not a thing, but a legal relationship:*
 - i) Created by communication between people
 - ii) Written document is simply evidence of a contract
- b) *A form of private ordering:*
 - i) Most important source of rights is a contract.
 - ii) Multifaceted regulation of the rights and interactions that surround us everyday.
- c) *The basis of reasonable expectations about what we feel we are obliged to, or entitled to.*
- d) *An enforceable agreement.*
 - i) The courts will enforce through the provision of some kind of legal remedy.
- e) *Legal relations governing simultaneous and future exchange.*
- f) *A way to expand our options in the world:*
 - i) By planning for the future instead of being limited by immediate exchange.
 - ii) The ability to trade in the future through promises has social value.
- g) *An element of exchange:*
 - i) Socially valuable and therefore subject to legal enforcement.
 - ii) Private individuals as free to enter into exchanges; freedom of contract.
 - iii) Exchange is inherently good; maximises human welfare.

2) Contract law:

- a) Facilitates freedom of contract
- b) Provides a policy framework:
 - i) In determining whether a contract exists, courts need to establish:
 - (1) That there was a reasonable reliance,
 - (2) There were expectations arising out of the transaction/interaction,
 - (a) There must be an entitlement to assert these expectations, or it would be unfair surprise to *enforce* these expectations.
 - (i) These considerations exist on a spectrum; must figure out where to draw the line so as to determine a legal relationship.

3) Bargain Theory of Contract:

- a) Builds on a core paradigm: you know there is a legally enforceable agreement that gives rise to enforceable reasonable expectations when there has been an **offer**, an **acceptance**, and a **bargain or consideration**.
 - i) So long as an agreement has the three requirements, it is reasonable and there is no element of unfair surprise.
 - ii) Typically based on objective assessment of what a reasonable person would interpret from the interaction.

4) How to turn an offer into a contract?

- a) Offer becomes a contract only when it is accepted on its terms. Acceptance must mirror the offer.
- b) Acceptance has to come while the offer is open.
 - i) At least three ways in which offer can be terminated:
 - (1) Offer itself may stipulate a period in which offer is open,
 - (2) Offer can be withdrawn,

(3) Acceptance must be communicated; silence is not acceptance even when the offeror says silence is acceptance.

5) Tendering:

- a) Contract A and B – A begins in the Request for Proposals which sets out terms and conditions for the bidding process (begins legal relationship), serves as both an invitation to treat and an offer (to enter into Contract B).

6) Examples:

- a) Offer provided in a railway timetable, accepted by customer arriving at station to purchase ticket (only accepted here because railway could have re-printed/put a sign/etc) – *Denton*
- b) No contract exists until the offer and the acceptance match – *Johnston Brothers*
- c) Advertisements more commonly understood as *invitation to treat* – *Lefkowitz*
 - i) **Invitation to treat** is not an offer, rather an invitation to *make* an offer
- d) Offer is only made when goods are brought to counter to purchase, not when picked up *Pharmaceutical Society*
- e) Acceptance *must be* communicated. – *Larkin*
- f) An exclusive offer to leave offer open is not legally binding. – *Dickinson*
- g) Offer can be revoked, indirect communication of revocation is effective even if promise is stated to be irrevocable – *Dickinson*
- h) Acceptance must be sent using method specified in offer, acceptance does not trigger legal consequences if it violates a term of the offer, even if this term does not seem immediately significant – *Eliason*
- i) *Last Shot Rule* - Contract is established as soon as the last of the forms is sent and received without objection being taken to it – *Butler Machine Tool Co.*
- j) Request for Proposals is an offer of Contract A and invitation to treat for Contract B; tender is acceptance of contract A and offer of contract B; selection of bid is acceptance of contract B. – *MJB Enterprises*

FORMALISATION & CERTAINTY

1) Agreements are not enforceable if the terms are too uncertain:

- a) Obligations are assumed, not imposed
- b) Avoid unfair surprise
- c) “The courts will not make a contract for the parties”

2) Courts will strive to enforce agreements that are intended to be binding

- a) Business reality is that expression and foresight are imperfect
- b) Reliance and business efficacy
- c) “As long as an agreement is not being constructed by the court, to the surprise of the parties ... the courts should try to retain and give effect to the agreement...” (Lambert in *Griffen v. Martens* (1988), 27 BCLR 92d 152 (CA))

3) Summary:

- a) Courts will not create a contract for the parties; needs to be relative agreement between parties so that there is no unfair surprise
- b) Courts will consider:
 - i) Did the parties think they had a binding agreement or were they really negotiating?
 - ii) Have the parties acted on the agreement and treated it as binding (mutual expectation)?
 - iii) Have the parties relied on the agreement to their detriment or received benefits under it (reliance and unjust enrichment)?

- iv) Is there evidence, based on past conduct, or practices in the industry to show how the agreement is intended to be interpreted?
- 4) Three ways in which agreements may create uncertainty & examples:**
- a) Incompleteness – ie, open terms, gaps
- i) If price has not been explicitly stated, no price agreed upon, and no method for determining price in future contract is not valid – *May and Butcher, Limited*
- ii) If price is missing but is generally well-understood, more familiar business setting, contract will be held (retreats and narrows from *May and Butcher*) – *W.N. Hillas and Co., Limited*
- iii) Failure to act in good with will often motivate a court to find a contract (e.g. adhering to terms of contract for three years then deciding there isn't one) - *Foley*
- b) Agreements to negotiate or agree – parties are aware something is missing, but still believe they have an agreement and agree to fill in the blanks as they go
- i) Agreeing to negotiate and no longer negotiate with a third party not binding – *Walford*
- ii) If specified that parties had to mutually agree on price, cannot be sure of terms without that agreement – *Empress Towers*
- c) Ambiguity and vagueness – parties agree on terms/forms of words but they are misleading or vague
- i) Item for sale must be reasonably specific – *Lefkowitz*
- ii) If agreement is too uncertain, non-binding – *Scammell*
- iii) If court cannot determine what contract means specifically, but knows exactly what it *doesn't* mean, can enforce minimum level of performance - *Durham Tees Valley Airport*

BC SALE OF GOODS ACT – ASCERTAINMENT OF PRICE

- 12 (1) the price in a contract of sale may be
- a) set by the contract
- b) left to be agreed in the contract, or
- c) determined by the course of dealing between the parties
- (2) if the price is not determined in accordance with subsection (1), the buyer must pay a reasonable price.
- (3) what is a reasonable price is a question of fact dependent on the circumstances of each case

Note: Act was in effect at time of *May v. Butcher*. Why did it not apply?

- Facts do not align with 12(1)(b),(c) of 12(2): parties set no mechanism to agree on price.
 - Price was not determined in dealing between parties.
 - Parties had explicitly excluded implication that it is a reasonable price by stating that it will be a price they agree on.
- ∴ the way the parties set the agreement precluded application of BC Sale of Goods Act.

CORRESPONDENCE

- **Postal Acceptance Rule**
 - a) *Most important technological development to raise this issue*
 - b) *Principle:*
 - i) Do not have contract until offer and acceptance, and acceptance is not binding until communicated, but when parties are not face-to-face what counts as communication?
 - (1) Moment of posting letter of acceptance = contract.
 - c) *Reasons for this exception:*
 - i) Business efficacy; if no rule, would expose offeree to high risk:
 - (1) How long would they have to wait to know if they had a contract?
 - ii) Not fair to offerors:
 - (1) Only applies in cases where post was the way the parties agreed they were going to communicate; therefore consistent with reasonable expectations.
 - (2) If offeror does not like the risk, they can simply choose to avoid this risk when drafting the contract.
 - iii) Postal acceptance therefore only applies where post is authorised way to communicate *and* nothing in offer that indicates the actual acceptance is required.
 - Note: Most standard form contracts/offers today explicitly exclude postal acceptance rule
 - d) *Rule does not apply in case of faxes:*
 - i) Due to instantaneous communication. PAR is to protect offeree (reasonable expectations) but not necessary because offeror receives acceptance right away.
 - e) *Other forms of electronic communication:*
 - i) Email now one of most common ways of entering into contracts; automated contracts also common.
 - ii) How do we apply traditional principles of offer and acceptance in this new context?
 - (1) Most jurisdictions have created a specific act of parliament to regulate electronic communication.
- **Examples:**
 - a) Acceptance valid when posted, revocation of offer must be communicated and only *communicated* once actually received – *Henthorn*
 - b) Even if acceptance is sent after revocation, so long as acceptance is received before revocation is there is a contract – *Byrne*
 - c) Postal acceptance rule does not apply if its application “would produce manifest inconvenience and absurdity” (also post was not specified) – *Holwell Securities*
 - d) Postal acceptance rule does not apply for forms of instantaneous communication – *Eastern Power Ltd.*

BC ELECTRONIC TRANSACTIONS ACT

- Digitised information assimilated to talking, etc. – held to be communication.
- Contract may be formed by interaction between electronic agent and individual or solely between electronic agents.
 - Contracts can be made with no human interaction.
- Electronic signature is anything that shows record of interaction, but signature *not* necessary for contract – simply proof of interaction.
- s. 15: Contracts can be created through computers, unless parties express otherwise.

- s. 18: Postal acceptance rule does not apply to email.
 - Question as to when it is said to be received.
 - Does not have to be read, but the moment it reaches inbox or moment it is capable of being retrieved (on the server) it is considered received (same with fax).

CONSIDERATION

- **General Framework:**
 - a) Balance between reasonable expectations on the one hand and unfair surprise on the other.
 - b) In addressing a contractual question, one needs to consider these factors before legal rules.
 - c) Then proceed to questions of carefulness/deliberateness:
 - i) Did they carefully define what they thought they were agreeing to? (Uncertainty)
 - ii) Was there reasonable reliance on the contract/agreement and/or were they using it to plan their future endeavours, would society endorse this sort of planning?
 - iii) Was there unjust enrichment as a result of making a promise? (Morality)

TWO BASIC LEGAL RULES/WAYS TO ENTER INTO CONTRACT

- a) **Put arrangement in writing and under seal:**
 - i) A promise that is written down and formalised with a seal is binding (a *deed*).
 - ii) Principle was developed in 14c. as a way of signifying that something important was happening.
 - iii) Judicial decisions have expanded the form of the seal (no longer needs to be dripped wax) but still very rare instruments.
- b) **The Doctrine of Consideration:**
 - i) Mere offer and acceptance does not make a contract.
 - ii) Must be part of a trade:
 - (1) Needs to be something of value that is exchanged between the parties.
 - (2) Must be more than just a promise in order to be enforceable.
 - iii) At broadest extremes:
 - (1) Pure gifts:
 - (a) Not enforceable,
 - (b) "Naked promise" – does not have consideration.
 - (2) Paradigm of contract/economic exchange:
 - (a) Economic relationship geared at the trading of resources,
 - (b) Includes offer, acceptance, and consideration.
 - iv) Principle of Consideration at its highest form:
 - (1) Enforces contract law when the agreement tends to look more like a commercial exchange.

WHAT IS CONSIDERATION?

- a) **What is traded in exchange for the promise can be:**
 - i) Actual – executed contract, nothing left to be traded; or
 - ii) Promised – executory contract, trade of mutual promises, trade remains to be done.
- b) **Can be right, interest, profit, or benefit to promisor given in exchange for promise OR**
 - i) Forbearance, detriment, loss, responsibility to promisee.

- ii) Therefore, do not need to benefit from a promise in order for the promise to be binding.
- c) **Courts will *not* second guess the value of the consideration: (*West Lake v. Adams*)**
 - i) Will give no consideration to *adequacy* of the consideration.
 - ii) Based in values of a liberal, capitalist society where people are free to enter into any kind of contracts they want;
 - (1) Not up to a third party tribunal to tell you what contracts you can and cannot enter into (up to a point).
 - (2) Not unjust enrichment because entry into agreement is voluntary.
 - (a) E.g. I'll give you a pink hat for your Lamborghini.
- d) **Principle of Consideration critiqued as both:**
 - i) Under-inclusive – excludes voluntary arrangements lacking consideration that do not take place under duress; and
 - ii) Over-inclusive – includes agreements with consideration made under economic duress.

GOING TRANSACTION ADJUSTMENTS (GTAS):

- a) Main problem that is perceived with modification of contracts part way through is duress.
 - i) Main reason not to enforce adjustment.
- b) In absence of duress, there are also very good policy reasons to enforce GTAs, especially in business context.
 - i) Showing flexibility in business relationship today often benefits parties later, and GTAs assumed to be enforceable.
- c) Problem is that the main tool law uses to determine if contract is enforceable (consideration) often assumes that GTAs are unenforceable – will not be binding in the absence of fresh consideration.
- d) Judges, however, recognise that consideration is not entirely satisfying, so there are a variety of exceptions/modifications to the rule:
 - i) **Variation in the new consideration** (*Gilbert Steel*) – if there is some new benefit given for promise to pay more, may be consideration.
 - ii) **Possible to construct interaction** of parties not as variation of existing contract, but rather as rescission of old contract and replacement with new contract.
 - iii) **Practical benefit with reliance** (*Williams v. Roffey*) – where we can find there is a promise to pay more, and a practical benefit and the other party relies upon it, enough to enforce.
 - iv) **Estoppel:**
 - (1) If you enter into legal relationship with someone based on a statement of fact, you are *estopped* from going back on statement of fact.
 - (2) *Promissory estoppel* – developed to apply this reasoning to promises.
 - (a) If you make a promise to someone, and they rely on that promise, you are *estopped* from going back on that promise (not a statement of law, or would replace doctrine of consideration with one of reliance)
 - (3) Examples: *Hughes v. Metropolitan Railway*, *Central London Property v. High Trees*
 - v) **Compromise:**
 - (1) Agreement to settle legal dispute.
 - (2) Sometimes contract variations enforced on the basis that what they really are is compromise.
 - (a) Settlement is binding because each party gives up right to go to court.

DEBT SETTLEMENTS & BC LAW AND EQUITY ACT

- a) Payment of a lesser sum in satisfaction of a debt is not binding because there is no consideration. – *Foakes v. Beer*
 - i) No detriment to debtor, no benefit to lender.
 - ii) Relies on *Pinnel's Case* – lesser sum cannot be satisfaction for entire sum.
- b) If something else (*new*) is offered, then acceptance of lesser sum would be binding.
 - i) New form of payment, do a little dance, offer a pink hat, etc. (contrary to common sense)
- c) *BC Law and Equity Act*, s. 43
 - i) “Part performance of an obligation, either before or after a breach of it, when expressly accepted by creditor...though without any new consideration, shall be held to extinguish obligation.”

CHARITABLE PLEDGES

- a) Doctrine of Consideration has prevented courts from enforcing charitable promises.
 - i) Not a contract; rather, a gift.
 - ii) Mere pledge not a contract - neither is a small gift in exchange for a pledge (not bargained for, simply a gift of appreciation).
- b) Problem from the perspective of charities is that it prevents them from relying on pledges, but it's still the rule.
- c) Possible exception: If it is specifically negotiated (donation in exchange for completion of specific project or action) then it is more like a contract because there is a benefit to donor (*consideration*) and it is bargained for (*not a gift*).

CASES TO REFER TO:

- a) **Informal relations:**
 - i) *White (Executor) v. William Bluett*, *Hamar v. Sidway*, *Eleanor Thomas v. Benjamin Thomas*
- b) **Problems of Mutuality:**
 - i) *The GNR Co. v. Witham*, *Tobias v. Dick and T. Eaton Co.*, *Wood v. Lucy Lady Duff-Gordon*
- c) **Going Transaction Adjustments (GTAs):**
 - i) *Harris v. Watson*, *Stilk v. Myrick*, *Gilbert Steel Ltd. v. University Construction Ltd.*, *Williams v. Roffey Bros. Ltd.*, *Greater Fredericton Airport Authority v. NAV Canada*
- d) **Debt Settlements:**
 - i) *Foakes v. Beer*, *Fairgrief v. Ellis*
- e) **Charitable Pledges:**
 - i) *Dalhousie College v. Boutilier Estate*

INTENTION

- 1) Though *consideration* is primary test for enforcement of promises, *test of intention to create legal relations* also exists.
 - a) Must be a bargain/exchange *and*
 - b) Interaction of parties must be such that court thinks parties appreciated that they were entering into legal relationship.
 - c) Test is not of subjective intent, but *objective*.

- i) Is this the type of social situation where it is generally understood that promise is made seriously and could have legal consequences?
- d) **Presumptions:**
 - i) Promises/agreements made in business/commercial situation are binding; can be rebutted, even in sophisticated commercial agreement. – *Rose v. J.R. Crompton*
 - ii) In family situations, promises and arrangements are *not intended to be legally binding*. – *Jones v. Padavatton*

NON-BARGAIN PROMISES

Excerpt from Fuller

- 1) Evidentiary Function
 - a) Most obvious function of a legal formality is that of providing “evidence of the existence and purport of the contract, in case of controversy”.
 - b) Can provide evidentiary security with:
 - i) Requiring a writing, or attestation, or the certification of a notary.
 - ii) Also, to some extent, by such a device as the Roman *stipulation*, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.
- 2) Cautionary Function
 - a) Formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action.
 - b) The seal in its original form fulfilled this purpose remarkably well.
- 3) Channelling Function
 - a) That a legal formality may perform a function not yet described, can be shown by the seal.
 - b) The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it – also serves to mark of signalise the enforceable promise.

Excerpt from Brudner

- 1) The fact that promises under seal are binding without consideration has led many to surmise that consideration must be a functional substitute for a seal.
 - a) ... taken to its extreme, this reasoning issues in a proposal to redefine consideration to mean any good reason for enforcing a promise, of which the existence of a bargain is only one.
 - i) Flaw in this reasoning is the assumption that consideration and the seal are interchangeable means by which to test the legal seriousness of a promise.
 - ii) Those who start from this premise forget that the enforcement of promises in an action for debt long predates the writ of *assumpsit* from which the modern action for breach of contract derives; and they forget, too, that promises under seal are enforceable only upon delivery to the donee.
 - iii) Promises under seal are enforced not as executory promises but as executed gifts.
 - iv) Delivery of a sealed deed acts as a symbolic delivery of the object.
 - b) Not in place of consideration, but transforms a promise into an executed transfer.

PAST CONSIDERATION

- 1) Rule is that contracts exist when promise is made in exchange for some consideration.
 - a) Promise made for something that happened in the past is *not* a contract – nothing was given in exchange for the promise/not induced by an exchange – *Mills v. Wyman*
 - b) Claims or promises made after the exchange are not part of exchange. Lord Denman:
“Promise must be co-extensive with the consideration” – *Roscorla v. Thomas*
 - c) If a promise is made in exchange for something already done, but it was for something that would normally expect consideration, then it will be a contract. – *Lampleigh v. Brathwait*
 - d) If there was an *implied* request, with consideration given after, it will be a contract – *Webb v. McGallan*

CASES

DAMAGES

WERTHEIM V. CHICOUTIMI PULP COMPANY (1911)

PRECEDENT FOR EXPECTANCY

❖ **Rule:**

- Lord Atkinson: "Party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed".

HAWKINS V. MCGEE (1929)

SURGERY LEADS TO A "HAIRY HAND" AND AWARDED EXPECTATION DAMAGES

❖ **Facts:**

- There is a contract, but what is it? Physician to perform action with due care.
- Trial judge said pain and suffering, and any damages if hand was worse.
- Appeal court said no damages for pain and suffering, implied in any surgery.
- Promised was a 100% good hand. Expectation damages are going to be somehow calculated by figuring out the difference between a perfect hand and the one he had after the surgery.

❖ **Decision:**

- Paid for damages between what was expected, a 100% good hand, and what was received, a hairy palm. Pain and suffering were expected and implicit in the contract, so damages were not paid for that.

SPECIFIC PERFORMANCE

FALCKE V. GRAY

ONE OF THE LEADING CASES ON SPECIFIC PERFORMANCE

❖ **Facts:**

- Item in question is not easily available in marketplace and market value cannot be determined – cannot be replaced with simple monetary compensation).

❖ **Rule:**

- Chattels can do specific performance, so long as they are of unusual distinction and curiosity.

WARNER BROS. PICTURES INCORPORATED V. NELSON

INJUNCTION CASE, BETTE DAVIS WAS IN 52-WEEK EXCLUSIVE CONTRACT, BREACHED IT

❖ **Facts:**

- Bette Davis said she would work for 52 weeks, renewable at Warner Bros.' discretion.
- Had a negative stipulation, said she couldn't render services for others.
- Contract would extend for length of time for which she did not perform her services for WB.
- Impractical to force her to work, relationship had been strained and good faith broken.

- Second clause of contract said she couldn't engage in "any other occupation without the written consent of the product" – too broad, court couldn't enforce.
- ❖ **Rule:**
 - Cannot force someone to do something, but can prevent from doing something else.

OFFER & ACCEPTANCE

DENTON V. GREAT NORTHERN RAILWAY COMPANY

SAID THERE WAS A TRAIN, THERE WASN'T, BUT KEPT SAYING THERE WAS

- ❖ **Facts:**
 - Railway timetable is an offer (normally).
 - Said contract materialised when person shows up ready to buy ticket.
 - Not late, no train at all, only for this case because railway continued to publish incorrect schedule.
- ❖ **Rule:**
 - Offer and acceptance sometimes manipulated, this case could be different today.
 - Quasi-punitive ruling, GNR should not have continued printing false schedule.
 - Court won't agree that price is offer, rather more like an invitation to treat.

JOHNSTON BROTHERS V. ROGERS BROTHERS

BAKERS WANT TO BUY FLOUR; WAS INITIAL CORRESPONDENCE AN OFFER?

- ❖ **Facts:**
 - Bakers seek to recover for a breach of a contract for the sale and delivery of a quantity of flour.
 - Alleged contract: Dft to Plf "we quote you... Hungarian \$5.40"
- ❖ **Rule:**
 - Mere quotation is not an offer to sell, merely an indication of price

LEFKOWITZ V. GREAT MINNEAPOLIS SURPLUS STORE

AN ADVERTISEMENT CAN BE AN OFFER, NORMALLY "INVITATION TO TREAT"

- ❖ **Facts:**
 - Dft made 2 advertisements, first said 3 fur coats worth up to \$100, first come first served, \$1
 - Wouldn't serve first person, said was only for women.
 - Ad said if you do this, you will get this.
 - Specified who can accept the offer and quantities were specified.
- ❖ **Held:**
 - Couldn't recover because "worth to \$100" was too vague.
- ❖ **Rule:**
 - No problem of limited supply when advertisement contains certain quantities of goods, at certain prices, with certain terms.

SCAMMELL AND NEPHEW, LIMITED V. OUSTON

TRADING A VAN, RARE CASE WHERE COURT CANNOT FIND SOME WAY TO MAKE CONTRACT WORK

❖ **Facts:**

- Claimants wished to trade in their old van for a new one.
- Agreed on price for trade in, but only that they would pay for remainder of the new van 'on hire-purchase terms' for two years.
- Defendants then pulled out of agreement.
- Held to be too vague to enforce, no objective standard by which the court could know what price was intended or what a reasonable price would be.

❖ **Rule:**

- Lord Atkinson: "Party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed".

DURHAM TEES VALLEY AIRPORT LTD. V. BMI BABY

BMI BACKED OUT BUT COURTS COULDN'T DETERMINE CONTRACT, BUT KNEW WHAT IT WASN'T

❖ **Facts:**

- Durham Airport did a lot of work to bring BMI in.
- After 2 years, BMI backed out of agreement and was sued.
- Court couldn't tell what the contract specifically meant, but knew what it didn't mean.
 - Not flying any aircraft was clearly not the contract.
- Couldn't award damages because would need to specify exactly what was required to determine losses.
- Shows how far a court may go when they see compelling reasons to enforce a contract even if it may be difficult to do so.

❖ **Rule:**

- Courts will not create a contract for the parties; needs to be relative agreement between parties so that there is no unfair surprise.
- Will consider whether parties thought there was a binding agreement, is there evidence based on past conduct to illustrate how the agreement is supposed to be interpreted?

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN V. BOOTS CASH CHEMISTS (SOUTHERN) LTD.

DETERMINING WHERE THE SALE OF GOODS OCCURED

❖ **Facts:**

- PS challenged the legality of how Boots supplied certain regulated drugs in its self-service stores.
- Under the legislation, Boots was required to supply such commodities only under supervision of a registered pharmacist.
- Products were displayed, people could take them off shelf, but pharmacist was authorised to prevent their sale at the cashier – when does sale occur?
 - If it was at moment taken off shelf they would be bound to purchase as soon as in basket.

❖ **Rule:**

- Need to be able to bend concepts of offer and acceptance like this.

MANCHESTER DIOCESAN COUNCIL FOR EDUCATION V. COMMERCIAL & GENERAL INVESTMENTS LTD.

PARTICULAR ACCEPTANCE CAN BE WAIVED, IF METHOD IS NOT ONLY WAY TO ACCEPT

❖ **Facts:**

- MD called for tenders relating to property. C&G submitted a tender (offer to buy). The tender stated that acceptance was to be notified to the person whose tender was accepted by letter sent 'by post addressed to the address given in his tender'. MD decided to accept C&G tender and sent their acceptance to the CG's solicitor, which was not the address given in the offer. C&G knew of this acceptance. Was there a contract? In particular, was a mandatory form stipulated for acceptance and, if so, was it complied with?

❖ **Held:**

- The method of acceptance prescribed in the tender was not *mandatory* - here the offeror was made aware of the acceptance by an equally effective method and thus the acceptance was effective.

❖ **Rule:**

- Particular acceptance can be waived.
- Where offeror has prescribed particular method, but not in terms insisting it is the only mode of acceptance that shall be binding, any mode of acceptance that is no less advantageous to the offeror will be binding

LARKIN V. GARDINER (1895 ON)

ACCEPTANCE MUST BE COMMUNICATED - AGREEMENT TO BUY WAS SIGNED BUT NO CONTRACT

❖ **Facts:**

- Larkin had placed property in hands of her agent for sale, agent received offer from D and got D to sign it, next morning took it to P's house where she signed it.
- Before Gardiner received agreement, he notified agent he was withdrawing offer.
- Held: Larkin had not accepted Gardiner's offer by time he withdrew it.

❖ **Rule:**

- Agreement must be communicated to be effective (doesn't always apply).
- Signing it and giving to your agent is not enough, neither is signing and putting in your desk.

DICKINSON V. DODDS

REVOCATION MAY BE EFFECTIVE WHEN OFFEREE LEARNS ABOUT IT INDIRECTLY

❖ **Facts:**

- Dodds have given a firm offer to sell Dickinson a residential property at particular price, open until the 12th at 9am. (Firm offers not binding, Dodds can withdraw whenever he wants)
- On the 11th Dickinson's agent advised him that he understood Dodds was negotiating to sell property to third party and property had in fact been sold.
- Still sent agent to give him acceptance on 12th, was denied.

❖ **General rule:**

- Must communicate withdrawal of offer.
- Exception: revocation can be communicated through actions (if buyer hears about it).

ELIASON V. HENSHAW

ACCEPTANCE NEEDS TO CORRESPOND TO OFFER, WANTED TO BUY SOME FLOUR

❖ **Facts:**

- Needs to be a mirror image for agreement to be valid.
 - Acceptance that is not compliant with the offer or that introduces significant new elements usually considered a counter-offer.
- Ruled there was no contract, offeror has the ability to set the terms of how they want acceptance returned; when these terms are not complied with there is no binding agreement.

❖ **Rule:**

- Acceptance does not trigger legal consequences if it violates a term of the offer, even if this term of the offer does not seem immediately significant.

BUTLER MACHINE TOOL CO. LTD. V. EX-CELL-O CORPORATION (ENGLAND) LTD.

BATTLE OF THE FORMS, WANTED TO SELL "ON OUR TERMS ONLY"

❖ **Facts:**

- First letter from seller to buyer, saying terms and conditions "shall prevail over any terms and conditions in the Buyer's order" – included price variation clause.
- Second form, buyer placed order, order stated to be subject to T&C that were materially different, no price variation clause – also had to tear off acknowledgement slip.
- Third letter, accompanying slip, said order was being entered in accordance with terms of first form, higher price due to price variation clause.

❖ **Rule:**

- Counteroffer killed the seller's earlier offer of sale, and seller's return of tear-off slip constituted acceptance of buyer's counteroffer.

M.J.B. ENTERPRISES V. DEFENCE CONSTRUCTION (1951)

NON-COMPLIANT BIDDER WAS CHOSEN, SUED FOR PROFITS THEY WOULD HAVE MADE

❖ **Facts:**

- Crown picked a non-compliant bidder.
- P sued for profits the P would have made if D had followed rules and only chosen compliant bids.
 - P argues they were second lowest, should recover full profits it would have made if bid was awarded.
- D had privilege clause saying had right not to pick lowest bidder
 - Court says this is OK.

❖ **Rule:**

- It is implied that offeror has obligation to accept only compliant bids. Where they do not comply with terms of tender (contract A) it is a breach of tender and bidding parties can claim expectancy damages (based on profits they would have realised).

FORMALISATION & CERTAINTY

MAY AND BUTCHER, LIMITED V. THE KING

WANTED SOME SURPLUS "TENTAGE" AS IT BECAME AVAILABLE

❖ **Facts:**

- Agreement said that prices to be paid, dates on which payment due, quantities available and dates for delivery to be determined later.

❖ **Held:**

- No contract, mainly because price was not stipulated.

❖ **Rule:**

- An agreement must contain the essential elements of the contract (price, in this case).

W.N. HILLAS AND CO., LIMITED V. ARCOS, LIMITED

CONTRAST TO MAY AND BUTCHER, COMMERCIAL SETTING REQUIRES FLEXIBILITY OF TERMS

❖ **Facts:**

- Agreement left a number of details such as dates and quantities of shipments to be determined, and prices to be determined by a forthcoming price list.
- For one year arrangement worked quite well, second year Arcos tried to get out of contract

❖ **Decision:**

- In contrast to May and Butcher, enforceable because a necessity of business that they make contracts with a degree of flexibility.
 - Undesirable to fix dates for shipments.
- Agreement already worked for a year, already overcame vague terms

FOLEY V. CLASSIQUE COACHES, LIMITED

PARTIAL EXECUTION OF CONTRACT WORKS TOWARDS ENFORCEABILITY, EVEN WITH NO SET PRICE

❖ **Facts:**

- Agreement that P would sell land to D on condition that D would purchase all the fuel they require for their business from P, "at a price to be agreed by the parties in writing and from time to time".
- D abided by agreement for 3 years until deciding to acquire fuel from another supplier.

❖ **Held:**

- Contract is enforceable.

❖ **Rule:**

- Didn't fail for incompleteness simply because price was not set.
- D wanted to escape contractual obligations while at the same time enjoy the benefits of that agreement, won't succeed.

WALFORD V. MILES (AUSTRALIA)

AUSTRALIAN CASE SHOWING THAT AN AGREEMENT TO NEGOTIATE IS NOT A CONTRACT

❖ **Facts:**

- Mr and Mrs Miles agreed to negotiate with Walford for the sale of a photographic processing business. They also agreed to terminate negotiations for the sale of the business to any other purchaser (which they did), provided Walford confirmed they were financially able to proceed with a purchase (which they did). However, the Miles' subsequently decided not to proceed with the negotiations for the sale and eventually sold to a third party. Walford sued for breach of contract. Walford succeeded at trial. Mr and Mrs Miles succeeded in an appeal.

❖ **Decision:**

- *On further appeal - Lord Ackner:* "There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B, agrees for a specified period of time, not to negotiate with anyone except A in relation to the sale of his property." Lord Ackner noted the commercial benefits of such an arrangement and stressed that such an agreement is 'a negative agreement' which does not lock B into negotiations with A.

EMPRESS TOWERS V. BANK OF NOVA SCOTIA

COURT GOES FAR TO DETERMINE A DIFFICULT TO ENFORCE CONTRACT, RENTAL PROPERTY

❖ **Facts:**

- Long-term lease arrangement between bank and landlord set to expire but has renewal clause in it at a price to be agreed.
- Contract seems to set a formula for setting price: "market rental prevailing at commencement of renewal term."
- Problem: parties had to mutually agree on the market rental price according to contract.
- Why try so hard to enforce?
 - Bad faith: landlord waiting until last day to respond to bank, acting out of personal animosity.

❖ **Rule:**

- Court implies obligation of good faith and argues that plaintiff's failure to act in good faith constitutes a breach of contract. Otherwise landlord could be liable for loss of business to bank as result of breach of contract.

CORRESPONDENCE

HENTHORN V. FRASER

POSTAL ACCEPTANCE RULE ADOPTED, ACCEPTANCE SENT BEFORE REVOCATION RECEIVED

❖ **Facts:**

- Fraser offers to sell land to Henthorn, sent acceptance before receiving revocation.

❖ **Rule:**

- Acceptance valid when posted.
- Revocation of offer must be communicated and only communicated when received.

BYRNE & CO. V. LEON VAN TIENHOVEN & CO.

FOR BUSINESS EFFICACY, POSTAL ACCEPTANCE RULE DOESN'T APPLY FOR REVOKATION

❖ **Facts:**

- Offer to sell tin is posted, then revoked, acceptance is then telegraphed, then posted, then revocation is received.
- Held that there was a contract.

❖ **Rule:**

- Postal acceptance rule doesn't apply for revocation.

HOLWELL SECURITIES LTD. V. HUGHES

ANOTHER EXCEPTION TO POSTAL ACCEPTANCE RULE, VENDOR ASKED FOR NOTICE IN WRITING

❖ **Facts:**

- Vendor asked for notice in writing, so court held that solicitor telling him about it not enough

❖ **Rule:**

- Exceptions to postal acceptance rule:
 - When the express terms of the offer specify that the acceptance must reach the offeror.
 - When its application would product manifest inconvenience and absurdity – that having regard to all circumstances, negotiating parties cannot have intended that there should be a binding agreement until party accepting offer had in fact communicated.

EASTERN POWER LTD. V. AZIENDA COMUNALE ENERGIA & AMBIENTE

POSTAL ACCEPTANCE RULE DOES NOT APPLY TO OTHER FORMS OF COMMUNICATION

❖ **Facts:**

- Key issue was where offer accepted (contract formed) Italy or Ontario.
- It was faxed by an offeree located in Ontario to offeror in Italy.

❖ **Held:**

- Offer was accepted in Italy where fax was received.

❖ **Rule:**

- When not using letter or telegram, acceptance occurs where the acceptance was heard.
 - Instantaneous communications we don't need PAR, so acceptance occurs where it is heard/received.

CONSIDERATION

WHITE (EXECUTOR) V. WILLIAM BLUETT (1853 UK)

DAD WOULD FORGIVE SON'S DEBT IF HE WOULD STOP COMPLAINING

❖ **Facts:**

- D, son, was unhappy with the way his father is doling out benefits to his children.
- Father agreed that he would forgive the debt his son had to him (promissory note) if he should forever cease to make complaints.

❖ **Decision:**

- Lawyer for the son would say this is clearly a promise in exchange for another promise, therefore consideration.
- Judge says there is no consideration because there is no right to complain, because the father can distribute his property however he wants.
- ❖ **Rule:**
 - A forbearance of something you do not have the right to do is not good consideration.

HAMER V. SIDWAY (1891 NY)

UNCLE PROMISED NEPHEW MONEY IF HE WOULD STOP DRINKING, SMOKING, WEST-COASTING

- ❖ **Facts:**
 - Uncle promised nephew that if he refrained from drinking, using tobacco, swearing and playing cards until age 21 he would give him \$5000.
 - Now dealing with third party (who nephew sold debt to, Hamer vs. executor of estate, Sidway)
- ❖ **Decision:**
 - Estate says contract without consideration, therefore invalid.
 - Uncle got no consideration.
 - Judge: "it is sufficient that he restricted his lawful freedom of action within prescribed limits upon the faith of his uncle's agreement".
 - Doesn't matter that there was no benefit to the uncle.
- ❖ **Rule:**
 - Restriction of freedom of action is sufficient consideration in return for a promise, even if the promisor does not benefit.

ELEANOR THOMAS V. BENJAMIN THOMAS (1842)

HUSBAND WANTED TO LEAVE HIS HOUSE TO HIS WIDOW, DIED, RENT FOR £1 A YEAR

- ❖ **Facts:**
 - Husband died, wanted to leave his house to his widow (P).
 - Executors try to put wish into effect, make contract with widow so that she pays £1/year as ground rent. After death of co-executor, D evicts P. P sues based on agreement.
- ❖ **Rule:**
 - Motive is not the same as consideration. Not a bargain or exchange.
 - Court enforces the promise to wife to be able to stay in the house.
 - Clearly a gift but someone knew about the law of contract and therefore decided to introduce rent into contract to serve as consideration.

THE GREAT NORTHERN RAILWAY COMPANY V. WITHAM (1873)

BUILDING A RAILWAY AND NEED TO SECURE SOURCE OF SUPPLIES, SUPPLIER WANTS TO STOP

- ❖ **Facts:**
 - D sent in a tender to P, undertaking to supply the P for a set period of time, with set prices for different articles that may be ordered.
 - P accepted tender, ordered iron and it was delivered several times, but eventually D refused to supply any more.

- D argues that contract is “void for want of mutuality”, because P did not bind themselves to take any iron from D, his promise to supply them with iron was a promise without consideration.
- ❖ **Decision:**
 - Umbrella contract (under which individual orders can be made) and each individual order.
 - Umbrella is not enforceable, because there is no consideration, ∴ there is no promise by P to make orders, or a certain amount of orders, so no consideration.
 - Individual orders are promises to pay a set amount of money in return for the promise of the goods ordered ∴ consideration.
 - If GNR had promised to buy solely from offeror that could be argued as consideration.
 - Witham has to supply order already submitted, but can back out of further agreements due to lack of mutuality.

TOBIAS V. DICK AND T. EATON CO. (1937 MB)

GRAIN GRINDING MACHINE INVENTOR GRANTS EXCLUSIVE RIGHT TO MARKET PRODUCT

- ❖ **Facts:**
 - P had agreement with D, that he would have exclusive rights to sell D’s machines in the prairies.
 - Tobias bought machines from D, but could not sell them, so stopped ordering machines.
 - Only then did D ask T Eaton Co. to sell machines.
 - No consideration on behalf of Tobias.
 - Exclusive selling rights, but no obligation to sell a certain amount.
 - Gives the right to buy, but no obligation. No benefit to Dick.
- ❖ **Rule:**
 - No mutuality.

WOOD V. LUCY, LADY DUFF-GORDON (1917 NYCA)

LADY GRANTS EXCLUSIVE SELLING RIGHTS TO PUT HER NAME ON FASHIONS, THEN BACKS OUT

- ❖ **Facts:**
 - P was to have exclusive right, subject to D’s approval, to place D’s endorsement on designs of others.
 - Also exclusive right to place her designs on sale, license others to market them.
 - In return she got 50% of all profits.
 - D placed her endorsement on products without P’s knowledge and kept profits to herself.
 - Is there consideration given even though there was no explicit guarantee on behalf of the P to generate revenues?
- ❖ **Decision:**
 - Judge says there was an implied promise that the P will use reasonable efforts to gain profits, and he lived up to this promise.
 - Unless he gave effort, she would not get anything, so without the implied promise of his effort there would be no point to the contract.
- ❖ **Rule:**
 - Implied promises can be used as evidence of obligation and consideration, thus making them enforceable.
 - Why different from Tobias? Tobias wasn’t trying/succeeding, wasn’t commission based.

HARRIS V. WATSON (1791 UK)

SAILOR DID EXTRA WORK BECAUSE SHIP WAS IN DANGER, WITH PROMISE OF EXTRA PAY

❖ **Facts:**

- Policy based explanation for why sailors shouldn't be allowed extra wages for times of danger because it would lead to extortion, cause ships to sink unless given extra money
- Contrast with *Stilk*, which explains with doctrine of consideration.

STILK V. MYRICK

TWO SEAMEN JUMPED SHIP, CAPTAIN PROMISED TO DIVIDE THEIR WAGES AMONGST THE REST

❖ **Facts:**

- Two sailors deserted a ship and the captain told the rest of the crew they could share the wages of the two equally if he could not replace them.

❖ **Rule:**

- Agreement to pay extra wages was void for want of consideration.
 - Promise to perform pre-existing duty is not good consideration.
 - Agreed to do what they were already contracted to do.

GILBERT STEEL LTD. V. UNIVERSITY CONSTRUCTION LTD. (1976 ONCA)

PRICE FOR SUPPLY OF STEEL WENT UP AFTER 2 OF 3 AGREED UPON BUILDINGS WERE DONE

❖ **Facts:**

- P was supplier of steel for three projects of the D.
- First 2 were fine, then P announced need to increase the prices, so agree to new contract.
- P then alleges that they approached D about further increase to which D orally agreed.

❖ **Decision:**

- Yes, had agreed to new contract, but no new consideration so unenforceable.

❖ **Rule:**

- Implied rescission can be denied.
- Increased credit not good consideration.
- Vague promises ("good price") not good consideration.

WILLIAMS V. ROFFEY BROS. LTD. (1991 UK)

SUBCONTRACTED CARPENTRY, RAN OUT OF FUNDS, ASKED FOR MORE MONEY

❖ **Facts:**

- P a carpenter employed by D (contractor) to work on refurbishing flats, total contract £20,000
- P having financial difficulty (contract price too low) and inadequate supervision of workers
- D became worried because penalty clause on main construction agreement if work not completed, so D agreed to pay P extra money (£10,300)
- D didn't pay all of this—argued variation of contract had been made without consideration

❖ **Rule:**

- One's promise to voluntarily (promisor speaks first and no duress or fraud) pay another party more to perform a pre-existing duty in order to obtain a benefit or avoid a dis-benefit or liability is good consideration and the agreement will thus be held to be enforceable.

GREATER FREDERICTON AIRPORT AUTHORITY V. NAV CANADA

PARTIES TO AN AGREEMENT, HAD TERMS GOVERNING CAPITAL EXPENDITURES, LANDING SYSTEM

❖ **Facts:**

- NAV Canada and GFAA were parties to agreement governing responsibility for some capital expenditures.
- As part of runway extension project, GFAA requested that NAV relocate an instrument to the runway being extended.
- NAV decided that rather than relocating they would replace it with something new.
- GFAA thought NAV should have to pay for it, NAV said they wouldn't provide for the purchase unless GFAA agreed on the acquisition cost, which they did "under protest".
- Was there sufficient consideration to find that a contract was created, or the existing contract modified?

❖ **Rule:**

- Post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress.
- To establish economic duress, two conditions must be met:
 - The promise must be made under pressure (demand/threat),
 - The pressured party must have no option but agreeing.
- Business efficacy often requires adjustments to on-going contracts and law must then protect the legitimate expectations of the parties that the modifications will be considered legally enforceable.

RIVER WIND VENTURES LTD. V. BRITISH COLUMBIA

ADJUSTMENTS/MODIFICATIONS TO ON-GOING CONTRACTS SHOULD BE ENFORCEABLE

❖ **Rule:**

- Adjustments/modifications to on-going contracts should be enforceable when:
 - They really were intended to be binding; and
 - There is some evidence of reliance.

FOAKES V. BEER (1884 UK)

PARTIAL PAYMENT OF A DEBT, PAID IN INSTALLMENTS

❖ **Facts:**

- Foakes owed Beer a large sum of money, had agreement for him to pay it down in a down payment and instalments
- Beer commenced this action to recover the interest

❖ **Rule:**

- Promise by a debtor to make partial payment of a debt in return for a creditors promise to accept the partial payment as fully discharging the debt does not give rise to an enforceable agreement.

- Not good consideration because debtor only promising partial performance of debt, not binding even if accepted. Stupid rule, but pay up regardless.

FAIRGRIEF V. ELLIS (1935 BCSC)

RETIRED GUY ASKS FRIENDS TO DO HOUSEKEEPING AND HE WOULD LEAVE HOUSE TO THEM

❖ **Facts:**

- Defendant asks 2 female friends (plaintiffs) to keep his home in return for him leaving it to them when he dies.
- Agreement was carried out until the defendant's wife returned home and insisted that the plaintiffs leave.
- Defendant made new agreement with the plaintiffs that if they gave up their rights under first agreement he would pay them \$1000.
- Plaintiffs seek to recover the \$1000.

❖ **Rule:**

- Good consideration even if original agreement was unenforceable as a contract.

DALHOUSIE COLLEGE V. BOUTILIER ESTATE

MADE PLEDGE ON A FORM TO COLLEGE TO MAINTAIN AND IMPROVE TEACHING, BINDING?

❖ **Facts:**

- D had made pledge on a form which said funds were promised, "for the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and ... in consideration of subscription of others, I promise..."

❖ **Rule:**

- Attempt to turn charitable gift into a contract fails because of no consideration.

INTENTION

JONES V. PADAVATTON

MOTHER BREACHED A CONTRACT TO SUPPORT DAUGHTER IF SHE MOVED AND STUDIED

❖ **Facts:**

- Mother (Jones) who lived in Trinidad, urges daughter to move to London to pursue legal studies.
- Daughter didn't want to leave Washington, where she had very good job.
- Daughter induced by mother's promise of monthly allowance in return for studying in London.
- Mother later purchased house in order to give daughter home, she is to rent out rooms use proceeds in lieu of monthly allowance.
- After 5 years (study only supposed to take 3) mother arrived in London, sought possession of house termination of agreement.

❖ **Decision:**

- One of those family arrangements, which depend on good faith of promises made, not intended to be legally binding.
- Minority said it should have been binding, but there was an implied term that was expired.

ROSE AND FRANK COMPANY V. J.R. CROMPTON & BROTHERS, LIMITED

AGREEMENT WAS SPECIFICALLY STATED NOT TO BE FORMAL OR LEGAL

❖ **Facts:**

- Parties wrote up agreement, which was specifically stated not to be formal/legal.

❖ **Rule:**

- Not binding, because the clause establishes that there is a clear intention that the agreement is based on faith and does not have legal consequences.

PAST CONSIDERATION

MILLS V. WYMAN

SON WAS TRAVELLING WORLD, GOT SICK, MAN TOOK CARE OF HIM – THEN HE DIED ANYWAY

❖ **Facts:**

- Wyman's son was travelling the world and got sick. Mills took care of him and gave him food, shelter, medical care and support while sick.
 - Kid died anyway.
- Father promised to pay Wyman out of gratitude for the assistance, and then he too died before he could make the payment.

❖ **Decision:**

- Court said there is no contract, promise made out of gratitude not consideration.

LAMPLEIGH V. BRATHWAIT (1615 UK)

EXCEPTION TO PAST CONSIDERATION RULE – KILLED A GUY, PARDONED, PROMISED TO PAY

❖ **Facts:**

- D killed someone, *requested* that P try and obtain a pardon for him from the king.
- P did work to do so, got the pardon.
 - D then promised to pay him £100.

❖ **Rule:**

- Past consideration is good consideration where the act is performed as a result of the request of a party who later promises to pay.

ROSCORLA V. THOMAS (1842 UK)

BOUGHT A HORSE, SUBSEQUENTLY TOLD IT WAS SOUND AND VICELESS

❖ **Facts:**

- P bought a horse from D, no promise as to quality of horse made at time of bargain.
- Later, D made a promise about the horse saying it was: "sound and free from vice".

❖ **Rule:**

- Past consideration is not good consideration for a subsequent gratuitous promise on top of a prior contract.

WEBB V. MCGALLAN (USA)

IMPLIED REQUEST AND MOTIVE AS CONSIDERATION - NOT FOLLOWED IN CANADA

❖ **Facts:**

- In act of courage, W fell to floor with pine block in order to avoid it falling and hitting M.
- W severely injured, M promised to pay allowance to W for rest of W's life.
- After M died, estate refused to make payments.
- Judges held promise enforceable b/c where there is an implied request (D obviously wanted him to save his life, would have asked him to do so) it will be held to be good consideration (an American exception to PC rule).

❖ **Rule:**

- Other way of framing is to say M had moral obligation to compensate Webb.