Revocation of an offer must be communicated. It is not effective on posting

68 ***Byrne*** **v** ***Van Tienhoven*** (1880) 5 CPD 344

On 1 October the defendants in Cardiff posted a letter to the claimants in New York offering to sell them tin plate. On 8 October the defendants wrote revoking their offer. On 11 October the claimants received the defendants' offer and immediately telegraphed their acceptance. On 15 October the claimants confirmed their acceptance by letter. On 20 October the defendants' letter of revocation reached the claimants who had by this time entered into a contract to resell the tin plate.

Held – (*a*) revocation of an offer is not effective until it is communicated to the offeree, (*b*) the mere posting of a letter of revocation is no communication to the person to whom it is sent. The rule is not, therefore, the same as that for acceptance of an offer. Thus, the defendants were bound by a contract which came into being on 11 October.

Revocation of offer: may be by a third party if a reasonable person would rely on that party's knowledge of the facts

69 ***Dickinson*** **v** ***Dodds*** (1876) 2 Ch D 463

The defendant offered to sell certain houses by letter, stating, 'This offer to be left over until Friday 9 am'. On Thursday afternoon the claimant was informed by a Mr Berry that the defendant had been negotiating a sale of the property with one Allan. On Thursday evening the claimant left a letter of acceptance at the house where the defendant was staying. This letter was never delivered to the defendant. On Friday morning at 7 am Berry, acting as the claimant's agent, handed the defendant a duplicate letter of acceptance explaining it to him. However, on the Thursday the defendant had entered into a contract to sell the property to Allan.

Held – since there was no consideration for the promise to keep the offer open, the defendant was free to revoke his offer at any time. Further, Berry's communication of the dealings with Allan indicated that Dodds was no longer minded to sell the property to the claimant and was in effect a communication of Dodds' revocation. There was, therefore, no binding contract between the parties.

Comment (i) The question of whether the person who communicates the revocation is a reliable source and should be relied on is a matter of fact for the court, but it could, e.g., be a mutual friend of the offeror and offeree. There is in fact no general statement in this case as to what is reliability or even that it is necessarily required.

(ii) This decision as it stands could cause hardship because it may mean that the offeree will have to accept as revocation all kinds of rumour from people who may not necessarily appear to be reliable and well informed. It would be nice to think that in modern law the third party would have to be apparently reliable and likely to know the true state of affairs, as where he is the offeror's agent, but as we have seen there is no actual clear statement in this case that this is so.

Lapse of offer after a reasonable time

70 ***Ramsgate Victoria Hotel Co*** **v** ***Montefiore*** (1866) LR 1 Exch 109

The defendant offered by letter dated 8 June 1864 to take shares in the company sending part-payment of 1 shilling (5p) a share. No reply was made by the company, but on 23 November 1864, they allotted shares to the defendant. The defendant refused to take up the shares.

Held – his refusal was justified because his offer had lapsed by reason of the company's delay in notifying their acceptance. He also recovered his part-payment.

Comment The question of 'reasonable time' is a matter of fact to be decided by the court on the basis of the subject matter of the contract and the conditions of the market in which the offer is made. Offers to take shares in companies are normally accepted quickly because the price fluctuates in the market. The same would be true of an offer to sell perishable goods. An offer to sell a farm might well not lapse so soon. The form in which the offer is made is also relevant so that an offer by mobile phone could well lapse quickly.

Conditional offer: termination on failure of condition

71 ***Financings Ltd*** **v** ***Stimson*** [1962] 3 All ER 386

On 16 March 1961, the defendant saw a motor car on the premises of a dealer and signed a hire-purchase form provided by the claimant (a finance company), this form being supplied by the dealer. The form was to the effect that the agreement was to become binding only when the finance company signed the form. It also carried a statement to the effect that the hirer (the defendant) acknowledged that before he signed the agreement he had examined the goods and had satisfied himself that they were in good order and condition, and that the goods were at the risk of the hirer from the time of purchase by the owner. On 18 March the defendant paid the first instalment and took possession of the car. However, on 20 March, the defendant, being dissatisfied with the car, returned it to the dealer, though the finance company was not

informed of this. On the night of 24–25 March the car was stolen from the dealer's premises and was recovered badly damaged. On 25 March the finance company signed the agreement accepting the defendant's offer to hire the car. The defendant did not regard himself as bound and refused to pay the instalments. The finance company sold the car, and now sued for damages for the defendant's breach of the hire-purchase agreement.

Held – the hire-purchase agreement was not binding on the defendant because:

(*a*) he had revoked his offer by returning the car, and the dealer was the agent of the finance company to receive notice;
(*b*) there was an *implied* condition in the offer that the goods were in substantially the same condition when the offer was accepted as when it was made.

Death of offeror before acceptance

72 *Bradbury* v *Morgan* (1862) 1 H & C 249

The defendants were the executors of J M Leigh who had entered into a guarantee of his brother's account with the claimants for credit up to £100. The claimants, not knowing of the death of J M Leigh, continued to supply goods on credit to the brother, H J Leigh. The defendants now refused to pay the claimants in respect of such credit after the death of J M Leigh.

Held – the claimants succeeded, the offer remaining open until the claimants had *knowledge* of the death of J M Leigh.

Comment This was a continuing guarantee which is in the nature of a standing offer accepted piecemeal whenever further goods are advanced on credit. Where the guarantee is not of this nature, it may be irrevocable. Thus, in *Lloyds* v *Harper* (1880) 16 Ch D 290, the defendant, while living, guaranteed his son's dealings as a Lloyds underwriter in consideration of Lloyds admitting the son. It was *held* that, as Lloyds had admitted the son on the strength of the guarantee, the defendant's executors were still liable under it, because it was irrevocable and was not affected by the defendant's death. It continued to apply to defaults committed by the son after the father's death.

Death of offeree before acceptance

73 *Re Cheshire Banking Co, Duff's Executors'* Case (1886) 32 Ch D 301

In 1882 the Cheshire and Staffordshire Union Banking Companies amalgamated, and Duff received a circular asking whether he would exchange his shares in the S Bank for shares in the C Bank which took the S Bank over. Duff held 100 £20 shares on which £5 had been paid, but he did not reply to the circular and died shortly afterwards. The option was exercised on behalf of his executors, Muttlebury, Bridges and Watts, and a certificate was made out in their names and an entry made in the register in which they were entered as shareholders, described as 'executors of William Duff, deceased'. The executors objected to having the share certificates in their names, so the directors of the Cheshire Banking Co cancelled the certificate and issued a fresh one in the name of William Duff. On 23 October 1884, the company went into liquidation.

Held – the liquidator acted rightly when he restored the executors' names to the register. The executors wished to enter into a new contract which had not previously existed. They could not make a dead man liable and so could only make themselves personally liable. Their names were improperly removed and must be restored. Although they had a right of indemnity against the estate, they were personally liable for the full amount outstanding on the shares, regardless as to whether the estate was adequate to indemnify them.

Comment This case probably has more to do with the liability of personal representatives in the law of succession than the law of contract. Personal representatives, like receivers, can be personally liable on contracts which they make, subject to a right of indemnity from the estate. The benefit of the contract is held on trust for the estate. This personal liability rule is essential in order to ensure that personal representatives cannot subject the estate to further debt without risk to themselves. There seems to be no direct contract law authority as to the effect of the death of the offeree. In *Reynolds* v *Atherton* (1922) 127 LT 189, Warrington, LJ said: 'The offer having been made to a living person who ceases to be a living person before the offer is accepted, there is no longer an offer at all. The offer is not intended to be made to a dead person, nor to his executors, and the offer ceases to be an offer capable of acceptance.' There is, however, some Canadian authority. In *Re Irvine* [1928] 3 DLR 268 an offeree gave his son a letter of acceptance to post. The son did not post it until after the offeree's death. The Supreme Court of Ontario held that the acceptance was invalid.

Offer and acceptance not essential: the collateral contract

74 *Rayfield* v *Hands* [1958] 2 All ER 194

The articles of a private company provided by Art 11 that: 'Every member who intends to transfer his shares shall inform the directors who will take the said shares . . . at a fair price.' The claimant held 725 full-paid

shares of £1 each, and he asked the directors to buy them but they refused.

Held – the directors were bound to take the shares. Having regard to what is now s 14(1) of the Companies Act 1985, Art 11 constituted a binding contract between the directors, as members, and the claimant, as a member, in respect of his rights as a member. The word 'will' in the Article did not import an option in the directors. Vaisey, J did say that the conclusion he had reached in this case may not apply to all companies, but it did apply to a private company, because such a company was an intimate concern closely analogous with a partnership.

Comment (i) Although the articles placed the obligation to take shares of members on the directors, Vaisey, J construed this as an obligation falling upon the directors in their capacity as members. Otherwise, the contractual aspect of the provision in the articles would not have applied, since the articles are not a contract between the company and the directors.

(ii) The leading case is *Clarke* v *Dunraven* [1897] AC 59 where it was held that competitors in a regatta had made a contract not only with the club which organised the race but also with each other so that one competitor was able to sue another for damages when his boat was fouled and sank under a rule which said that each competitor was liable 'to pay all damages' that he might cause.

(iii) Section 14(1) of the Companies Act 1985 provides that the provisions in the company's articles and memorandum form a contract between the company and its members, which the parties are bound to observe. Incidentally, the Contracts (Rights of Third Parties) Act 1999, which is further considered in Chapter 10, clearly excludes the operation of s 14(1) from its provisions so that third parties cannot acquire rights under the contract. Thus, the appointment of a person as solicitor or accountant to the company would not operate as a contract enforceable against the company.

MAKING THE CONTRACT II

Consideration need not be adequate so long as it has some economic value

75 ***Thomas* v *Thomas*** (1842) 2 QB 851

The claimant's husband had expressed the wish that the claimant, if she survived him, should have use of his house. He left a will of which his brothers were executors. The will made no mention of the testator's wish that his wife should be given the house. The executors knew of the testator's wish and agreed to allow the widow to occupy the house on payment of £1 per year for so long as she remained unmarried. The claimant remained in possession of the house until the death of one of the executors, Samuel Thomas. The other executor then turned her out. She sued him for breach of contract. It was *held* that the claimant's promise to pay £1 per year was consideration and need not be adequate. The action for breach of contract succeeded.

Comment The rule that consideration need not be adequate allows virtually gratuitous promises to be binding even though not made by deed (and see *Mountford* v *Scott*, above).

76 ***Chappell & Co Ltd* v *Nestlé Co Ltd*** [1959] 2 All ER 701

The claimants owned the copyright in a dance tune called 'Rockin' Shoes', and the defendants were using records of this tune as part of an advertising scheme. A record company made the records for Nestlés which advertised them to the public for 1s 6d each but required in addition three wrappers from their 6d bars of chocolate. When Nestlé received the wrappers, they were thrown away. The claimants sued the defendants for infringement of copyright. It appeared that under s 8 of the Copyright Act of 1956 a person recording musical works for retail sale need not get the permission of the holder of the copyright, but had merely to serve him with notice and pay $6^1/_4$ per cent of the retail selling price as royalty. The claimants asserted that the defendants were not retailing the goods in the sense of the Act and must therefore get permission to use the musical work. The basis of the claimants' case was that retailing meant selling entirely for money, and that as the defendants were selling for money plus wrappers, they needed the claimants' consent. The defence was that the sale was for cash because the wrappers were not part of the consideration. The House of Lords by a majority gave judgment for the claimants. The wrappers were part of the consideration since the offer was to supply a record in return, not simply for money, but for the wrappers as well. On the question of adequacy, Lord Somervell said: 'It is said that, when received, the wrappers are of no value to the respondents, the Nestlé Co Ltd. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.'

Comment (i) There seems to be no doubt that the wrappers could, on their own, have formed the consideration.

(ii) The statutory licence to copy records sold by retail under s 8 of the Copyright Act 1956 was repealed by the Copyright, Designs and Patents Act 1988, Sch 1, para 21. Permission to reproduce is now required even by those retailing the records. However, the case remains a classic example of an adequacy of consideration ruling by the House of Lords.

77 *White* v *Bluett* (1853) 23 LJ Ex 36

This action was brought by White who was the executor of Bluett's father's estate. The claimant White, alleged that Bluett had not paid a promissory note given to his father during his lifetime. Bluett admitted that he had given the note to his father, but said that his father had released him from it in return for a promise not to keep on complaining about the fact that he had been disinherited.

Held – the defence failed and the defendant was liable on the note. The promise not to complain was not sufficient consideration to support his release from the note.

Comment This case illustrates the general point that on formation of contract consideration must be capable of expression in terms of value. On its facts, of course, the case is concerned with consideration on discharge of contract, i.e. the promissory note, where the rule is the same. In addition, the decision seems to be based upon the fact that the son had no right to complain of his disinheritance, so he was not giving up anything which he had a right to do. 'The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be of no consideration', said the judge, Chief Baron Pollock, in the old Exchequer Division of the High Court.

Adequacy of consideration: implied forbearance to sue can support a promise

78 *Horton* v *Horton* [1961] 1 QB 215

The parties were husband and wife. In March 1954, by a separation agreement by deed the husband agreed to pay the wife £30 a month. On the true construction of the deed, the husband should have deducted income tax before payment but for nine months he paid the money without deductions. In January 1955, he signed a document, not by deed, agreeing that instead of 'the monthly sum of £30' he would pay such a monthly sum as 'after deduction of income tax should amount to the clear sum of £30'. For over three years he paid this clear sum but then stopped payment. To an action by his wife he pleaded that the later agreement was unsupported by consideration and that the wife could sue only on the earlier deed. The Court of Appeal *held* that there was consideration to support the later agreement. It was clear that the original deed did not implement the intention of the parties. The wife, therefore, might have sued to rectify the deed and the later agreement represented a compromise of this possible action. Whether such an action would have succeeded was irrelevant; it sufficed that it had some prospect of success and that the wife believed in it.

Comment It will be seen from the facts of this case that although the person who forbears to sue may actually promise not to do so, there may be implied forbearance on the facts. A promise is not essential, provided there is evidence to show that there was some causal connection between the forbearance and the way in which the parties acted.

Adequacy of consideration: the position in bailment

79 *Gilchrist Watt and Sanderson Pty* v *York Products Pty* [1970] 1 WLR 1262

Two cases of German clocks were bought by the respondents and shipped to Sydney. The shipowners arranged for the appellant stevedores to unload the ship. The goods were put in the appellants' shed but when the respondents came to collect them one case of clocks was missing. It was admitted that this was due to the appellants' negligence.

Held – by the Privy Council – that the appellants were liable. Although there was no contract between the parties an obligation to take due care of the goods was created by delivery and voluntary assumption of possession under the sub-bailment.

Comment (i) The matter of consideration and bailment was first raised in *Coggs* v *Bernard* (1703) 2 Ld Ray 909 where the defendant had agreed to take several hogsheads of brandy, belonging to the claimant, from the cellar of one inn to another. One of the casks was broken and the brandy lost and the claimant alleged that this was due to the defendant's carelessness. The defendant denied liability on the ground that there was no consideration to support the agreement to move the casks.

Held – the claimant's suit succeeded. The case seems to have been decided on the ground that once the relationship of bailor and bailee is established certain duties fall upon the bailee independently of any contract.

(ii) It should be borne in mind, of course, that if a person agrees to take charge of goods gratuitously he could not be sued if he fails to take them into his custody. The duty seen in this case arises only when the goods are in the custody of the gratuitous bailee.

Sufficiency of consideration: promise to perform or performance of an existing public or contractural duty will not support a further promise: acts in excess of the duty may

80 *Collins* v *Godefroy* (1831) 1 B & Ad 950

The claimant received a witness summons (previously a subpoena) to give evidence for the defendant in an action to which the defendant was a party. The claimant now sued for the sum of six guineas which he said the defendant had promised him for his attendance.

Held – the claimant's action failed because there was no consideration for the promise. Lord Tenterden said: 'If it be a duty imposed by law upon a party regularly subpoenaed to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration.'

81 *Stilk* v *Myrick* (1809) 2 Camp 317

A sea-captain, being unable to find any substitutes for two sailors who had deserted, promised to divide the wages of the deserters among the rest of the crew if they would work the ship home shorthanded.

Held – the promise was not enforceable because of absence of consideration. In sailing the ship home the crew had done no more than they were already bound to do. Their original contract obliged them to meet the normal emergencies of the voyage of which minor desertions were one. Compare *Hartley* v *Ponsonby* (1857) 7 E & B 872, where a greater remuneration was promised to a seaman to work the ship home when the number of deserters was so great as to render the ship unseaworthy.

Held – this was a binding promise because the sailor had gone beyond his duty in agreeing to sail an unseaworthy ship. In fact, the number of desertions was so great as to discharge the remaining seamen from their original contract, leaving them free to enter into a new bargain.

Comment (i) It must be said that the decision in *Stilk* took a nasty knock in *Williams* v *Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512. The defendants in that case were building contractors. They made a contract to refurbish a block of 27 flats and engaged Mr Williams to carry out carpentry work for £20,000. This turned out to be too low to enable Mr Williams to operate at a profit and after completing some of the flats and receiving interim payments of £16,000 he got into financial difficulties. The defendants, concerned that the job might not be finished on time and that they would in that event have to pay money under a penalty clause in the main contract, made an oral promise to pay Mr Williams a further sum of £10,300 to be paid at the rate of £575 for each flat on which work was completed. Mr Williams was not paid in full for this work and later brought this claim for the additional sum promised. The Court of Appeal *held* that he was entitled to it because where a party to a contract agrees to make an additional payment to secure its performance on time this may provide sufficient consideration contractually to support the extra payment, if the agreement to pay is obtained without economic duress or fraud (see further Chapter 13) and where it ensures the completion of the contract to the paying party's satisfaction and benefit as by avoiding a penalty which was the position here. Apparently, *Stilk* survives only where the person making the promise receives no benefit for it. It would seem to have been possible to find benefit in *Stilk* so that it may well be overruled on its own facts though the Court of Appeal would only say that the principle had been 'refined'.

(ii) The Court of Appeal took a more traditional approach and did not apply the decision in *Williams* in a case entitled *Re Selectmove*, *The Times*, 13 January 1994, where a company was having difficulty paying its taxes and agreed with the Revenue, through one of its officers, to pay by instalments. Some instalments were paid but then, while sums were still owing, the Revenue demanded the balance at once and on failing to get it started proceedings to wind up the company. The Court of Appeal held that the agreement to take instalments was not binding because it was not supported by consideration. The *Williams* case was distinguished because it was concerned with an obligation to supply goods and services, whereas the *Selectmove* case was an obligation to pay money. It was well established by the House of Lords in *Foakes* v *Beer* (1884) (see Case **92**) that an agreement to pay an existing debt by instalments was not enforceable in the absence of either consideration or a deed.

(iii) The facts of *Selectmove* were virtually the same as those in *Foakes*, i.e. payment of debt by instalments without consideration or a deed. Therefore, the Court of Appeal could hardly have decided differently. Nevertheless, it seems a pity that a promise to pay by instalments made in good faith and accepted, initially, by both parties should be ineffective on the technicality of the absence of consideration or a deed.

(iv) The company in *Selectmove* could, of course, have protected itself by agreeing to pay the Revenue a slightly higher rate of interest on the money owed by way of diminishing balance which would have amounted to good consideration for the agreement to pay by instalments.

82 *Glasbrook Bros Ltd* v *Glamorgan County Council* [1925] AC 270

In 1921 the Glamorgan police were asked to provide 100 police officers to be billeted on the premises of Glasbrook's colliery near Swansea because it was

feared that striking miners were going to prevent safety men going into the mine with the consequence that it would be flooded. The owners of the mine signed a document saying that they would pay not only for the services of the officers but also their travelling expenses. Glasbrook's also undertook to provide them with food and sleeping accommodation. Eventually a bill amounting to £2,200 11s 10d was rendered to the claimants by the Glamorgan County Council, for the above services. Glasbrook's refused to pay the bill, alleging that the police were doing no more than was their duty and therefore there was no consideration for Glasbrook's written promise to pay for the protection which they had had.

Held – by the House of Lords – Glasbrook's promise was binding on them on the ground that the number of constables provided was in excess of what the local police superintendent thought was necessary and, therefore, provided consideration over and above the obligation resting on the police to take all steps necessary for protecting property from criminal injury. In the course of his judgment Viscount Cave, LC said:

> No doubt there is an absolute unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, preventing crime, or for protecting property from criminal injury; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right. . . . But it has always been recognized that, where individuals desire that services of a special kind which, though not within the obligations of a police authority, can most effectively be rendered by them, should be performed by members of the police force, the police authorities may . . . 'lend' the services of constables for that purpose in consideration of payment. Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations.

Comment (i) This case was applied in *Harris* v *Sheffield United Football Club* [1987] 2 All ER 838, where Boreham, J held that the provision of policemen at a football ground to keep law and order was the provision of special services by the police. The police authority is under a duty to protect persons and property against crime or threatened crime for which no payment is due. However, the police have no public duty to protect persons and property against the mere fear of possible future crime. The claim of the police authority for some £70,000 for police services provided at the defendants' football ground over 15 months was allowed. The Court of Appeal later affirmed this ruling.

(ii) The issue of exceeding a statutory duty was also raised in *Ward* v *Byham* [1956] 2 All ER 318. In that case an unmarried mother sued to recover a maintenance allowance by the father of the child. The defence was that, under s 42 of the National Assistance Act 1948, the mother of an illegitimate child was bound to maintain it. However, it appeared that in return for the promise of an allowance the mother had promised:

(*a*) to look after the child well and ensure that it was happy; and
(*b*) to allow it to decide whether it should live with her or the father.

Held – there was sufficient consideration to support the promise of an allowance because the promises given in (*a*) and (*b*) above were in excess of the statutory duty, which was merely to care for the child.

(iii) 'Is a promise to make a child happy adequate consideration?' (Compare *White* v *Bluett* (1853).) This point is not taken in the case and shows the considerable power which judges have to find or not to find contractual obligations.

(iv) Cases such as *Ward* v *Byham* (1956) show that the concepts of the law of contract are not confined to business arrangements and so students should have a knowledge of adequacy and sufficiency rulings. However, the concepts are not likely to be met with in business or at least not often. The reason is simple: those in business seldom if ever (perhaps never) enter into commercial transactions for nothing or for inadequate prices or fees. The problem for those in business (and the consumer) is to prevent other businesses charging customers too much!

Sufficiency of consideration: performance of a contractual duty owed by X to Y can support a promise made by Z to X

83 *Shadwell* v *Shadwell* (1860) 9 CB (NS) 159

The claimant was engaged to marry a woman named Ellen Nicholl. In 1838 he received a letter from his uncle, Charles Shadwell, in the following terms: 'I am glad to hear of your intended marriage with Ellen Nicholl and, as I promised to assist you at starting, I am happy to tell you that I will pay you one hundred and fifty pounds yearly during my life and until your income derived from your profession of Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.' The claimant duly married Ellen Nicholl and his income never exceeded six hundred guineas during the 18 years his uncle lived after the marriage. The uncle paid 12 annual sums and

part of the thirteenth but no more. On his death, the claimant sued his uncle's executors for the balance of the 18 instalments to which he suggested he was entitled.

Held – the claimant succeeded even though he was already engaged to Ellen Nicholl when the promise was made. His marriage was sufficient consideration to support his uncle's promise, for, by marrying, the claimant had incurred responsibilities and changed his position in life. Further, the uncle probably derived some benefit in that his desire to see his nephew settled had been satisfied.

Comment (i) In this case the consideration is a little dubious in that it is in part a sentimental benefit to the uncle. This type of consideration, e.g. the 'love and affection' variety, has often been regarded as ineffective to support a contract. Nevertheless, the principle of the case is a good one and makes more sense in a business context. (See *New Zealand Shipping Co Ltd* v *Satterthwaite* (1974), Chapter 15.)

(ii) An engagement to marry is no longer binding as a contract: see s 1 of the Law Reform (Miscellaneous Provisions) Act 1970.

Past consideration: where a particular activity is undertaken without any promise of payment, a subsequent promise to pay is not actionable. If there is a request to carry out the act in a commercial situation where a promise to pay can be implied, the subsequent promise may be enforceable

84 ***Re McArdle*** [1951] Ch 669

Certain children were entitled under their father's will to a house. However, their mother had a life interest in the property and during her lifetime one of the children and his wife came to live in the house with the mother. The wife carried out certain improvements to the property, and, after she had done so, the children signed a document addressed to her stating: 'In consideration of your carrying out certain alterations and improvements to the property . . . at present occupied by you, the beneficiaries under the Will of William Edward McArdle hereby agree that the executors, the National Provincial Bank Ltd, . . . shall repay to you from the said estate when so distributed the sum of £488 in settlement of the amount spent on such improvements . . .'. On the death of the testator's widow the children refused to authorise payment of the sum of £488, and this action was brought to decide the validity of the claim.

Held – since the improvements had been carried out before the document was executed, the consideration was past and the promise could not be enforced.

Comment (i) The rule applied also in *Roscorla* v *Thomas* (1842) 3 QB 234 where a horse was sold and the seller after the sale gave a warranty as to its quality, i.e. that it was not vicious whereas it was. There was no action on the warranty by the buyer.

(ii) If Mrs McArdle had actually been paid by a cheque, she would not have been able to sue upon it under s 27 of the Bills of Exchange Act 1882 because her acts were gratuitous and did not create an antecedent (or previous) debt or liability, for which she could have claimed to be paid in legal tender or otherwise.

85 ***Re Casey's Patents, Stewart* v *Casey*** [1892] 1 Ch 104

Patents were granted to Stewart and another in respect of an invention concerning appliances and vessels for transporting and storing inflammable liquids. Stewart entered into an arrangement with Casey, whereby Casey was to introduce the patents. Casey spent two years 'pushing' the invention and then the joint owners of the patent rights wrote to him as follows: 'In consideration of your services as the practical manager in working both patents we hereby agree to give you one-third share of the patents.' Casey also received the letters patent. Some time later Stewart died and his executors claimed the recovery of the letters patent from Casey, suggesting that he had no interest in them because the consideration for the promise to give him a one-third share was past.

Held – the previous request to render the services raised an implied promise to pay. The subsequent promise could be regarded as fixing the value of the services so that Casey was entitled to a one-third share of the patent rights.

Privity of contract: effect of the rule: remedies (if any) available to a person not in privity

86 ***Tweddle* v *Atkinson*** (1861) 1 B & S 393

William Tweddle, the claimant, was married to the daughter of William Guy. In order to provide for the couple, Guy promised the claimant's father to pay the claimant £200 if the claimant's father would pay the claimant £100. An agreement was accordingly drawn up containing the above-mentioned promise, and giving William Tweddle the right to sue either promisor for the sums promised. Guy did not make the promised payment during his lifetime and the claimant now sued Guy's executor.

Held – the claimant's action failed because he had not given any consideration to Guy in return for the promise to pay £200. The provision in the agreement allowing William Tweddle to sue was of no effect without consideration.

87 *Dunlop* v *Selfridge* [1915] AC 847

The appellants were motor tyre manufacturers and sold tyres to Messrs Dew & Co who were motor accessory dealers. Under the terms of the contract, Dew & Co agreed not to sell the tyres below Dunlop's list price, i.e. £4.05 per tyre, and as Dunlop's agents, to obtain from other traders a similar undertaking. In return for this undertaking Dew & Co were to receive special discounts, some of which they could, if they wished, pass on to retailers who bought tyres. Selfridge & Co accepted two orders from customers for Dunlop covers at a lower price. They obtained the covers through Dew & Co and signed an agreement not to sell or offer the tyres below the list price. For giving this undertaking, Dew & Co gave them part of the discount received by Dew & Co from Dunlop. It was further agreed that £5 per tyre sold should be paid to Dunlop by way of liquidated damages. Selfridge supplied one of the two tyres ordered below list prices, i.e. at £3.65 per tyre. They did not actually supply the other, but informed the customer that they could only supply it at list price. The appellants claimed an injunction and damages against the respondents for breach of the agreement made with Dew & Co, claiming that Dew & Co were their agents in the matter.

Held – there was no contract between the parties. Dunlop could not enforce the contract made between the respondents and Dew & Co because they had not supplied consideration. Even if Dunlop were undisclosed principals, there was no consideration moving between them and the respondents. The discount received by Selfridge was part of that given by Dunlop to Dew & Co. Since Dew & Co were not bound to give any part of their discount to retailers, the discount received by Selfridge operated only as consideration between themselves and Dew & Co and could not be claimed by Dunlop as consideration to support a promise not to sell below list price.

Comment (i) It was in this case that the House of Lords adopted the definition of consideration given by Sir Frederick Pollock, i.e.: 'An act or forbearance of one party, *or the promise thereof*, is the price for which *the promise* of the other is bought and *the promise* thus given for value is enforceable.'

(ii) The case would now be dealt with under the Competition Act 1998. A resale price agreement is outlawed by s 2(2)(a) of the Act as an agreement preventing, restricting or distorting competition. The automatic result of breaching the 1998 Act is to make the offending parts of the agreement null and void so that the resale price aspect would not be enforceable. If it is possible to sever other legal provisions in the contract, these may be enforced and it may well be that the court would allow a claim by a buyer who has taken goods under the contract for breach of condition or warranty in regard to the quality of the goods. The Act does not specifically set out a right of private action as was seen in the *Dunlop* case. However, s 60(6)(b) says, in effect, that there is a private right of action under the Act (which mirrors EU law) if, and only if, there is a similar right under EU competition law. Most of those who have commented on the Act believe that EU law provides a right to damages and as appropriate an injunction. So damages and injunctions are clearly available to those who have suffered as a result of infringements of the 1998 Act. These individual claims are further considered in Chapter 16.

(iii) The case will live on because of the definition of consideration given in it. It is not such a good example of privity on its own facts because in the modern context the contract is unenforceable *because it is void* under competition law.

88 *Jackson* v *Horizon Holidays* [1975] 3 All ER 92

Mr Jackson had booked a four-week holiday in a hotel in Ceylon for himself and his family, everything to be 'of the highest standard'. The brochure issued by the defendants described the hotel as enjoying many facilities including a mini golf course, a swimming pool, and beauty and hairdressing salons. None of these in fact materialised and the food was distasteful. It was *held* that Mr Jackson could sue on the contract not only for his own loss and disappointment but also for that of his family. The decision was based on the fact that Mr Jackson had entered into the contract partly for the benefit of his family. On that basis an award of damages of £1,100 was not excessive. In the course of his judgment Lord Denning, MR said: 'The case comes within the principle stated by Lush, LJ in *Lloyd's* v *Harper* [1880] 16 Ch D 290 at p. 321: "... I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself." ' Speaking of these words, Lord Denning said: 'I think they should be accepted as correct, at any rate so long as the law forbids the third persons themselves to sue for damages. It is the only way in which a just result can be achieved.'

Comment (i) This judgment of Lord Denning has been much criticised since it infringes a very old rule of English contract law which states that if A contracts with B in return for B's promise to do something for C, if B then repudiates the contract, C has no enforceable claim, and A is restricted to an action for nominal damages by reason of his having suffered no loss. The judgment in *Jackson* was criticised by the Lords in *Woodar* v *Wimpey*

[1980] 1 All ER 571 and they assumed that only nominal damages were available in *Beswick* (see below) so that it must be regarded with caution.

The House of Lords said that the *Jackson* case could be justified on the basis that Mr Jackson *actually saw* his family suffering discomfort and disappointment. Their Lordships would not, however, accept that there was a general rule in contract that A could recover damages from B in respect of loss suffered by C.

(ii) If damages are recovered under the ruling given by Lord Denning in *Jackson*, the recipient must hand over the relevant shares to the other members of the family, and if he does not they can sue him in quasi-contract (see Chapter 18).

(iii) The House of Lords ruling in *Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 is worth nothing. The owner of a site made a building contract with a contractor to erect offices, shops and flats. The site when developed was transferred to a third party who suffered loss because of the contractor's bad workmanship. The site owner sued for damages and was awarded full damages even though he had parted with the site but only because their Lordships found on the facts that the parties had envisaged that the site would be transferred to the third party and the contractor had impliedly taken on liability to him. The damages were held by the site owner *for the benefit of the third party* who had suffered the loss. The case provides an exception to the general rule that a claimant can only recover damages for his own loss and that a claimant who sues on behalf of others will only recover nominal damages. The implication of liability to the third party made the difference.

(iv) The solution is now clear: make sure that your third-party beneficiaries (here the family) are named in the contract and then they will be able to sue in their own right under the Contracts (Rights of Third Parties) Act 1999. In fact, the 1999 Act may well have applied here without naming the third parties specifically since the 1999 Act allows identification to be by description, e.g. 'Mr J Bloggs and family'. That expression in a contract could well cover those members of Mr Bloggs' family accompanying him.

89 *Beswick* v *Beswick* [1967] 2 All ER 1197

A coal merchant agreed to sell the business to his nephew in return for a weekly consultancy fee of £6 10s payable during his liftime, and after his death an annuity of £5 per week was to be payable to his widow for her lifetime. After the agreement was signed, the nephew took over the business and paid his uncle the sum of £6 10s as agreed. The uncle died on 3 November 1963, and the nephew paid the widow one sum of £5 and then refused to pay her any more. On 30 June 1964, the widow became the administratrix of her husband's estate, and on 15 July 1964, she brought an action against the nephew for arrears of the weekly sums and for specific performance of the agreement for the future. She sued in her capacity as administratrix of the estate and also in her personal capacity. Her action failed at first instance and on appeal to the Court of Appeal, [1966] 3 All ER 1, it was decided amongst other things that:

(*a*) specific performance could in a proper case be ordered of a contract to pay money;
(*b*) 'property' in s 56(1) of the Law of Property Act 1925 included a contractual claim not concerned with realty and that, therefore, a third party could sue on a contract to which he was a stranger. The widow's claim in her personal capacity was, therefore, good (*per* Denning, MR and Danckwerts, LJ);
(*c*) the widow's claim as administratrix was good because she was not suing in her personal capacity but on behalf of her deceased husband, who had been a party to the agreement;
(*d*) that no trust in her favour could be inferred.

There was a further appeal to the House of Lords, though not on the creation of a trust, and there it was *held* that the widow's claim as administratrix succeeded, and that specific performance of a contract to pay money could be granted in a proper case. However, having decided the appeal on these grounds, their Lordships went on to say that the widow's personal claim would have failed because s 56 of the Law of Property Act 1925 was limited to cases involving realty. The 1925 Act was a consolidating not a codifying measure, so that if it contained words which were capable of more than one construction, effect should be given to the construction which did not alter the law. It was accepted that when the present provision was contained in the Real Property Act 1845, it had applied only to realty. Although s 205(1) of the 1925 Act appeared to have extended the provision to personal property, including things in action, it was expressly qualified by the words 'unless the context otherwise requires', and it was felt that Parliament had not intended to sweep away the rule of privity by what was in effect a sidewind.

Comment (i) Here the problem of whether or not to award nominal damages to the claimant referred to in *Jackson*'s case was overcome because the court awarded specific performance. However, four Law Lords said that if damages had been awarded they would have been nominal only, though Lord Pearce would have awarded substantial damages. Furthermore, it is unlikely that s 56 does have a very wide application. The sub-section says that a person may take the benefit of an agreement

although he is not 'named as a party'. The legislation does not say that he need not *be a party*. There are those who take the view, therefore, that s 56(1) is designed to cover the situation where there is a covenant over land in favour of, say, 'the owner of Whiteacre', so that the owner of Whiteacre could benefit from the covenant, provided he could be ascertained, even though he was not named in the instrument creating the covenant. If this interpretation is correct, then s 56(1) of the 1925 Act has little effect on the law of contract generally.

(ii) The circumstances of this case are ideal for the application of the Contracts (Rights of Third Parties) Act 1999. If the contract between the coal merchant and his nephew had expressly provided that the widow could sue, she would have succeeded in her personal capacity and the case would probably have never come to court. In any case, s 1(1)(b) of the Act applies in that the contract conferred a benefit on her, which in itself would have allowed her to claim in a personal capacity on the assumption that her rights had not been excluded, as the 1999 Act allows.

Privity of contract: exceptions in the case of benefits and burdens attaching to land

90 *Smith and Snipes Hall Farm Ltd* v *River Douglas Catchment Board* [1949] 2 KB 500

In 1938 the defendants entered into an agreement with 11 persons owning land adjoining a certain stream, that, on the landowners paying some part of the cost, the defendants would improve the banks of the stream and maintain the said banks for all time. In 1940 one landowner sold her land to Smith, and in 1944 Smith leased the land to Snipes Hall Farm Ltd. In 1946, because of the defendant's negligence, the banks burst and the adjoining land was flooded.

Held – the claimants could enforce the covenant given in the agreement of 1938 even though they were strangers to it. The covenants were for the benefit of the land and affected its use and value and could therefore be transferred with it.

91 *Tulk* v *Moxhay* (1848) 2 Ph 774

The claimant was the owner of several plots of land in Leicester Square and in 1808 he sold one of them to a person called Elms. Elms agreed, for himself, his heirs and assigns, 'to keep the Square Garden open as a pleasure ground and uncovered with buildings'. After a number of conveyances, the land was sold to the defendant who claimed a right to build on it. The claimant sued for an injunction preventing the development of the land. The defendant, whilst admitting that he purchased the land with notice of the covenant, claimed that he was not bound by it because he had not himself entered into it.

Held – an injunction to restrain building would be granted because there was a jurisdiction in equity to prevent, by way of injunction, acts inconsistent with a restrictive covenant on land, so long as the land was acquired with notice of the covenant, and the claimant retains land which can benefit from the covenant.

Comment (i) Such notice may now be constructive where the covenant is registered under land charges legislation. Knowledge need not be actual. It is assumed everyone knows, whether they have seen the register or not.

(ii) It was held in *Roake* v *Chadha* [1983] 3 All ER 503 that whether a covenant runs with the land depends upon its wording. If the words used in it prevent the benefit of the covenant, in this case that the plot holder of land would not build more than one house on it, passing to a subsequent owner of the land unless specifically assigned to him by the present owner, then the covenant would not run with the land as such but would depend upon assignment.

The common law rule of accord and satisfaction: agreed variations in contractual obligations are generally unenforceable without consideration

92 *Foakes* v *Beer* (1884) 9 App Cas 605

Mrs Beer had obtained a judgment against Dr Foakes for debt and costs. Dr Foakes agreed to settle the judgment debt by paying £500 down and £150 per half-year until the whole was paid, and Mrs Beer agreed not to take further action on the judgment. Dr Foakes duly paid the amount of the judgment plus costs. However, judgment debts carry interest by statute, and while Dr Foakes had been paying off the debt, interest amounting to £360 had been accruing on the diminishing balance. In this action Mrs Beer claimed the £360.

Held – she could do so. Her promise not to take further action on the judgment was not supported by any consideration moving from Dr Foakes. *Pinnel*'s Case applied.

Comment (i) In view of the possible development of equity envisaged by Lord Denning in the *D & C Builders* case, see below, it might be better to restrict the application of this case to situations where the promise has been extorted and not freely given. If this were so, *Foakes* v *Beer* would be reconcilable with any development of the equitable rule of promissory estoppel on the lines envisaged by Lord Denning in *D & C Builders* v *Rees*.

(ii) However, in *Re Selectmove* (1994) the Court of Appeal followed *Foakes* by deciding that a promise to allow payment by instalments was invalid because it was not supported by consideration and even though the promise to accept instalments had in no way been extorted.

Accord and satisfaction: payment by cheque is not substituted performance: promissory estoppel may, in appropriate circumstances, extinguish as distinct from suspend contractual rights

93 *D & C Builders Ltd* v *Rees* [1965] 3 All ER 837

D & C Builders, a small company, did work for Rees for which he owed £482 13s 1d. There was at first no dispute as to the work done but Rees did not pay. In August and October 1964, the claimants wrote for the money and received no reply. On 13 November 1964, the wife of Rees (who was then ill) telephoned the claimants, complained about the work, and said, 'My husband will offer you £300 in settlement. That is all you will get. It is to be in satisfaction.' D & C Builders, being in desperate straits and faced with bankruptcy without the money, offered to take the £300 and allow a year to Rees to find the balance. Mrs Rees replied: 'No, we will never have enough money to pay the balance. £300 is better than nothing.' The claimants then said: 'We have no choice but to accept.' Mrs Rees gave the claimants a cheque and insisted on a receipt 'in completion of the account'. The claimants, being worried about their financial position, took legal advice and later brought an action for the balance. The defence was bad workmanship and that there was a binding settlement. The question of settlement was tried as a preliminary issue and the judge, following *Goddard* v *O'Brien* [1880] 9 QBD 33, decided that a cheque for a smaller amount was a good discharge of the debt, this being the generally accepted view of the law since that date. On appeal it was *held* (by the Master of the Rolls, Lord Denning) that *Goddard* v *O'Brien* was wrongly decided. A smaller sum in cash could be no settlement of a larger sum and 'no sensible distinction could be drawn between the payment of a lesser sum by cash and the payment of it by cheque'.

In the course of his judgment Lord Denning said of *High Trees*:

> It is worth noting that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.
>
> This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. . . . But he is not bound unless there has been truly an accord between them.

In the present case there was no true accord. The debtor's wife had held the creditors to ransom, and there was no reason in law or equity why the claimants should not enforce the full amount of debt.

Comment (i) The case also illustrates the requirements of equality of bargaining power and the absence of economic duress in the negotiation (or as here, the re-negotiation) of a contract. (See also *Lloyds Bank* v *Bundy* (1974), Chapter 13.)

(ii) It was held in *Stour Valley Builders (a Firm)* v *Stuart*, *The Times*, 22 February 1993 that the fact that a cheque for a lesser sum, said to be given in full satisfaction but without consideration, was cashed by the recipient did not prevent him from suing for the balance, even though the cashing of the cheque might indicate agreement to take a lesser sum. The decision serves to confirm that, at common law, an *agreement*, express or implied, to change existing obligations is ineffective unless it is a *contract*.

(iii) The same rule was applied in *Inland Revenue Commissioners* v *Fry* [2001] STC 1715 where a cheque in payment of only half the tax bill was sent to the Revenue 'in full and final settlement'. The Revenue was able to sue for the balance even though the cheque had been cashed.

Accord and satisfaction: compromises between creditors

94 *Good* v *Cheesman* (1831) 2 B & Ad 328

The defendant had accepted two bills of exchange of which the claimant was the drawer. After the bills became due and before this action was brought, the claimant suggested that the defendant meet his creditors with a view perhaps to an agreement. The meeting was duly held and the defendant entered into an agreement with his creditors whereby the defendant was to pay one-third of his income to a trustee to be named by the creditors, and that this was to be the method by which the defendant's debts were to be paid. It was not clear from the evidence whether the claimant attended the meeting, though he certainly did not sign the agreement. There was, however, evidence that the agreement had been in his possession for some time and it was duly stamped before the trial. No trustee was in fact appointed, though the defendant was willing to go on with the agreement.