FACULTE DE DROIT ET DE SCIENCE POLITIQUE

DEPARTEMENT DE LANGUES JURIDIQUES

ENGLISH: CONTRACT LAW

CASEBOOK

LICENCE 3 – DROIT
2021

ROLE DUTIES
In order of appearance during the moot[1] presentation

JUDGE

- Introduce the case (parties, court, judge, procedural posture[2], date)
- Define the relevant vocabulary (minimum of 4 words/phrases)
- Define the problem(s) that the court is going to solve (the issue) « whether…when »
- Take notes and ask the speakers questions to make sure that their arguments are clear to the jury (the class)
- After the 'Jury' has asked their questions, give the Court's analysis and pronounce judgment.

LEAD COUNSEL[3] FOR THE PLAINTIFF[4]

- Present the facts of the case from your client's point of view
- Give the court the rules of law, including case citations and other legal references
- After the Defence has made their legal arguments demand judgment for your client.

ASSISTANT COUNSEL FOR THE PLAINTIFF

- Make arguments for your client using the rules of law introduced by the Lead Counsel
- If the rules of law are not in favour of your client, distinguish the facts of your case from the case rules cited.

LEAD COUNSEL FOR THE DEFENDANT

- Present the facts of the case from your client's point of view
- Give the court the rules of law, including case citations and other legal references
- After Counsel for the Plaintiff has made their demand for judgement, demand judgment for your client.

ASSISTANT COUNSEL FOR THE DEFENDANT

- Make arguments for your client using the rules of law introduced by the Lead Counsel
- If the rules of law are not in favour of your client, distinguish the facts of your case from the case rules cited.

JURY (the class)

- Ask the judge questions to clarify the court's analysis of the facts and laws
- Ask counsel questions related to their arguments, the facts, the rules of law
- Vote on the winning party - be prepared to justify your vote
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WITNESSES (optional extra roles)

- Create a role for a person likely to have important, relevant knowledge of the issue
- Can be called to the stand to testify for either party
- Should be sworn in before they testify : « I promise to tell the truth, the whole truth and nothing but the truth (so help me God) »

[1] A moot is an argument on points of law which aims to simulate, as far as possible, an authentic court hearing before a judge. A successful mooter is one who manages to persuade the judge of the superiority of his or her legal arguments.
[2] Which court the case started in and the path it took through appeals to get to the current court.
[3] A barrister or other legal adviser conducting a case: *the counsel for the defence*
[4] In contract law the plaintiff is the party that brings the action to court, they may be referred to as the applicant or claimant.

GENERAL PRESENTATION TIPS AND USE OF LANGUAGE

1. **Do not read your speech,** you may use an outline of the case to help you remember points for your presentation. However you may not read your notes. Reading from your notes will cause your grade to be lowered. The only way to score the maximum points is to present your information from memory. Preparation is very important.

2. **Put your presentation in your own words**. Copying text from the case, word for word, does not demonstrate your understanding of the case. The only exception to this is for rules of law which may be read word for words (quotes and excerpts from legislation).

3. **Practice your pronunciation.** Proper pronunciation can mean the difference between the jury and your teacher understanding your argument, giving you maximum points, and them being completely lost as to what you are saying and giving you few points. Some words mean different things when pronounced differently. Some mispronunciations are distracting enough that your listener may miss much of what you say after the mispronunciation. If you have an English-speaking friend or family member, practice your presentation in front of them and ask for help with pronunciation. You can also check online via online dictionaries where you can hear the word pronounced correctly.

4. **Mind your word choice.** You can really impress the jury and your teacher with your ability to use legal English if you are making purposeful word choices. Your job as a lawyer in the courtroom is to convince the judge and jury that you have the most compelling case. You can be more compelling with your word choice because words have power. There are stronger and softer words that you can use to change the impact of an argument. This can sway your audience a great deal.

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5. **Use your legal English.** When the judge/jury asks you questions about your case, use a legal English answer. If you've read and understood your case very well, many of the terms you can use are in it. All of the case summaries are fill of legal English words and phrases that you will be able to use in any legal English situation, not just your presentation in class.

6. **Listen attentively to questions.** If you don't understand a question, ask the questioner to repeat using a phrase like 'I'm afraid I don't understand. Can you please repeat the question?'

7. **Avoid using language which expresses doubt.** In court an advocate will never say "I think..." or "In my opinion..." in the presentation of their arguments; the correct form is that which connotes the advancement of opposing ideas, such as "I submit..." or "It is my submission that..." or even "I suggest...".

8. **Don't be afraid of silence.** Find the right words to use. If you don't know the exact legal English, use words that are close as possible with the same meaning.

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9. **Don't try to make the jury laugh.** Unless humour is critical to winning your case, making your presentation a stand-up comedy routine indicates you do not appreciate the seriousness of courtroom proceedings.

10. **Don't ramble.** Be as concise as possible. Stick to the points of each argument.

11. **Don't rifle through your papers or shuffle them in front of you.** Don't hold papers in front of your face, or focus on the papers. They are just there to support you. They should be well organised and prepared that you don't have to do this. It will also distract you from being methodical in your arguments.

12. **Stand when addressing the jury or the judge.** The judge, on the other hand, should sit.

13. **Wait your turn.** Do not interrupt the other lawyers when they are presenting. The exception would be in relation to an objection.

14. **Use the correct form of address when speaking to the judge.** The first speaker in the moot must introduce himself or herself and the three other speakers, and should say, "May it please your

lordship, I am [Caroline Whitmore] and I appear in this matter on behalf of the [appellant], together with my learned friend [Miss Sally Webb], and the [respondent] is represented by my learned friends [Mr William Postgate] and [Miss Mary White]." Always end your submission by asking the judge if there are any questions to be asked by saying, "Unless I can help your lordship any further...", wait to see if you can, then thank the judge and sit down.

Address the judge as "Your Honour". When agreeing or disagreeing with the judge always do so "with respect...". If the judge directs you to address a particular point, say, "If your Honour pleases".

Refer to other speakers as "My learned friend" or "My learned junior/leader".

15. **Use eye contact and good posture to maintain the attention of your audience**. Scan the eyes of the jury members. Address the judge looking at them.

A successful mooter will:

- be familiar with the facts of the case but not speculate
- offer well-structured, clear arguments without reading from a script
- refer to case law to support his/her arguments but will avoid lengthy quotations
- be able to spontaneously discuss the strengths and weaknesses of the argument with the judge and to answer questions from the jury.

PREPARING A CASE BRIEF

Although individuals or law firms will generally have their own preferred methods of structuring a case brief, it is typical that they include the following elements.

CASE STYLE

- Party Names and their roles (plaintiff, defendant, appellant, appellee)
- Procedural Posture (where the case started – what court – and the path it took through appeals or motions to get to the current court). Useful terminology includes phrases like; 'The lower court held that…', or 'The appeals court reversed the lower court's decision…'.

SUMMARY OF FACTS

- Relevant facts only. This can be told chronologically if it will help your audience understand the case better.
- One way to begin this discussion is to say, 'The facts of the case are as follows…'

ISSUE

- Define the problem that the court is going to resolve. Sometimes there is more than one issue.
- Frame this by using the 'whether… when' format.
  Whether [insert legal problem] when [facts from the case].

RULE / LAW

- These are the 'rules of law' or 'laws' that the court cites in the case opinion or judgment. Often these case citations or citations of statute come from the lawyers who argue the case. They often appear in a case opinion like this: Jones v Walker, 340 Us 32, 35 (1956). If they are statutes they can appear like this: s128(a) Corporations Act 2001 (Cth), or Fed. R. Civ. Pro. 12(h)(3)(2010).
- Not rules of law, but regularly cited in case opinions, are persuasive texts that the courts use to help understand and illustrate some common law rules. Examples include the American Jurisprudence, CJS (Corpus Juris Secundum), or Restatements. These texts define rules of law in general, but are not authoritative texts that the court must follow.

ANALYSIS

- An account of the reasons leading to the court's holding (decision). An application of the facts to the law, often including a history of the law as it has developed, mentioning previous cases and established principles of law.
- Use phrases like, 'The court reasoned that…' when you are explaining why a court has made a decision, you are relying upon.

CONCLUSION

- Also known as the court's holding or decision.
- Includes the procedural posture, or whether the case will go from here (reversed, remanded, upheld, dismissed, rejected).
- Use phrases like 'The court held that…' or 'The court's holding was…'.

CASES FOR MOOTS

1. **EDGINGTON V. FITZMAURICE** Court of Appeal 29 ChD 495 (1885) May 12 1884.
2. **WOOD V. BOYNTON** 25 N.W. 42 (Wis. 1885).
3. **BARTON V. ARMSTRONG** [1975] 2 AER 465, 5 December 1973.
4. **LLOYDS BANK LTD V. BUNDY** Court of Appeal, Civil Division [1975] QB 326, 30 July 1974.
5. **TAYLOR V. CALDWELL** King's Bench, 3 B. & S. 826, 122 Eng. Rep. 309 (1863)
6. **KIRKLAND V. ARCHBOLD** Court of Appeals of Ohio, Cuyahogn County, 1953. 113 N.E.2d 496.
7. **RAFFLES V. WICHENHAUS** In the Court of the Exchequer, 1864. 2 Hurl. & C. 906.

Case 1:

EDGINGTON v. FITZMAURICE
Court of Appeals
29 ChD 459 (1885)
May 12 1884

FACTS: The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The Plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus offered a charge upon the property of the company, and stated in his evidence that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent

...

FRY LJ:

...

[W]ith respect to the statement of the objects for which the debentures were issued, I have come to the conclusion that there was a misstatement of fact, that the statement contained in the circular was false in fact and false to the knowledge of the Defendants. Was the statement true in fact? The circular was adopted at a meeting of the board when all the Defendants were present. The financial state of the company was considered. They owed £5000 to their bankers, and £5000 to Hores & Pattisson. The owed large sums to tradesmen other persons. They were under an obligation to pay £3500 in instalments on the mortgage for £21,500 before April, 1884, and they knew that if they did not pay the instalments, the whole would be called in. The necessity of raising money must have been discussed at the meeting.

It is clear that their object in raising the money was to meet their pressing liabilities. But the Defendants say that the mortgage for £5000 to Hores & Pattisson was only a temporary loan, and that the greater part of it was expended in alterations and additions to the buildings, and therefore the mortgage was merely an anticipation of the loan for the objects stated in the prospectus. But the statement in the prospectus was that a large sum of money had been already expended in improving the building (and that included the greater part of the advance by Hores & Pattisson), and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was therefore false.

It is not necessary to call attention to the evidence, that the Defendants knew at the time that a large proportion of the loan would have to be expended in paying pressing liabilities. It is hardly denied by the Defendants. I come, therefore, to the conclusion, with regret, that this false statement was not only false in fact, but was false to the knowledge of the Defendants.

The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader.

Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own

mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed.

COTTON LJ:

This case has been very fully and ably argued. It is what is called an action of deceit, the Plaintiff alleging that statements were made by the Defendants which were untrue, and that he had acted on the faith of those statements so as to incur damage for which the Defendants are liable. In order to sustain such an action the Plaintiff must show that the Defendants intended that people should act on the statements, that the statements are untrue in fact, and that the Defendants knew them to be untrue, or made them under such circumstances that the Court must conclude that they were careless whether they were true or not. The statements in question were made in a prospectus or circular issued by the Defendants for the purpose of getting subscribers to a loan, and the Plaintiff alleges that he understood from them that the advances were to be secured by a mortgage on leasehold property of the company. In my opinion there was no good ground for his so believing. There was nothing in the prospectus to lead him to such a conclusion. The debentures were merely bonds, and the Plaintiff made no objection to their form at the time when he received them. Therefore if the question had rested on that alone there could be no difficulty. But it does not end there. The Plaintiff also complains that the circular referred to one mortgage, and stated that it was to be paid off by half-yearly installments of £500, but did not state that the mortgage money could be demanded in a lump sum in a few years; and further, that it omitted to state another mortgage for £5000, which was not to be paid off by installments, but was payable in two months. I do not think it necessary to go into the consideration of these statements. As regards the first mortgage the Defendants say that they had reasonable grounds for making the statement which they made, and as to the second mortgage they say that they did not mean to imply that there was no other mortgage affecting the company's property. But it is not necessary to give any decision respecting these statements, because, giving credit to the Defendants for having made them fairly, there are other statements which follow, which, in my opinion, cannot be justified. I allude to statements respecting the objects for which the loan was effected: - [His Lordship read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded: -] It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the Defendants liable to the Plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact, and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus the Defendants were stating a fact which was not true; and if they knew that it was not true, or made it recklessly, not caring whether it was true or not, they would be liable. Did the Defendants know or believe that the company was in a flourishing condition? I think they must have thought that it would turn out well and that the loan could be paid back, for they had shown their confidence in the company by advancing money of their own. But the question is whether they did not make a statement of a fact which was not correct, and which they knew to be not correct when they stated the objects for which the loan was asked. I do not say that it was necessary to show that they intended that all the money raised should be applied in carrying out those particular objects, but certainly they ought to show that it was to be spent in improving the property and business of the company. What is the fact? The financial state of the company was openly discussed at the board meetings, at which the Defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the Defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties; and, considering all the other evidence, and the admissions of the

Defendants in their cross-examination, I cannot doubt that the real object of the issue of debentures was to meet the pressing liabilities of the company and not to improve the property or develop the business of the company. I cannot but come to the conclusion that however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. It was said, How could those who advanced the money have relied on this statement as material? I think it was material. A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred.

But it was urged by the counsel for the Appellants that the Plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion which really induced the Plaintiff to advance his money. In my opinion this argument does not assist the Defendants if the Plaintiff really acted on the statement in the prospectus. It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to show that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will be still liable. Did he act upon that misstatement? He states distinctly in his evidence that he did rely on the Defendants' statements, and the learned Judge found, as a fact, that he did, and it would be wrong for this Court, without seeing or hearing the witness, to reverse that finding of the Judge. We must therefore come to the conclusion that the statements in the prospectus as to the objects of the issue of the debentures were false in fact, and were relied upon by the Plaintiff.

With respect to the Defendant Clench, we are not called on to express an opinion on the points in which his case differs from that of the other directors. I am not influenced by the misstatement as to the mortgage. The point on which I rely is the misstatement as to the objects of the loan, in which the Defendants all joined, and for which they are all equally responsible.

The judgment must be affirmed.

BOWEN LJ:

This is an action for deceit, in which the Plaintiff complains that he was induced to take certain debentures by the misrepresentations of the Defendants, and that he sustained damage thereby. The loss which the Plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord Blackburn's judgment in Smith. v. Chadwick , but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it and has sustained damage by so doing: you must show that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting. So the law is laid down in Clarke v. Dickson , and that is the law which we have now to apply.

The alleged misrepresentations were three. First, it was said that the prospectus contained an implied allegation that the mortgage for £21,500 could not be called in at once, but was payable by installments. I think that upon a fair construction of the prospectus it does so allege; and therefore that the prospectus

must be taken to have contained an untrue statement on that point; but it does not appear to me clear that the statement was fraudulently made by the Defendants. It is therefore immaterial to consider whether the Plaintiff was induced to act as he did by that statement.

Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the Defendants that it was made dishonestly; accordingly, although the Plaintiff may have been damnified by the weight which he gave to the allegation, he cannot rely on it in this action: for in an action of deceit the Plaintiff must prove dishonesty. Therefore if the case had rested on these two allegations alone, I think it would be too uncertain to entitle the Plaintiff to succeed.

But when we come to the third alleged misstatement I feel that the Plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develope the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the Defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the Defendants, I am satisfied that the objects for which the loan was wanted were misstated by the Defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

Then the question remains - Did this misstatement contribute to induce the Plaintiff to advance his money. Mr. Davey's argument has not convinced me that they did not. He contended that the Plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the Plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned Judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

FRY LJ:

I am of the same opinion. I do not think it necessary to refer to the two alleged misstatements as to the mortgages, because I do not rely on that portion of the case. But with respect to the statement of the objects for which the debentures were issued, I have come to the conclusion that there was a misstatement of fact, that the statement contained in the circular was false in fact and false to the knowledge of the Defendants. Was the statement true in fact? The circular was adopted at a meeting of

the board when all the Defendants were present. The financial state of the company was considered. They owed £5000 to their bankers, and £5000 to Hores & Pattisson. They owed large sums to tradesmen and other persons. They were under an obligation to pay £3500 in instalments on the mortgage for £21,500 before April, 1884, and they knew that if they did not pay the instalments, the whole would be called in. The necessity of raising money must have been discussed at the meeting. It is clear that their object in raising the money was to meet their pressing liabilities. But the Defendants say that the mortgage for £5000 to Hores & Pattisson was only a temporary loan, and that the greater part of it was expended in alterations and additions to the buildings, and therefore the mortgage was merely an anticipation of the loan for the objects stated in the prospectus. But the statement in the prospectus was that a large sum of money had been already expended in improving the building (and that included the greater part of the advance by Hores & Pattisson), and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was therefore false.

It is not necessary to call attention to the evidence, that the Defendants knew at the time that a large proportion of the loan would have to be expended in paying pressing liabilities. It is hardly denied by the Defendants. I come, therefore. to the conclusion, with regret, that this false statement was not only false in fact, but was false to the knowledge of the Defendants.

The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed.

Case 2:

WOOD v. BOYNTON
25 N.W. 42 (Wis. 1885)

Taylor, J.

This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court and, after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and, after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box, --the pin, -- a small earring; . . . this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and spent some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?" I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the 28th of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz and he says "Well, yes; what did I offer you for it?," and I says, "One dollar"; and he stepped to the change drawer and gave me the dollar, and I went out.

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg, -- worn pointed at one end; it was nearly straw color, -- a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no ideas this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. . . .

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, -- a mistake in fact as to the identify of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. . . . Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond.

. . .

When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold . . . .

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. . . .

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

By the Court -- The judgment of the circuit court is affirmed.

Case 3:

PRIVY COUNCIL

BARTON v. ARMSTRONG

[1975] 2 AER 465, 5 December 1973

LORD CROSS OF CHELSEA:

This is an appeal by leave of the Supreme Court of New South Wales from a decree of that court (Mason JA and Taylor A-JA, Jacobs JA dissenting) made on 30 June 1971. That decree dismissed the appeal of the appellant, Alexander Barton, against a decree of Street J made on 19 December 1968 which dismissed a suit brought by Barton against the respondents in which he sought a declaration that a deed dated 17 January 1967 made between Barton and the first fourteen respondents and certain deeds ancillary thereto had been executed by him under duress exerted by the first respondent, Alexander Ewan Armstrong, and were void so far as concerned him.

The case is the outcome of a struggle between Armstrong and Barton for control of the 14th respondent, Landmark Corporation Ltd ('Landmark') **** In the middle of 1966 - when the story begins - Armstrong was the chairman of Landmark and either himself or through the medium of one or other of the second to the sixth respondents (which are family companies controlled by him) held 300,000 shares in the company - the largest single shareholding in its capital. Barton was the managing director of Landmark and was a substantial shareholder in it - though his holding was less than that controlled by Armstrong. **

In 1966 the principal activity of Landmark was the development through the medium of the eighth respondent, Paradise Waters (Sales) Pty Ltd (hereinafter called 'Sales'), and the ninth respondent, Paradise Waters Ltd, of a building estate near Surfers' Paradise in Queensland which was to be known as 'Paradise Waters'. **** Of the purchase price payable in respect of the sale of the Paradise Waters land, $400,000 remained unpaid. This sum was secured by mortgages given by Paradise Waters Ltd to the respondent George Armstrong and Son Pty Ltd which provided, inter alia, that the sum secured with interest should become payable forthwith if Armstrong should be removed from the chairmanship of Landmark. It will be seen therefore that Armstrong through his companies was interested in the Paradise Waters project in three different ways. First as a secured creditor for $400,000; secondly as holder of 40 per cent of the share capital of Sales, and thirdly as the largest shareholder in Landmark which held 60 per cent of the capital of Sales.

The 'Paradise Waters' project involved the expenditure of large sums in dredging and forming canals to provide water frontages for the lots into which the land was to be subdivided for sale. This expenditure was being financed by advances made by United Dominions Corporation (Australia) Ltd (hereinafter called 'UDC') which were secured by mortgages on the land which had priority over the mortgage for $400,000 to George Armstrong and Son Pty Ltd. By November 1966 a sum of over $400,000 had been advanced by UDC in respect of development costs which were running at the rate of over $20,000 a month and were likely to continue to be incurred for some time. Landmark itself was an unsecured creditor of the Paradise Waters companies for between $600,000 and $700,000 which it had advanced towards the development.

In the middle of 1966 relations between Armstrong and Barton which hitherto had been not unfriendly began the deteriorate. In particular Barton resented what he considered to be the undue interference of Armstrong in the day-to-day business of Landmark and the use by Armstrong of office facilities for purposes of his own unconnected with Landmark's affairs. Eventually he came to the conclusion - and Bovill and Cotter agreed with him - that the interests of Landmark required that Armstrong should be so far as possible excluded from any say in the management of its affairs. In the middle of October Barton

asked Armstrong to resign - which he refused to do. At a directors' meeting held on 24 October 1966 a series of resolutions aimed at Armstrong were passed, including one which denied to the directors other than Barton any executive authority in connection with Landmark's affairs. On 8 November at board meetings of Paradise Waters Ltd and of Sales, Armstrong was removed from the chairmanship of those companies and Barton appointed chairman in his place; and at a board meeting of Landmark held on 17 November Armstrong was removed from the chairmanship in favour of Bovill. On 21 November Armstrong's solicitors gave notice to Landmark that the $400,000 must be repaid. In anticipation of that demand Barton had approached UDC for an advance of $450,000 to be used to discharge the $400,000 debt and certain other indebtedness to the Armstrong companies and on 23 November UDC wrote a formal letter to Landmark stating that its board had resolved that the necessary advance should be made. At the annual general meeting of Landmark which was to be held on 2 December Cotter was due to retire and offered himself for re-election. Armstrong nominated candidates of his own and each side circularised the shareholders to obtain proxies for the impending trial of strength. The contest resulted in a victory for Barton for at the meeting Cotter was re-elected and Armstrong's candidates rejected. As arrangements had been made for discharging the debt due to him it looked as though Barton's wish to exclude Armstrong from any effective say in the company's affairs had been fulfilled.

But within a few days the picture had changed completely, for on 10 December the managing director of UDC told Barton that his company had decided not, after all, to advance the money necessary to discharge Landmark's indebtedness to the Armstrong companies and further not to make any more loans in connection with the Paradise Waters project. At this point negotiations started between Barton and Mr B H Smith, a well-known accountant who was Armstrong's financial adviser, which eventually resulted in the agreement of 17 January 1967 which Barton claims to have executed under duress. ****

Smith obtained Armstrong's signature to a document embodying those terms which he read over to Barton and which formed the basis on which the solicitors for the parties drew up the deed executed on 17 January 1967 which is the subject of the suit. This was a very lengthy document containing recitals of the relationship between the various companies and the connection of Barton and Armstrong with them but it is common ground that subject only to slight modifications introduced by the solicitors, it implements the agreement made between Smith and Barton on 4 January. It was eventually agreed that only seven other people as well as Barton should join in purchasing Armstrong's shares in Landmark. These are the last seven respondents who on 18 January executed mortgages of the shares purchased by them respectively to secure payment of the purchase price. On the execution of the various documents Armstrong and his nominees resigned from the boards of the Landmark companies.

The cash payment made by Landmark under the deed denuded it of most of its liquid assets; UDC refused to change its mind with regard to the financing of the Paradise Waters project; and Barton failed to obtain finance from any other source. Consequently Landmark was soon in serious financial difficulties. A scheme of arrangement between the company and its subsidiaries on the one hand and their creditors on the other was formulated but the petition seeking the approval of the court to it was dismissed on 11 January 1968 and an order made that Landmark be wound up on account of its insolvency. On 10 January 1968, without having previously served any letter of demand, Barton commenced the present suit alleging that Armstrong on behalf of himself and the Armstrong companies had coerced him into agreeing to the matters dealt with by the deed of 17 January 1967 by threatening to have him murdered and by otherwise exerting unlawful pressure on him. In answers to interrogatories Barton gave particulars of numerous occasions on which and the means by which, as he alleged, Armstrong and persons acting on his behalf had threatened or brought pressure to bear on him in connection with the making of this deed. ***

The hearing before Street J lasted for 56 days and its result was somewhat surprising. On the one hand the judge found that Armstrong was a totally unreliable witness whose evidence could not be accepted unless corroborated; that on many occasions he had threatened Barton with death; and that Barton was justified in taking and did take these threats seriously. On the other hand he held that though Barton was during the relevant period in consequence of Armstrong's threats in real fear for the safety of himself and his family, these threats and the fear engendered by them did not in fact coerce him into entering into the agreement. Barton - the judge said -

'did not in his own mind relate Armstrong's threats to a desire by Armstrong to force through the agreement; nor was it forced through, so far as Barton was concerned, by reason of his fear of Armstrong's power to harm him. The agreement went through for the primary and predominant reason that Mr Barton along with Mr Bovill was firmly convinced that it was indispensable for the future of Landmark to enter into some such arrangement as this with Armstrong. Their belief was that they had to get rid of Armstrong if Landmark was to survive.'

'It was' to quote another passage, 'what they' (ie Barton and Bovill) 'regarded as sheer commercial necessity that was the real and quite possibly the sole motivating factor' underlying the agreement recorded in the deed of 17 January 1968. At this stage therefore it is necessary first to set out in some detail the threats alleged by Barton with the judge's findings with regard to each and secondly to refer to the judge's reasons for reaching the conclusions which he did as to their effect.

The threats alleged were as follows:

(1) Barton said that when, in the middle of October 1966, he told Armstrong that he could not continue to work with him and suggested that he should resign Armstrong, after declining to do so, said, 'The city is not as safe as you may think between office and home. You will see what I can do against you and you will regret the day when you decided not to work with me'. Despite Armstrong's denial the judge held that he did in fact utter this threat.

(2) Barton said that after Armstrong had been removed from the chairmanship - on 17 November 1966 - he began to receive telephone calls in the middle of the night. They would usually be made between 4 and 5 am and would continue for four or five nights at a time. Then there would be a break for a few days; after which they would start again. This went on until early in January 1967. Generally no one spoke and he only heard heavy breathing into the telephone but on some occasions a voice would say, 'You will be killed'. Generally the voice was distorted but on one occasion in January 1967 he recognised this voice as Armstrong's. The judge found that Armstrong was in fact responsible for these calls.

(3) Barton said that over the period during which he was receiving these telephone calls he noticed that his house was being watched by a man named Hume. There was some evidence to show that he was Armstrong's 'strong arm' man. The judge accepted that Barton was in fact being watched by Hume but said that there was not enough evidence to enable him to find that Armstrong was responsible for his activities.

(4) Barton said that one day late in November 1966 Armstrong said to him,'I am of German origin and Germans fight to the death. I will show you what I can do against you and you had better watch out. You can get killed'. In the light of some evidence to the effect that Armstrong was not of German origin the judge doubted whether Barton was right as to the first sentence but he accepted that he was right as to the second and third.

(5) Bovill whose evidence was accepted said that on 30 November Armstrong came into the board room and shouted at Barton: 'You stink; you stink. I will fix you.' Later he had a conversation with Armstrong alone in the course of which the latter made a number of extravagant statements such as that by virtue of his wealth and his position as a member of the Legislative Council he could procure police officers to do his bidding; that organised crime was moving into Sydney and that for $2,000 you could have someone killed. The judge found not only that Armstrong was uttering threats of this character at this time but that Barton was justifiably seriously perturbed by them. Indeed on 24 November he hired a bodyguard to watch over his safety until after the annual general meeting. At this meeting three bodyguards were present - two of them concealed behind a curtain near where Barton was sitting.

(6) Barton said that on 7 December 1966, after a board meeting of Sales, Armstrong said to him in the presence of a number of other people, 'You can employ as many bodyguards as you want. I will still fix you'. In the absence of corroborative evidence from any of the other persons said to have been present the judge was not prepared to hold that this threat was made.

(7) Barton said that on 14 December 1966 Armstrong said to him, 'Unless Landmark buys my interest in Paradise Waters (Sales) Pty Ltd for $100,000 and the company repays $400,000 owing to me and you buy my shares for 60 cents each I will have you fixed'. The judge said that though Armstrong might well have threatened Barton on 14 December he was not satisfied that such threats, if made, were coupled with any requirement that he enter into an agreement with him.

(8) On 7 January 1967 a Jugoslav named Vojinovic - a man with a bad criminal record - telephoned to Barton saying that he wished to see him urgently. When they met he told Barton that Hume had hired him to kill him promising him $2,000 for doing so and that Hume was acting on instructions from Armstrong. He said that he would prefer not to commit the murder provided that Barton paid him the money and Barton professed his willingness to do this if the matter could be put in the hands of the police so that Hume and Armstrong could be brought to justice. Next day Barton went with Landmark's solicitor and counsel to the Criminal Investigation Branch and reported the matter to the officer-in-charge. Vojinovic was promptly arrested and made a statement asserting that he had indeed been hired on Armstrong's behalf to kill Barton. The police however never interviewed Armstrong to find out what he had to say with regard to Vojinovic's story. Barton, of course, considered that this was due to Armstrong's intervention and was simply an example of his ability to influence their conduct of which he had boasted to Bovill. The judge was very puzzled by and critical of their inaction; but he did not consider that the evidence justified him in finding that Vojinovic was in fact employed directly or indirectly by Armstrong. He had, however, no doubt that Barton believed that Armstrong had hired a criminal to kill him and was seriously and justifiably alarmed for his safety. His actions indeed bore this out for he bought a rifle, moved with his wife and son from his house in the suburbs into a city hotel and did not return home until after the documents were executed on 17 and 18 January.

(9) Barton said that on Thursday 12 January Armstrong rang him up at the company's office and said 'You had better sign this agreement - or else' to which he replied that he did not let himself be blackmailed into any agreement. The judge inclined to the view that this conversation - which was, of course, denied by Armstrong - did in fact take place.

(10) Barton said that by Friday 13 January he had made up his mind not to sign the deeds - which were then being finalised by the solicitors - and not to advise his co-directors to execute them on behalf of Landmark and that he so informed Smith on that day; but that on 16 January Armstrong rang him up in the morning saying, 'Unless you sign this document I will get you killed', and that yielding to this threat he changed his mind and executed the deeds. The judge rejected this part of Barton's evidence. He held

that although before Christmas Barton may well have felt - and expressed to Bovill - doubts as to the wisdom of entering into an agreement on the lines being suggested by Smith on behalf of Armstrong he had ceased to feel any such doubts by the beginning of January, that thereafter he never changed his mind and that Armstrong did not threaten him with death on 16 January unless he signed.

Their Lordships must now refer to the reasons given by the judge for holding that Barton was not coerced into signing the agreement by any threat of physical violence made by Armstrong. When UDC went back on its promise to advance the money needed to pay off the debt to Armstrong and further said that it was not prepared to go on advancing money to enable the development to be completed it must have been obvious to Barton that unless UDC could be induced to change its mind again or the necessary money could be obtained from some other source the Paradise Waters project was 'finished' so far as Landmark was concerned even if Landmark itself could survive. The judge accepted that when he heard of UDC's decision Barton was at first despondent. Bovill gave evidence - which the judge accepted - that on 13 December Barton said to him, 'The money has not come through. I don't think that it will come through. I would like to resign. I don't think that we can get this money any other way. I think that it is finished.' But the judge held that Barton soon came to share the view - which appears always to have been held by Bovill - that if only Armstrong could be got out of the way UDC would change its mind and provide the necessary finance to enable the project to be completed and that to enter into an agreement on the lines suggested by Smith on behalf of Armstrong was 'good business' from Landmark's point of view. In his judgment the judge lists a number of acts done and statements made by Barton both before and shortly after the documents in question were executed which indicate that he was optimistic as to the future once Armstrong was out of the way. Thus on 3 January 1967 he told Smith that once Armstrong was out of the way he was sure that UDC would give the company finance and after the deed was executed he said to Armstrong's solicitor (Mr Grant) 'Now we have got rid of Armstrong nothing will stop us' and told Smith that he thought that the deal was 'a miracle'. Again during the negotiations and in the period immediately after the execution of the deeds Barton was either himself or through his family companies lending money to Landmark or its subsidiaries and buying Landmark shares on the stock exchange. The judge refused to accept that these manifestations of optimism and confidence were a mere 'facade'. Further he was much impressed by the evidence given by Detective Inspector Lendrum as to what he was told by Barton's solicitor (Mr Millar) in Barton's presence with regard to the negotiations for an agreement between Barton and Armstrong when they reported the Vojinovic incident to him. According to Lendrum's notes which the judge accepted as accurate Millar said that shortly before Christmas it appeared that Landmark would fall but that since then Barton had managed to save the company; that there had been some conferences between representatives of Armstrong and Barton in connection with a compromise; that on Wednesday 4 January Armstrong's representative B H Smith and Barton had reached what appeared to be an agreement subject to documentation to be prepared by Armstrong's lawyers and submitted to Millar's firm; and the drafts had in fact been submitted on Friday, 6 January. The judge pointed out that if the agreement which Barton had apparently reached with Smith had been induced by Armstrong's threats it was very surprising that Barton should have allowed Millar to give such a misleading picture of the position to Lendrum. Barton had come to the police in order to get Armstrong brought to justice for hiring criminals to murder him and if his agreement with Smith had itself been induced by threats on Armstrong's part he would surely have brought that fact to Lendrum's attention at the same time. The judge indeed went so far as to hold that Armstrong was, as he put it, a 'reluctant vendor' and that his threats were not intended and were not thought by Barton to be intended to induce him to enter into the agreement but were simply manifestations of blind malevolence. He thought that Barton - though by comparison with Armstrong an honest witness - had after the failure of Landmark come to believe that Armstrong's threats played a part in inducing him to enter into an agreement which had proved disastrous which they did not in fact play.

Barton appealed from the judgment of Street J to the Court of Appeal Division of the Supreme Court and there contended that many of the findings of fact adverse to him made by the judge should be reversed. For the most part this attack failed but it succeeded on a few points to which their Lordships must now refer. In the first place Mason JA and Taylor A-JA held that the judge was wrong in refusing to draw the inference that Armstrong had employed Hume to 'keep a tag' on Barton. Secondly all three judges held that Armstrong was not a 'reluctant vendor' and that such threats as he uttered after 13 December were intended by him to induce and were understood by Barton to be intended to induce him to enter into the agreement. Their Lordships have no hesitation in agreeing with the judges of the Appeal Division on these points. On the facts proved the inference that Armstrong was responsible for Hume's 'watching' of Barton is irresistible. Again as their Lordships read it the evidence points strongly to the conclusion that so far from being a 'reluctant vendor' Armstrong was eager to 'get out' of Landmark on the best terms that he could so soon as he heard, as he did about 10 December that UDC had decided not to advance it any more money. Smith was in touch with the directors of UDC during the negotiations and he never thought for a moment that UDC was likely to change its mind whether or not Armstrong was 'out of' Landmark. He declined to become chairman of the company - though Barton and Armstrong would both have liked him to take on the chairmanship - because he realised that it was doomed and it must have seemed to him - and consequently to Armstrong - that an agreement under which Armstrong acquired all or nearly all of Landmark's liquid assets and sold his shares at nearly twice their market value was very favourable to him. Armstrong - being the sort of man he was - had every reason to threaten Barton in order to induce him to go through with the agreement and their Lordships have no doubt that such threats as he made during the negotiations were made for this purpose and that Barton was well aware of the fact. The judge has found that on 12 January Armstrong told Barton in terms 'Sign the agreement - or else'. Moreover Sergeant Wild who was in charge of the investigation into the Vojinovic incident said that on 11 January Barton told him how nervous he was for his safety and that of his family but added, 'Well, the agreement will be signed on the 18th and it will all be over'. This remark - which is not mentioned in the judgment of Street J - appears to their Lordships to show clearly that Barton was well aware that Armstrong's threats were in fact directed to inducing him to sign the agreement. ****

Their Lordships turn now to consider the question of law which provoked a difference of opinion in the Court of Appeal Division. It is hardly surprising that there is no direct authority on the point, for if A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document. But this is a most unusual case and the findings of fact made below do undoubtedly raise the question whether it was necessary for Barton in order to obtain relief to establish that he would not have executed the deed in question but for the threats. In answering this question in favour of Barton, Jacobs JA relied both on a number of old common law authorities on the subject of 'duress' and also - by way of analogy - on later decisions in equity with regard to the avoidance of deeds on the ground of fraud. Their Lordships do not think that the common law authorities are of any real assistance for it seems most unlikely that the authors of the statements relied on had the sort of problem which has arisen here in mind at all. On the other hand they think that the conclusion to which Jacobs JA came was right and that it is supported by the equity decisions. The scope of common law duress was very limited and at a comparatively early date equity began to grant relief in cases where the disposition in question had been procured by the exercise of pressure which the Chancellor considered to be illegitimate - although it did not amount to common law duress. There was a parallel development in the field of dispositions induced by fraud. At common law the only remedy available to the man defrauded was an action for deceit but equity in the same period in which it was building up the doctrine of 'undue influence' came to entertain proceedings to set aside dispositions which had been obtained by fraud: see Holdsworth's History of English Law. There is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud. In each

case - to quote the words of Holmes J in Fairbanks v Snow ((1887) 13 NE at 598) - 'the party has been subjected to an improper motive for action'. Again the similarity of the effect in law of metus and dolus in connection with dispositions of property is noted by Stair in his Institutions of the Law of Scotland. Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to execute the deed of 17 January 1967 the answer to the problem which has arisen would have been clear. If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes. 'Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand'(per Lord Cranworth LJ in Reynell v Sprye ((1852) 1 De GM & G 660 at 708); see also the other cases referred to in Cheshire and Fifoot's Law of Contract). Their Lordships think that the same rule should apply in cases of duress and that if Armstrong's threats were 'a' reason for Barton's executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.

It remains to apply the law to the facts. What was the state of Barton's mind when he executed the deed is, of course, a question of fact and a question the answer to which depended largely on Barton's own evidence. The judge who heard him give evidence was in a better position than anyone else to decide whether fear engendered by Armstrong's threats was 'a' reason for his executing the deed. It was submitted that the decision of Street J in favour of Armstrong amounted to a finding that fear engendered by the threats was not such a reason and that as that decision had been affirmed by a majority of the Appeal Division the Board should not disturb it. But this case, as their Lordships see it, is not one to which the rule as to 'concurrent findings' is applicable. In the first place some of the findings of fact made by the judge were varied by the Appeal Division. In particular they held that he was wrong in finding that Barton did not think that Armstrong's threats were being made with a view to inducing him to execute the agreement. Again there appears to have been little discussion of the law before Street J and it is by no means clear that he directed his mind to the precise question which was debated in the Appeal Division and before the Board. Consequently one cannot be sure that if he had applied to the facts found by him as modified by the Appeal Division what their Lordships think to be the correct principle of law he would have reached the conclusion which he did reach. He might have done so but equally he might not have done so. The judges in the Appeal Division approached the case no doubt in the light of what their Lordships assume to be the right findings of fact but the majority applied to them what in their Lordships' judgment was a wrong principle of law. In these circumstances their Lordships think that they can properly, and indeed should, reach their own conclusions by applying the law as they understand it to the facts found by the judge as modified by the Appeal Division. They proceed then on the footing that although when he learnt that UDC had decided no longer to finance the Paradise Waters project Barton was at first despondent as to its future he soon came to share Bovill's view that UDC would change its mind when once Armstrong was out of the way; that the confidence as to the eventual success of the project to which he gave expression to Smith and others during the negotiations and shortly after the execution of the documents was genuine; that he thought that the agreement with Armstrong was a satisfactory business arrangement both from the point of view of Landmark and also from his own point of view; and that the evidence which he gave at the trial, though possibly honest, was a largely erroneous reconstruction of his state of mind at the time. But even so Barton must have realised that in parting with all Landmark's liquid assets to Armstrong and in agreeing himself to buy Armstrong's shares for almost twice their market value in the hope that when Armstrong was out of the way UDC would once more provide finance he was taking a very great risk. It is only reasonable to suppose that from time to time during the negotiations he asked himself whether it would not be better either to insist that any settlement

with Armstrong should be conditional on an agreement with UDC or to cut his own and Landmark's losses on the Paradise Waters project altogether rather than to increase the stakes so drastically. If Barton had to establish that he would not have made the agreement but for Armstrong's threats then their Lordships would dissent from the view that he had not made out his case. But no such onus lay on him. On the contrary it was for Armstrong to establish, if he could, that the threats which he was making and the unlawful pressure which he was exerting for the purpose of inducing Barton to sign the agreement and which Barton knew were being made and exerted for this purpose in fact contributed nothing to Barton's decision to sign. The judge has found that during the ten days or so before the documents were executed Barton was in genuine fear that Armstrong was planning to have him killed if the agreement was not signed. His state of mind was described by the judge has one of 'very real mental torment' and he believed that his fears would be at an end when once the documents were executed. It is true that the judge was not satisfied that Vojinovic had been employed by Armstrong but if one man threatens another with unpleasant consequences if he does not act in a particular way, he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible. It is true that on the facts as their Lordships assume them to have been, Armstrong's threats may have been unnecessary; but it would be unrealistic to hold that they played no part in making Barton decide to execute the documents. The proper inference to be drawn from the facts found is, their Lordships think, that though it may be that Barton would have executed the documents even if Armstrong had made no threats and exerted no unlawful pressure to induce him to do so the threats and unlawful pressure in fact contributed to his decision to sign the documents and to recommend their execution by Landmark and the other parties to them. It may be, of course, that Barton's fear of Armstrong had evaporated before he issued his writ in this action but Armstrong - understandably enough - expressly disclaimed reliance on the defence of delay on Barton's part in repudiating the deed.

In the result therefore the appeal should be allowed and a declaration made that the deeds in question were executed by Barton under duress and are void so far as concerns him. Their Lordships express no view as to what (if any) effect this may have on the rights or obligations inter se of the other parties to the deeds - and the order should include liberty to any of them to apply to the court of first instance for the determination of any questions which may arise between them in that regard. Their Lordships think that the costs below should be dealt with as suggested by Jacobs JA - that is to say, that Armstrong and his companies (the first to sixth respondents) should pay Barton's costs of the hearing before Street J but that there should be no costs of the appeal to the Appeal Division because so much of the time there was taken up by submissions which all three judges were agreed in rejecting. The first respondent (Armstrong) must pay to the appellant (Barton) his costs of the appeal to the Board. Their Lordships will humbly advise Her Majesty accordingly.

Case 4:

LLOYDS BANK LTD V BUNDY
COURT OF APPEAL, CIVIL DIVISION
[1975] *QB 326,* 30 JULY 1974

INTRODUCTION:

Appeal. The plaintiffs, Lloyds Bank Ltd ('the bank'), brought an action against the defendant, Herbert James Bundy, in the Salisbury County Court. By their amended particulars of claim the bank alleged that by four legal charges dated respectively 16th October 1958, 19th September 1966, 27th May 1969 and 17th December 1969 and each made between the defendant of the one part and the bank of the other part, the defendant had covenanted with the bank, inter alia, to pay to the bank on demand all money and liabilities whether certain or contingent which at the date of the respective legal charge or at any time thereafter might be due, owing or incurred by the defendant to the bank or for which the defendant might be or become liable to the bank on any current or other account or in any manner whatever together with interest and costs; that by each of the four legal charges the defendant had charged by way of legal mortgage the property known as Yew Tree Farm, Broadchalke, Wiltshire ('the property'), as a continuing security for the payment to the bank of the principal money, liabilities, interest and other money thereby covenanted to be paid by the defendant and that it had been further agreed and declared by the parties that the powers and remedies conferred on mortgagees by the Law of Property Act 1925 should apply to the security with the variation or extension that, on the expiration of one month's written notice to the defendant of their intention to do so, the bank might exercise and put in force all and every of any such powers and remedies as thereby varied or extended; that by two guarantees in writing dated respectively 19th September 1966 and 27th May 1969 and made between the defendant of the one part and the bank of the other part the defendant had guaranteed, and by a guarantee in writing dated the 17th December 1969 and made between the defendant and Michael James Bundy of the one part and the bank of the other part the defendant and Michael James Bundy had jointly and severally guaranteed, payment on demand on him or them of all money and liability whether certain or contingent then or thereafter due, owing or incurred to the bank by MJB Plant Hire Ltd ('the company') on any current or other account or in any manner whatever together with interest and costs, subject always to the amount recoverable under any one guarantee being limited to the amount stated herein, and that it had therein also been provided, inter alia, that any notice or demand thereunder should be deemed to have been sufficiently given if sent by prepaid letter to the guarantor's address in the United Kingdom last known to the bank or stated thereon; that on 8th December 1970 the bank by letter sent by ordinary prepaid postage addressed to the company had called on the company to repay advances made to it by the bank amounting at the close of business on that date to £10,518.45 plus accrued interest amounting to £591.37; that on 10th December 1970 the bank by demand in writing served on the defendant had required payment of the sum of £11,000, being part of the amount then due from the defendant to the bank under the covenant for payment referred to above, and that the defendant had neglected or refused to make such payment; that by the same demand in writing the bank had given formal notice in accordance with the terms of the four legal charges of their intention at the expiration of one month to exercise the powers and remedies conferred on them as mortgagees by the Law of Property Act 1925, as varied or extended, by sale of the property or otherwise and that the power of sale had arisen; that the bank had contracted to sell the property with vacant possession on completion and by notice in writing dated 16th November 1971 the bank had required the defendant to vacate the property by not later than 31st January 1972 but the defendant remained in possession. Accordingly the bank claimed possession of the property.

By his amended defence the defendant admitted the bank's allegations so far as they related to the legal charges of 16th October 1958, 19th September 1966, and 27th May 1969 but made no admission as to their effect or as to their continued validity after 17th December 1969. With regard to the legal charge dated 17th December 1961 the defendant admitted that it had been signed by him. The defendant alleged

however that that legal charge was not his deed or alternatively that he had been induced to execute the legal charge was not his deed or alternatively that he had been induced to execute the legal charge whilst acting under the influence of the bank's agent, Michael John Head, the manager of their Salisbury branch. The defendant also alleged that the earlier guarantees had been cancelled or superseded by the guarantee dated 17th December 1969. As to the guarantee dated 17th December 1969 the defendant admitted that he had signed the document but said that it was not his deed or alternatively that he had been induced to do so whilst acting under the influence of Mr Head.

The defendant counterclaimed, inter alia, for (i) an order setting aside the legal charge and guarantee dated 17th December 1969 or declaring them to be void and for delivery up and cancellation of the documents; and (ii) an injunction restraining the bank from selling or completing any agreement for the sale of the property.

On 6th June 1973 his Honour Judge McLellan gave judgment for the bank, ordering the defendant to give possession of the property within four months, and dismissed the counterclaim. The defendant appealed on the grounds, inter alia, that the judge's finding that there was no duty on the bank, through their branch manager, Mr Head, to ensure that the defendant received independent advice before executing the legal charge and joint guarantee was against he weight of the evidence; and that on the evidence, and in particular the statement of Mr Head that he believed that the defendant was relying on him to advise him conerning the transaction, the judge ought to have held (a) that there was a relationship of confidence between them giving rise to a fiduciary duty on the part of the bank through Mr Head not merely to explain the effect of the joint guarantee and legal charge to the defendant but to ensure that he was advised whether or not they were reasonable and proper transactions for him to enter into; (b) that Mr Head had not given such advice; further or alternatively, that in view of the commercial importance to the bank of obtaining security from the defendant to cover the existing debts of the company they were not in a position, through Mr Head, to give such advice themselves and ought therefore to have ensured that such advice was given by an independent source, and (d) that accordingly the bank had failed to discharge their fiduciary duty and the joint guarantee and legal charge ought to be set aside or declared void.

The facts are set out in the judgment of Lord Denning MR. ***
Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks. Yet there are exceptions to this general rule. There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court.

The first category is that of 'duress of goods'. A typical case is when a man is in a strong bargaining

position by being in possession of the goods of another by virtue of a legal right, such as, by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than in justly due, and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess: see Astley v Reynolds and Green v Duckett . To which may be added the cases of 'colore officii', where a man is in a strong bargaining position by virtue of his official position or public profession. He relies on it so as to gain from the weaker -- who is urgently in need -- more than is justly due: see Pigot's Case cited by Lord Kenyon CJ ; Parker v Bristol and Exeter Railway Co and Steele v William . In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power -- the strength of the one versus the urgent need of the other -- Renders the transaction voidable and the money paid to be recovered back: see Maskell v Horner .

The second category is that of the 'unconscionable transaction'. A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stroner than himself so as to get his property at a gross undervalue. The typical case is that of the 'expectant heir'. But it applies to all cases where a man comes into property, or is expected to come into it, and then being in urgent need another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him: see Evans v Llewellin . Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set side: see Fry v Lane where Kay J said: 'The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.' This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker: see the cases cited in Halsbury's Laws of England and in Canada, Morrison v Coast Finance Ltd and Knunpp v Bell.

The third category is that of 'undue influence' ususally so called. these are divided into two classes as stated by Cotton LJ in Allecard v Skinner . The first are these where the stronger has been guilty of some fraud or wrongful act -- expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in Tate v Williamson : 'Wherever the persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.' Such a case was Tufton v Sperni.

The fourth category is that of 'undue pressure'. The most apposite of that is Silliams v Bayley where a son forged his father's name to a promissory note, and, by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect: 'Take your choice -- give us security for your son's debt. If you do take that on yourself, then it will all go smoothly; if you do not, we shall be bound to exercise pressure.' Thereupon the father charged his property to the bank with payment of the note. The house of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said : 'A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary

agency of the individual who enters into it.' Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit. As where an employer -- the stronger party -- had employed a builder -- the weaker party -- to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage.Stuart V-C said: 'Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it this Court will set it aside': see Ormes v Beadel ; D & C Builders Ltd v Rees .

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court of Admiralty have always recognised that fact. The fundamental rule is: 'If the parties have made an agreement, the Court will enforce it, unles it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just.' See Akerblom v Price per Brett LJ applied in a striking case, The Port Caledonia and The Anna , when the rescuer refused to help with a rope unless he was paid £ 1,000.

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. On who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. ****

Case 5:

TAYLOR V CALDWELL

KING'S BENCH,
3 B. & S. 826, 122 Eng. Rep. 309 (1863)

Blackburn, J.

In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night fetes, at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

The parties inaccurately call this a "letting," and the money to be paid, a "rent"; but the whole agreement is such as to show that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract, such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. [The plaintiffs sought damages in the amount of moneys spent for advertising and other preparations for the concerts.] The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll.Abr. 450, Condition (G), and in the note (2) to Walton v. Waterhouse (2 Wms.Saund. 421a, 6th Ed.) and is recognized as the general rule by all the judges in the much discussed case of Hall v. Wright (E.B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. . . .

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; Hyde v. The Dean of Windsor (Cro.Eliz. 552, 553). See 2 Wms.Exors. 1560 (6th Ed.), where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord Lyndhurst in Marshall v. Broadhurst (1 Tyr. 348, 349) and a case mentioned by Patteson, J., in Wentworth v. Cock (10 A. & E. 42, 4S46). In Hall v. Wright (E.B. & E. 746, 749), Crompton, J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter, of his eyesight. In the instances just given the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370 [7th Ed.] by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of Rugg v. Minett (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment. . . .

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of Coggs v. Bernard (1 Smith's L.C. 171 [5th Ed.] 2 L.Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the case of bailments; but the case of Williams v. Lloyd (W. Jones, 179), above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

Case 6:

KIRKLAND V ARCHBOLD

COURT OF APPEALS OF OHIO, CUYAHOGN COUNTY, 1953
113 N.E. 2d 496.

[The plaintiff contracted to make alterations and repairs on a dwelling house owned by the defendant. Paragraph 20 of the contract provided: "The Owner agrees to pay the Contractor, as follows: $1,000 when satisfactory work has been done for ten days; an additional $1,000 when twenty days work has been completed; an additional $1,000 when thirty days work has been completed, and $1,000 on completion of the contract. $2,000 shall be paid within thirty days after the completion of the contract." After the plaintiff had worked for two months on the job he was prevented from proceeding further. He claims that he and his sub-contractors had reasonably expended $2,985 at that point; he has been paid only $800; and he sues for damages in the amount of the difference.

[The trial court found that the plaintiff was in default in attempting to plaster the house over wood lath instead of rock lath, and without the use of rock wool. Paragraph 4 of the contract provided: "All outside walls are to be lined with rock wool and rock lathe, superimposed thereon." Thus the defendant was within her rights in preventing the plaintiff from proceeding. However, the court held that her payment of $800 was an admission that the first installment of the price was earned, and gave the plaintiff judgment for $200. The plaintiff appealed.]

SKEEL, PRESIDING JUDGE. . . . The court committed error prejudicial to the rights of plaintiff in holding that the provisions of

the contract were severable. The plaintiff agreed to make certain repairs and improvements on the defendant's property for which he was to be paid $6,000. The total consideration was to be paid for the total work specified in the contract. The fact that a schedule of payments was set up based on the progress of the work does not change the character of the agreement. Newman Lumber Co. v. Purdum, 41 Ohio St. 373.

The court found that the plaintiff and not the defendant breached the agreement, leaving the job without just cause, when the work agreed upon was far from completed. In fact, the plaintiff by his pleadings and evidence does not attempt to claim substantial performance on his part. The question is, therefore, clearly presented on the facts as the court found them to be, as to whether or not the plaintiff being found in default can maintain a cause of action for only part performance of his contract.

The earlier case law of Ohio has refused to permit a plaintiff to found an action on the provisions of a contract where he himself is in default. The only exception to the rule recognized is where the plaintiff has substantially performed his part of the agreement. . . .

The result of decisions which deny a defaulting contractor all right of recovery even though his work has enriched the estate of the other party to the contract is to penalize the defaulting contractor to the extent of the value of all benefit conferred by his work and materials upon the property of the other party. This result comes from unduly emphasizing the technical unity and entirety of contracts. Some decisions permit such result only when the defaulting contractor's conduct was wilful or malicious.

An ever-increasing number of decisions of courts of last resort now modify the severity of this rule and permit defaulting contractors, where their work has contributed substantial value to the other contracting party's property, to recover the value of the work and materials expended on a quantum meruit basis, the recovery being diminished, however, to the extent of such damage as the contractor's breach causes the other party. These decisions are based on the theory of unjust enrichment. The action is not founded on the broken contract but on a quasi-contract to pay for the benefits received, which cannot be returned, diminished by the damages sustained because of the contractor's breach of his contract.

The leading case supporting this theory of the law is Britton v. Turner, 6 N.H. 481, 26 Am.Dec. 713. . . .

Williston on Contracts, Vol. 5, p. 4123, par. 1475, says:

"The element of forfeiture in wholly denying recovery to a plaintiff who is materially in default is most strikingly exemplified in building contracts. It has already been seen how, under the name of

substantial performance,[a] many courts have gone beyond the usual principles governing contracts in allowing relief in an action on the contract. But many cases of hardship cannot be brought within the doctrine of substantial performance, even if it is liberally interpreted; and the weight of authority strongly supports the statement that a builder, whose breach of contract is merely negligent, can recover the value of his work less the damages caused by his default; but that one who has wilfully abandoned or broken his contract cannot recover. The classical English doctrine, it is true, has denied recovery altogether where there has been a material breach even though it was due to negligence rather than wilfulness; and a few decisions in the United States follow this rule, where the builder has not substantially performed. But the English court has itself abandoned it and now holds that where a builder has supplied work and labor for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services and materials, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished. The courts often do not discuss the question whether one who has intentionally abandoned the contract did so merely to get out of a bad bargain or whether he acted in a mistaken belief that a just cause existed for the abandonment. Where the latter situation exists, however, it would seem that the defaulter might properly be given recovery for his part performance. It seems probable that the tendency of decisions will favor a builder who has not been guilty of conscious moral fault in abandoning the contract or in its performance."

The drastic rule of forfeiture against a defaulting contractor who has by his labor and materials materially enriched the estate of the other party should in natural justice, be afforded relief to the reasonable value of the work done, less whatever damage the other party has suffered. Such a rule has been clearly recognized in the law of bailment where a defaulting bailee has enhanced the property of the bailor (Dobie on Bailments, Page 139 (1914)) and also by statute a defaulting vendee in a conditional sales contract, where the vendor retakes the property, is entitled to a return of a just proportion of the money paid. G.C. Sec. 8570.

We conclude, therefore, that the judgment is contrary to law as to the method by which the right to judgment was determined. . . .

For the foregoing reasons the judgment is reversed and the cause is remanded for further proceedings.

Case 7:

RAFFLES V. WICHENHAUS

In the Court of the Exchequer, 1864.
2 Hurl. & C. 906.

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's hollorah, to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17l/4 d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.

Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendant to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C.B. It would be a question for the jury whether both parties meant the same ship called the Peerless.]That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name. [Pollock, C.B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other Peerless. [Martin, B. It is imposing on the defendant a contract different from that which he entered into.] [Pollock, C.B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence, a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock, C.B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus ad idem [meeting of the minds], and therefore no binding contract.

He was then stopped by the Court.

PER CURIAM. There must be judgment for the defendants. Judgment for the defendants.