U.F.R de DROIT et
de SCIENCE
POLITIQUE

Département de Langues Juridiques

LEGAL ENGLISH
CASES AND EXERCISES

L3
CONTRACT LAW

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ROLE DUTIES
(In order of appearance during presentation)

JUDGE

- introduce the case (parties, court, judge, procedural posture, date)
- define relevant vocabulary words (minimum of 4)
- frame the issue(s) using "whether...when" format (see page 4 for explanation)
- [AFTER JURY HAS WEIGHED IN] give court's analysis and pronounce judgment

LEAD COUNSEL FOR PLAINTIFF

- present the facts of the case from client's point of view
- give the court the rules of law, including case citations, & citations to other legal references
- [AFTER ASSISTANT COUNSEL FOR PLAINTIFF IS DONE] demand judgment for client

ASSISTANT COUNSEL FOR PLAINTIFF

- make argument for client using rules of law introduced by Lead Counsel
- if rules of law are not in favor of your client, distinguish the facts of your case from the case rules cited

LEAD COUNSEL FOR DEFENDANT

- present the facts of the case from client's point of view
- give the court the rules of law, including case citations, & citations to other legal references
- [AFTER ASSISTANT COUNSEL FOR DEFENDANT IS DONE] demand judgment for client

ASSISTANT COUNCEL FOR DEFENDANT

- make argument for client using rules of law introduced by Lead Counsel
- if rules of law are not in favor of your client, distinguish the facts of your case from the case rules cited

JURY

- ask questions of judge to clarify the issue
- ask questions of judge to clarify the court's analysis of the facts and laws
- ask the attorneys questions related to their arguments, the facts, the rules of law
- vote on winning party – be prepared to give support to your vote

GENERAL PRESENTATION TIPS & USE OF LANGUAGE IN COURT

1. **Don't read your notes.** 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 notes will cause your grade to be lowered. The only way to score the maximum points is to present your information from memory.
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 is for rules of law which may be read word for word.
3. **Practice your pronunciation.** Proper pronunciation can mean the difference between the jury and the instructor understanding your argument, giving you max 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 will 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 go to www.dictionary.com, look up a word, and click on the little speaker icon to hear the word pronounced by a native English speaker.
4. **Mind your word choice.** You can really impress the jury and your instructor with your ability to use legal English if you are making purposeful word choices. Your job as an attorney 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. For example, when we are discussing the criminal case of Terry v. Ohio, we must deal with the fact that a firearm was found in Terry's pocket. A defense attorney could use the word "revolver" or "pistol" to describe this fact. A prosecutor could use the word "gun". Why? Because the words revolver and pistol are much "softer" versions of the word – less threatening. The word "gun" is a harder, scarier word. If you're the prosecutor you want to paint the defendant as a bad guy. If you're the defense attorney you want to paint the defendant as an innocent good guy. The power of words can sway your audience to a great degree. Show that you can use this skill.
5. **Use your legal English.** When the 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 would use will be in it. All of the cases are *full* 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 this: "I'm afraid I don't understand. Can you please repeat your question?"
7. **Do not be frightened of silence.** Find the right words to use. If you don't know the exact legal English, use words that are as close as possible with the same meaning.
8. **Avoid the use of phrases that indicate doubt.** Prases like: "I think that...", "It's my opinion that...", "That's a good point...", etc., give the impression you doubt your client's position.
9. **Don't try to make the jury laugh.** Unless humor is critical to winning your case, making your presentation into a stand-up comedy routine indicates you don't appreciate the seriousness of courtroom proceedings.
10. **Don't ramble.** Be as concise as possible. Stick to your point.
11. **Don't rifle through your papers or shuffle them in front of you.** Don't hold papers in front of your face. If your hands are shaking, put your papers on the table in front of you.
12. **Stand when addressing the jury or the judge.** The judge, on the other hand, should sit.
13. **Wait your turn.** Don't interrupt other attorneys or the judge when they are speaking.
14. **Use eye contact.** Scan the eyes of the jury members. Address the judge looking him or her in the eye. Use these titles to address the judge: "Your honor" (U.K. and U.S.), "My Lord/Lady"(U.K.),"Your Lordship/Ladyship" (U.K.)

Preparing a Case Brief

Although individuals or law firms usually have their own preferred methods of structuring a case brief, a typical one will include the following elements:
(NOTE: In U.S. Law schools and firms, the bulk of this structure is called the "IRAC" pronounced /aɪ-ræk/ or /eye-rack/. It's an acronym for **I**ssue, **R**ule, **A**nalysis, **C**onclusion).

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). Terminology you can use includes phrases like: "The lower court held that...", or "The appeals court reversed the lower court's decision...".

SUMMARY OF FACTS

- Relevant facts only. Can be told in chronological order 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

- Defines the problem that the court is going to resolve. Sometimes there is more than one issue.
- Framed by using the "*whether...when*" format as follows:

"Whether [insert legal problem] when [insert facts from case]."
Example: "The issue in this case is *whether* there is a breach of contract *when* one of the parties to the contract fails to perform because a hurricane destroyed his machinery that makes the goods contracted for and no replacement machinery was reasonably available."

RULE

- These are the "rules of law" or "laws" that the court cites in the case opinion. Often these case citations or citations to statutes come from the attorneys who argue the case. They often appear in a case opinion like this: Jones v. Walker, 340 U.S. 32, 35 (1956). If they are statutes, they can appear like this: Fla. Stat. § 324.56(b) (2009). A rule of civil procedure would look like this: Fed. R. Civ. Pro. 12(h)(3) (2010).
- Not rules of law, but often cited in case opinions, are persuasive texts that courts use to help understand and illustrate some common law rules. Examples are American Jurisprudence, or CJS (Corpus Juris Secundum), or Restatements. These texts define rules of law in general, but are *not* authoritative texts 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 sometimes also previous cases and established principles of law.
- Use phrases like "The court reasoned that..."

CONCLUSION

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

Case 1

EDGINGTON v. FITZMAURICE
Court of Appeal
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

Raffles v. Wichelhaus

In the Court of 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.

Case 3

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 4

PRIVY COUNCIL

BISSET v WILKINSON

(1927) AC 177, July 20, 1926

LORD MERRIVALE:

The appellant in this litigation brought his action in the Supreme Court of New Zealand to recover a sum of money payable to him under an agreement for sale and purchase of land. The defendants by way of defence and counterclaim alleged misrepresentation by the appellant in a material particular as to the character and quality of the land in question and claimed rescission of the agreement with consequential relief or alternatively damages for fraudulent misrepresentation or breach of warranty. Upon the trial of the action judgment was given for the plaintiff on the claim and the counterclaim. The Court of Appeal of New Zealand, by a majority, set aside the judgment of the trial judge and decreed rescission of the contract between the parties with consequential relief as prayed. The appellant claims to have the judgment of the Supreme Court reinstated.

The contract between the parties was an agreement in writing made in May, 1919, whereby the respondents agreed for the purchase by them of two adjoining blocks of land at Avondale, in the Southern Island of New Zealand, called 'Homestead' and 'Hogan's,' containing respectively 2062 acres and 348 acres or thereabouts, for £13,260 10s.; £2000 payable - and it was in fact paid - on the signing of the agreement, and the balance payable in May, 1924, interest to be paid half-yearly in the meantime. The lands in question formed parts of an area of 5225 acres which the appellant had bought in 1907 and after sundry works of reclamation and improvement had in 1911 sub-divided for sale. He sold lots containing 1500 acres and upwards, 964 acres, 350 acres, and Hogan's block of about 348 acres, retaining the Homestead block of 2400 acres which he used for his business of a sheep-farmer and sheep dealer until 1919 - during the war under some difficulties with regard to labour. Hogan's block was thrown on the appellant's hands by failure of the purchaser to complete, and in September, 1918, on the breakdown of a provisional arrangement which the appellant had made with another intending purchaser, he resumed his occupation of it. During the spring and summer, September, 1918, to April, 1919, the appellant carried out renewal work and stocked part of Hogan's block with young sheep, and in May he made his agreement for sale of the combined areas to the respondents, who had agreed upon a partnership as farmers.

Sheep-farming was the purpose for which the respondents purchased the lands of the plaintiff. One of them had no experience of farming. The other had been before the war in charge of sheep on an extensive sheep-farm carried on by his father, who had accompanied and advised him in his negotiation with the appellant and had carefully inspected the lands at Avondale. In the course of coming to his agreement with the respondents the appellant made statements as to the property which, in their defence and counterclaim, the respondents alleged to be misrepresentations.

At an early period after the respondents went into occupation and commenced their farming operations they found themselves in difficulties. They sought and obtained extensions of time for payment of the interest which fell due to the appellant. Sheep-farming became very unprofitable and they changed their user of the land. One of them withdrew from the partnership. The other made an assignment of the valuable part of his property to his wife, and on being eventually pressed by the appellant for payments under the agreement disclosed this assignment as an answer to the practical enforcement by the appellant of his demands. The appellant brought his action for a half-year's interest on the unpaid purchase money and the respondents set up their case of misrepresentation.

By their defence and counterclaim the respondents alleged that the appellant had 'represented and warranted that the land which was the subject of the agreement had a carrying capacity of two thousand sheep if only one team were employed in the agricultural work of the said land.' It was common ground

at the hearing and in the Court of Appeal that the carrying capacity of a sheep- farm is its capacity the year round. As was said by Reed J. in the Court of Appeal: 'The meaning of the representation as alleged was that the carrying capacity of the farm during the winter, with such special food and new pasture as could be grown by the proper use in ploughing of one team of horses regularly employed throughout the year was two thousand sheep.' 'It is also common ground,' said the same learned judge, 'that to bring a farm to its full carrying capacity skilled management is required. It is admitted that the appellants were not experienced farmers.'

The appellant made these admissions at the hearing: 'I told them that if the place was worked as I was working it, with a good six-horse team, my idea was that it would carry two thousand sheep. That was my idea and still is my idea.' Further, he said: 'I do not dispute that they bought it believing it would carry the two thousand sheep.'

The learned judge who tried the action, Sim J., based his judgment in favour of the appellant upon conclusions at which he arrived upon his examination of the evidence, first, that the representation made by the plaintiff was a representation only of his opinion of the capacity of the farm, not a representation of what that capacity in fact was; and secondly, that this representation of opinion was honestly made by the appellant. 'It seems to me,' the learned judge said, 'that the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject. I am satisfied that what he said was, and still is, his honest opinion on the subject.' These conclusions - if warranted by the evidence - were sufficient to dispose of the whole case of misrepresentation, whether as grounding a claim for rescission or a claim for damages. By them the charge of fraud in the pleadings is also specifically negatived. The cause of action founded on alleged warranty which is set up in the defence and counterclaim was, it has been agreed, not asserted at the trial, and the fact is not without bearing on the true effect of the claims which were relied upon.

In the Court of Appeal, as is said in the judgment of Stout C.J., 'the real question in dispute turned out to be whether the appellants were entitled to rescission of the contract. They did not rely upon the breach of warranty, but they asked for rescission of the contract, though their claim for damages for misrepresentation had not been formally withdrawn.' The learned judges of the Court of Appeal differed in opinion. Reed J. - who thought the appeal failed - dealt with the case upon the contention of the defendants - the now respondents - that the representation made to them by the plaintiff was a representation of fact. He found it to be conclusively established by the defendants' own evidence that, given proper management, the farm was fully capable of carrying at least two thousand sheep. Stout C.J. held that the statement relied upon was made and accepted as a statement of fact. 'It would surely be improbable,' the learned Chief Justice said, 'that when a seller is asked to say what the carrying capacity of his farm is he should not answer the question, but volunteer his opinion or estimate.' As to the truth of the representation, the learned Chief Justice said: 'The evidence in my opinion is clear that this place never carried all the year round two thousand sheep.' He added this: 'The respondent allowed the appellants to purchase the farm from him believing that it would carry two thousand sheep, and, therefore, they were misled.' Adams and Ostler JJ. alike held that the statement was a representation of fact and was proved to be untrue.

In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation is the alleged ground of relief of the party who repudiates the contract, it is, of course, essential to ascertain whether that which is relied upon is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy, as is illustrated

in a good many reported cases, as well as in this. A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact. In Karberg's Case Lindley L.J., in course of testing a representation which might have been, as it was said to be by interested parties, one of opinion or belief, used this inquiry: 'Was the statement of expectation a statement of things not really expected?' The Court of Appeal applied this test and rescinded the contract which was in question. In Smith v. Land and House Property Corporation there came in question a vendor's description of the tenant of the property sold as 'a most desirable tenant' - a statement of his opinion, as was argued on his behalf in an action to enforce the contract of sale. This description was held by the Court of Appeal to be a misrepresentation of fact, which, without proof of fraud, disentitled the vendor to specific performance of the contract of purchase. 'It is often fallaciously assumed,' said Bowen L.J., 'that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.' The kind of distinction which is in question is illustrated again in a well known case of Smith v. Chadwick. There the words under consideration involved the inquiry in relation to the sale of an industrial concern whether a statement of 'the present value of the turnover or output' was of necessity a statement of fact that the produce of the works was of the amount mentioned, or might be and was a statement that the productive power of the works was estimated at so much. The words were held to be capable of the second of these meanings. The decisive inquiries came to be: what meaning was actually conveyed to the party complaining; was he deceived, and, as the action was based on a charge of fraud, was the statement in question made fraudulently?

In the present case, as in those cited, the material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject-matter spoken of, are relevant to the two inquiries necessary to be made: What was the meaning of the representation? Was it true?

In ascertaining what meaning was conveyed to the minds of the now respondents by the appellant's statement as to the two thousand sheep, the most material fact to be remembered is that, as both parties were aware, the appellant had not and, so far as appears, no other person had at any time carried on sheep- farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. The two blocks comprised in it differed substantially in character. Hogan's block was described by one of the respondents' witnesses as 'better land.' 'It might carry,' he said, 'one sheep or perhaps two or even three sheep to the acre.' He estimated the carrying capacity of the land generally as little more than half a sheep to the acre. And Hogan's land had been allowed to deteriorate during several years before the respondents purchased. As was said by Sim J.: 'In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact. .... This, however, is not such a case. The defendants knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. In these circumstances .... the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject.' In this view of the matter their Lordships concur.

Whether the appellant honestly and in fact held the opinion which he stated remained to be considered. This involved examination of the history and condition of the property. If a reasonable man with the appellant's knowledge could not have come to the conclusion he stated, the description of that conclusion

as an opinion would not necessarily protect him against rescission for misrepresentation. But what was actually the capacity in competent hands of the land the respondents purchased had never been, and never was, practically ascertained. The respondents, after two years' trial of sheep-farming, under difficulties caused in part by their inexperience, found themselves confronted by a fall in the values of sheep and wool which would have left them losers if they could have carried three thousand sheep. As is said in the judgment of Ostler J.: 'Owing to sheep becoming practically valueless, they reduced their flock and went in for cropping and dairy-farming in order to make a living.'

The opinions of experts and of their neighbours, on which the respondents relied, were met by the appellant with evidence of experts admitted to be equally competent and upright with those of his opponents, and his own practical experience upon part of the land, as to which his testimony was unhesitatingly accepted by the judge of first instance. It is of dominant importance that Sim J. negatived the respondents' charge of fraud.

After attending to the close and very careful examination of the evidence which was made by learned counsel for each of the parties their Lordships entirely concur in the view which was expressed by the learned judge who heard the case. The defendants failed to prove that the farm if properly managed was not capable of carrying two thousand sheep.

Questions of laches and of affirmance of the contract on the part of the respondents which were argued at the hearing, are not material for further consideration, and in view of the course of the proceedings and the finding of Sim J. as to the honesty of the appellant in the statements he in fact made, it would be improper to accede to the application which was made at the Board on behalf of the respondents for leave to proceed anew upon the charge of fraudulent misrepresentation.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Sim J. restored. The respondents must bear the appellant's costs here and below.

Case 5

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 6

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 7

HOUSE OF LORDS

THORSTEN NORDENFELT (PAUPER), APPELLANT;

v.

THE MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY, LIMITED, RESPONDENTS

1894 April 13, 16, 17; July 31.

JUDGES: Lord Herschell L.C., Lord Watson, Lord Ashbourne, Lord Macnaghten, Lord Morris

APPEAL from an order of the Court of Appeal(1). The question turned upon a covenant in restraint of trade, unrestricted as to space, made on the 12th of September 1888 between the appellant and the respondent company, under the circumstances related in the judgment of Lord Herschell L.C. The covenant was in these words: –

"The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of re-constitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same."

The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

Romer J. made an order declaring that the covenant was void as being unreasonable and beyond what was required for the protection of the company.

The Court of Appeal (Lindley, Bowen and A. L. Smith L.JJ.) were of opinion that the covenant was too wide in its application to any business which the company might carry on during twenty-five years, but was valid as regarded the gun and ammunition business, and varied the order of Romer J. by declaring "that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder or subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper)." And the Court granted an injunction and ordered an inquiry accordingly(1).

April 13, 16, 17. The appellant in person: – The judgment of Bowen L.J. is inconsistent with the decision of the Court of Appeal in Davies v. Davies (2) and with *Tallis v. Tallis* (3) in which Lord Campbell C.J. expressly stated that though the restriction may be unlimited in respect of time, there must be some limit of space. The Court of Appeal has altered the law. It cannot be the law that a man should be prevented from earning his living in any part of the wide world. The true principle is that the restraint must not be wider than is necessary for the protection of the covenantee: *Rousillon*

v. Rousillon (4); *Mills v. Dunham* (5). The present case does not come within any of the exceptions to the general principle against restraints of trade. The business was sold without reserve, and the covenant was not made in connection with the sale of the business and is thus doubly void, as there was no consideration, and the restraint is in effect a universal one, both as to time and space. Further, it would be against public policy to enforce the covenant; as the special knowledge acquired is no longer available for the service of the British Government. Besides, the respondents are sufficiently protected by their patents; and to enforce the covenant would be an indirect and illegitimate method of prolonging or extending those patents.

Sir R. E. Webster Q.C. and W. F. Hamilton for the respondents: – The restraint is not greater than is required for the protection of the respondents, who were in a position to impose more stringent terms. It cannot be against public policy to prohibit the appellant from giving his advice or assistance to foreign Governments, and Bowen L.J. seemed to intimate that a stipulation that he should not advise the British Government might be illegal. The limits of such covenants must vary with the progress of trade and international intercourse, and also according to the character of the business. The case is practically one of a trade secret to which the law forbidding retraint of trade does not apply. The appellant is not prevented from earning his living. He may, for instance, make and sell sporting guns. The alleged absence or inadequacy of consideration is a matter which the Court cannot consider: *Gravely v. Barnard* (1).

The appellant in reply: – There is nothing in the nature of a trade secret, as any one could make one of the guns from a pattern. Many of the patents expire in a year or two, and the respondents are thus practically getting a large extension of these patents. The terms imposed are oppressive, especially as the company has sold its business at 100 per cent. profit.

The House took time for consideration.

July 31.LORD HERSCHELL L.C.:– My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade. The covenant in question was contained in an agreement of the 12th of September 1888, and was in these terms "The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company. Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March 1886, obtained patents for improvements in quick-firing guns,

and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March 1886 an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July 1888 negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies; dated the 3rd of July 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September 1888.

The respondents were incorporated on the 17th of July 1888, and on the 8th of August the agreement of the 3rd of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, inter alia, not only the adoption of the agreement of the 3rd of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the goodwill of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the goodwill of the appellant's business, and was designed for the protection of the goodwill so sold, and he contended that this was an error, inasmuch as there was no sale by him of the goodwill on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the goodwill was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new

company the object was, as I have shewn, stated to the world to be the acquisition of the goodwill of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognised and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel v. Reynolds*. That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of Master, &c., of Gunmakers v. Fell, Willes C.J. said the general rule was "that all restraints of trade, (which the law so much favours,) if nothing more appear, are bad ... But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

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I am confirmed in this view of Tindal C.J.'s opinion by his judgment in the subsequent case of *Hinde v. Gray*. In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, Tindal C.J. saying that it was "assigned on a covenant which according to the case of *Ward v. Byrne* was void in law." ****but Tindal C.J. did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde v. Gray*, the covenant was a reasonable one, or was wider than

was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward v. Byrne*, except to say, that although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to *Mitchel v. Reynolds*. He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of Willes and Keating JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases. ****

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the goodwill

were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner v. Graves*, in considering whether the agreement was reasonable. Tindal C.J. said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed. **Order appealed from affirmed and appeal dismissed. Lords' Journals 31st July 1894.**

(LORD WATSON, Lord Herschell, Lord Ashboune and Lord Morris also delivered judgments in favor of dismissal):– ****

Case 8

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 9

KEHM CORP. v. UNITED STATES

United States Court of Claims, 1950.
93 F.Supp. 620.

The Kehm Corporation sued the United States for damages sustained as the result of delays caused by defendant, in performance of plaintiff's contract to manufacture practice bombs for the Navy. On a hearing under a court rule to determine whether defendant is liable for any part of the money sought to be recovered. . . .

Judgment determining plaintiff's right to recover damages in an amount to be determined in future proceedings.

HOWELL, JUDGE. On October 8, 1943, the plaintiff contracted with the United States to manufacture for the Navy 2,800 concrete practice bombs, 2,500 to be 100-pound bombs and 300 to be 1,000-pound bombs. Plaintiff had two plants, one at Miami, Florida, where the 1,000-pound bombs were manufactured, and one at nearby Fort Lauderdale, where the 100-pound bombs were manufactured. The completed bombs were to include tail assemblies which were to be furnished by the defendant. Delivery of the bombs, complete with tail assemblies, was to be made within 45 days, that is, by November 22, 1943. As it turned out, the last shipment was not made until April 12, 1944. Plaintiff has been paid the contract price, and now sues here for an additional $21,737.94 as compensation for losses and damages allegedly sustained as a result of delays caused by the Government which retarded completion of the contract. The period for which damages are sought ended April 7, 1944, and plaintiff's claim was first filed with the contracting officer on April 8, 1944. The case at this stage is limited under our Rule 39(b), 28 U.S.C.A., to a determination of whether the United States is liable for any part of the money sought to be recovered.

The contract did not specify what type of tail assemblies was to be supplied by the Government, nor when. There were two types, service and practice. The methods of manufacturing the bombs differed depending on the type of tail to be used. Practice tails must be cast integrally with the concrete, which means that the bomb cannot be cast until the tail is actually on hand. Service tails are attached after the concrete casting has been completed, and it is feasible therefore to cast the bomb before receipt of the tail. In the initial stage of the negotiations leading up to the contract, it was contemplated that practice tails would be used. Prior to the signing of the contract, however, plaintiff was informed that service tails were desired and would be supplied. The Navy did not have sufficient tail assemblies and had to procure them by special orders. At the time the contract was signed, the Navy had not ordered any service tails for 100-pound bombs, although it had ordered 500 practice tails on September 10. Plaintiff, however, had been led to expect service tails.

On October 16, the Government delivered the 500 practice tails to plaintiff at Fort Lauderdale. Plaintiff had already commenced making molds for bombs to which service tails could be attached. A week was lost while plaintiff attempted to determine whether the delivery of practice tails was a mistake or whether it indicated a change in the last expressed intention of the Navy, which was that service tails would be supplied. Plaintiff was again assured that service tails were wanted and would be furnished for the major part of the bombs. Plaintiff was instructed, however, to proceed with the manufacture of the bombs with the tails at hand, that is, with the practice tails.

Plaintiff had previously cast some test sample bombs with practice tails and had about a dozen or two of these molds on hand. Other molds for practice tail bombs were made, and plaintiff had 500 100-pound bombs, equipped with practice tails, ready for delivery by November 22, 1943, the date by which the contract was supposed to have been completed.

Three days earlier, on November 19, two more shipments of tails were received. One shipment, to Fort Lauderdale, was of 500 more practice tails for 100-pound bombs; the other, to Miami, consisted of 500 service tails for 1,000-pound bombs. This was the first shipment of tails for 1,000-pound bombs and was of the expected type. Plaintiff proceeded with the manufacture of 1,000-pound bombs, and the 500 called for in the contract were ready for delivery by the end of December.

No more tails were received by plaintiff until February 23, 1944, when 2,050 service tails for 100-pound bombs were received. These tails had not even been ordered by the Government until November 12, 1943, and an additional shipping order for them had to be issued on January 25, 1944. After receipt of this shipment, manufacture of 100-pound bombs was resumed and all casting was completed at Fort Lauderdale by March 10, 1944. Plaintiff then closed its Fort Lauderdale plant and moved the undelivered 100-pound bombs to Miami. Some of the tails for this last group of bombs were not attached until after the bombs had reached the Miami plant.

Plaintiff was unable to complete manufacture of the bombs by November 22, 1943, because of defendant's delay in furnishing the tails. [Further details of the Navy's delays are here omitted.]

Plaintiff was further delayed by the defendant's failure to accept the bombs as they were completed. [Details are here omitted.]

Behind the defendant's delays in accepting the bombs was the fact that the Navy had lost interest in the concrete bomb program. It was having difficulty in finding storage space for these now unwanted items. Because of the uncertainty created by defendant's confusing deliveries of practice rather than service tails and because of defendant's delays in supplying any tails and in accepting the completed bombs, plaintiff's performance of its contract was delayed until April 12, 1944. For purposes of measuring damages in this case, however, the period of delay will have to be considered as ending on April 7.

Plaintiff has been paid the contract price. Its claim for additional expenses was filed on April 8, 1944. On July 10, 1944, the contracting officer made findings of fact sustaining plaintiff's contentions. His findings were forwarded to the Navy Department, which referred the matter to the Comptroller General, who disallowed the claim on January 26, 1945, on the ground that it was for unliquidated damages and therefore a matter for determination by the courts. The disallowance was reaffirmed on September 7, 1945. We have now to determine not the extent of recoverable damages, if any sustained by plaintiff but whether any recoverable damages were sustained, that is, whether defendant's delays amounted to a breach of contract.

Logic would seem to require that a contract binding one party to fabricate goods for another by a certain time out of material to be furnished by the other must perforce be held also to bind the other party to supply the material sufficiently early for the work to be done as promised and not to be dilatory in accepting the completed goods. The law considers a promise such as plaintiff's to be subject to a "constructive condition of cooperation." Patterson, Constructive Conditions in Contracts, 42 Col.L.Rev. 903. The promisor's undertaking normally gives rise to an implied complementary obligation on the part of the promisee: he must not only not hinder his promisor's performance, he must do whatever is necessary to enable him to perform. United States v. Speed, 8 Wall. 77, 75 U.S. 77, 19 L.Ed. 449. . . . 5 Williston on Contracts (1937) Sections 1293 A and 1318. The implied obligation is as binding as if it were spelled out. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 [p. 234 supra].

[The court here distinguishes the case of United States v. Howard P. Foley Co., Inc., 329 U.S. 64, 67 S.Ct. 154.]

The Government's right under the contract to make changes cannot justify its waiting until February to supply material it was obligated to supply in October or November. [Citations omitted.]

We hold only that defendant's delays breached the contract, prevented timely performance by plaintiff, and resulted in some damage. Plaintiff is entitled to recover the loss it actually sustained as a result of the delay. United States v. Wyckoff Pipe & Creosoting Co., 271 U.S. 263, 46 S.Ct. 503, 70 L.Ed. 938. What these damages were we do not now determine. . . .

SECTION 5. CERTAINTY

Case 10

KENFORD CO. v. ERIE COUNTY

New York Court of Appeals, 1986.
67 N.Y.2d 257, 502 N.Y.S.2d 131, 493 N.E.2d 234.

PER CURIAM.

The issue in this appeal is whether a plaintiff, in an action for breach of contract, may recover loss of prospective profits for its contemplated 20–year operation of a domed stadium which was to be constructed by defendant County of Erie (County).

On August 8, 1969, pursuant to a duly adopted resolution of its legislature, the County of Erie entered into a contract with Kenford Company, Inc. (Kenford) and Dome Stadium, Inc. (DSI) for the construction and operation of a domed stadium facility near the City of Buffalo. The contract provided that construction of the facility by the County would commence within 12 months of the contract date and that a mutually acceptable 40–year lease between the County and DSI for the operation of said facility would be negotiated by the parties and agreed upon within three months of the receipt by the County of preliminary plans, drawings and cost estimates. It was further provided that in the event a mutually acceptable lease could not be agreed upon within the three-month period, a separate management contract between the County and DSI, as appended to the basic agreement, would be executed by the parties, providing for the operation of the stadium facility by DSI for a period of 20 years from the completion of the stadium and its availability for use.

Although strenuous and extensive negotiations followed, the parties never agreed upon the terms of a lease, nor did construction of a domed facility begin within the one-year period or at any time thereafter. A breach of the contract thus occurred and this action was commenced in June 1971 by Kenford and DSI.

Prolonged and extensive pretrial and preliminary proceedings transpired throughout the next 10 years, culminating with the entry of an order which affirmed the grant of summary judgment against the County on the issue of liability and directed a trial limited to the issue of damages (*Kenford Co. v. County of Erie*, 88 A.D.2d 758, *lv dismissed* 58 N.Y.2d 689). The ensuing trial ended some nine months later with a multimillion dollar jury verdict in plaintiffs' favor. An appeal to the Appellate Division resulted in a modification of the judgment. That court reversed portions of the judgment awarding damages for loss of profits and for certain out-of-pocket expenses incurred, and directed a new trial upon other issues (*Kenford Co. v. County of Erie*, 108 A.D.2d 132). On appeal to this court, we are concerned only with that portion of the verdict which awarded DSI money damages for loss of prospective profits during the 20–year period of the proposed management contract, as appended to the basic contract. That portion of the verdict was set aside by the Appellate Division and the cause of action dismissed. The court concluded that the use of expert opinion to present statistical projections of future business operations involved the use of too many variables to provide a rational basis upon which lost profits could be calculated and, therefore, such projections were insufficient as a matter of law to support an award of lost profits. We agree with this ultimate conclusion, but upon different grounds.

Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205). In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made (*Witherbee v. Meyer*, 155 N.Y. 446). If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty (*Cramer v. Grand Rapids Show Case Co.*, 223 N.Y. 63; 25 CJS, Damages, § 42[b]).

These rules must be applied to the proof presented by DSI in this case. We note the procedure for computing damages selected by DSI was in accord with contemporary economic theory and was presented through the testimony of recognized experts. Such a procedure has been accepted in this State and many other jurisdictions (*see, De Long v. County of Erie*, 60 N.Y.2d 296). DSI's economic analysis employed historical data, obtained from the operation of other domed stadiums and related facilities throughout the country, which was then applied to the results of a comprehensive study of the marketing prospects for the proposed facility in the Buffalo area. The quantity of proof is massive and, unquestionably, represents business and industry's most advanced and sophisticated method for predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by DSI in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, DSI's proof is insufficient to meet the required standard.

The reason for this conclusion is twofold. Initially, the proof does not satisfy the requirement that liability for loss of profits over a 20–year period was in the contemplation of the parties at the time of the execution of the basic contract or at the time of its breach (*see, Chapman v. Fargo*, 223 N.Y. 32; 36 N.Y.Jur.2d, Damages, §§ 39, 40, at 66–70). Indeed, the provisions in the contract providing remedy for a default do not suggest or provide for such a heavy responsibility on the part of the County. In the absence of any provision for such an eventuality, the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject. The evidence here fails to demonstrate that liability for loss of profits over the length of the contract would have been in the contemplation of the parties at the relevant times.

Next, we note that despite the massive quantity of expert proof submitted by DSI, the ultimate conclusions are still projections, and as employed in the present day commercial world, subject to adjustment and modification. We of course recognize that any projection cannot be absolute, nor is there any such requirement, but it is axiomatic that the degree of certainty is dependent upon known or unknown factors which form the basis of the ultimate conclusion. Here, the foundations upon which the economic model was created undermine the certainty of the projections. DSI assumed that the facility was completed, available for use and successfully operated by it for 20 years,

providing professional sporting events and other forms of entertainment, as well as hosting meetings, conventions and related commercial gatherings. At the time of the breach, there was only one other facility in this country to use as a basis of comparison, the Astrodome in Houston. Quite simply, the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty.

The economic facts of life, the whim of the general public and the fickle nature of popular support for professional athletic endeavors must be given great weight in attempting to ascertain damages 20 years in the future. New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general (*see, Broadway Photoplay Co. v. World Film Corp.*, 225 N.Y. 104) and, in this case, we are dealing, in large part, with a new facility furnishing entertainment for the public. It is our view that the record in this case demonstrates the efficacy of the principles set forth by this court in *Cramer v. Grand Rapids Show Case Co.* (223 N.Y. 63, *supra*), principles to which we continue to adhere. In so doing, we specifically reject the "rational basis" test enunciated in *Perma Research & Dev. Co. v. Singer Co.* (542 F.2d 111, *cert. denied* 429 U.S. 987) and adopted by the Appellate Division.

Accordingly, that portion of the order of the Appellate Division being appealed from should be affirmed.

Chief Judge WACHTLER and Judges MEYER, ALEXANDER, TITONE and KANE* concur in Per Curiam opinion; Judges SIMONS, KAYE and HANCOCK, JR., taking no part.

Order insofar as appealed from affirmed, with costs.

Case 11

KIRKLAND v. ARCHBOLD

Court of Appeals of Ohio, Cuyahoga 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 12

PEEVYHOUSE v. GARLAND COAL & MINING CO.

Supreme Court of Oklahoma, 1962.
382 P.2d 109, cert. denied, 375 U.S. 906, 84 S.Ct. 196, 11 L.Ed.2d 145 (1963).

JACKSON, J. In the trial court, plaintiffs Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Company, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

In the briefs on appeal, the parties present their argument and contentions under several propositions; however, they all stem from the basic question of whether the trial court properly instructed the jury on the measure of damages.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A "strip-mining" operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the "diminution in value" of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract—that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it might consider the cost of performance of the work defendant agreed to do, "together with all of the evidence offered on behalf of either party".

It thus appears that the jury was at liberty to consider the "diminution in value" of plaintiffs' farm as well as the cost of "repair work" in determining the amount of damages.

It returned a verdict for plaintiffs for $5000.00—only a fraction of the "cost of performance", *but more than the total value of the farm even after the remedial work is done.*

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default.

Defendant argues that the measure of damages is the cost of performance "limited, however, to the total difference in the market value before and after the work was performed".

It appears that this precise question has not heretofore been presented to this court. In Ardizonne v. Archer, 72 Okl. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the "cost of performance" rule as opposed to the "value" rule. The result was to authorize a jury to give plaintiff damages in the amount of $60,000, where the real estate concerned would have been worth only $12,160, even if the work contracted for had been done.

It may be observed that Groves v. John Wunder Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon Sandy Valley & E.R. Co., v. Hughes, 175 Ky. 320, 194 S.W. 344; Bigham v. Wabash-Pittsburg Terminal Ry. Co., 223 Pa. 106, 72 A. 318; and Sweeney v. Lewis Const. Co., 66 Wash. 490, 119 P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the "value" rule instead of the "cost of performance" rule. Plaintiff points out that in the earliest of these cases (Bigham) the court cites as authority on the measure of damages an earlier Pennsylvania *tort* case, and that the other two cases follow the first, with no explanation as to why a measure of damages ordinarily followed in cases sounding in tort should be used in contract cases. Nevertheless, it is of some significance that three out of four appellate courts have followed the diminution in value rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of "improvements" upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

In Groves v. John Wunder Co., supra, in arriving at its conclusions, the Minnesota court apparently considered the contract involved to be analogous to a building and construction contract, and cited authority for the proposition that the cost of performance or completion of the building as contracted

is ordinarily the measure of damages in actions for damages for the breach of such a contract.

* * *

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages "if this is possible and does not involve *unreasonable economic waste*"; and that the diminution in value caused by the breach is the proper measure "if construction and completion in accordance with the contract would involve *unreasonable economic waste*". (Emphasis supplied.) In an explanatory comment immediately following the text, the Restatement makes it clear that the "economic waste" referred to consists of the destruction of a substantially completed building or other structure. Of course no such destruction is involved in the case now before us.

On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that " ... in cases where the defect is one that can be repaired or cured without *undue expense* "the cost of performance is the proper measure of damages, but where" ... the defect in material or construction is one that cannot be remedied without *an expenditure for reconstruction disproportionate to the end to be attained* "(emphasis supplied) the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

"The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value."

It thus appears that the prime consideration in the Restatement was "economic waste"; and that the prime consideration in McCormick, Damages, and in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the "end to be attained"—in other words, the "relative economic benefit".

In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the "relative economic benefit" is a proper consideration here.

* * *

applying the cost rule, the Virginia court specifically noted that " ... the defects are remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained*"(Emphasis supplied).

23 O.S.1961 §§ 96 and 97 provide as follows:

"§ 96. ...Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides....

"§ 97. ...Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered."

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

* * *

We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

* * *

The above holding disposes of all of the arguments raised by the parties on appeal.

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of nonperformance of the remedial work was $300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record.

We are asked by each party to modify the judgment in accordance with the respective theories advanced, and it is conceded that we have authority to do so. 12 O.S.1961 § 952; Busboom v. Smith, 199 Okl. 688, 191 P.2d 198; Stumpf v. Stumpf, 173 Okl. 1, 46 P.2d 315.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $300.00, and as so modified it is affirmed.

WELCH, DAVISON, HALLEY, and JOHNSON, JJ., concur.

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EXERCISES

Exercise 1
Contract Synonyms

Match the synonyms in the table below with the words in italics in the sentences.

a. *severed*	**b.** *waive*	**c.** *rendered null and void*	**d.** *drawn up*	**e.** *executed*
f. *fell due*	**g.** *subject to*	**h.** *for material breach of contract*	**i.** *the expiration date of (US) the date of expiry of (UK)*	**j.** *enter into*
k. *rescinded*	**l.** *proviso*	**m.** *time is of the essence*	**n.** *in accordance with*	**o.** *laid down*
p. *preclude*	**q.** *proscribes*	**r.** *terms of the contract*	**s.** *is in breach of contract*	**t.** *terminates*

_____1. This contract is *dependent* on government approval.

_____2. The company *has failed to carry out what was agreed to in the contract.*

_____3. This offer *comes to an end* on the death of the offeror.

_____4. The company was sued *because it had not completed a critical obligation of the contract.*

_____5. The skeleton contract was *drafted* yesterday.

_____6. This contract under seal is now *cancelled.*

_____7. *The date when* your insurance policy *comes to an end* is in a month.

_____8. The contract has all the terms the parties have negotiated on, so it is ready to be *signed.*

_____9. This implied contract has been *cancelled.*

_____10. Who convinced you to *agree to sign* the contract?

_____11. There is an important *condition* at the end of the deed. It begins with the phrase 'provided always that'.

_____12. The bill *was due to be paid* on Monday.

_____13. *According to* your instructions, I sent him the money yesterday.

_____14. He refused to agree to some of the *conditions which have to be carried out as part of the contract.*

_____15. The conditions are *stated clearly* in the last part of the contract.

_____16. This agreement does not *forbid* a further agreement between the parties in the future.

_____17. This clause may be *removed* from the contract without causing the entire contract to be void.

_____18. One party may *put aside* his rights, if he so chooses.

_____19. *All time periods in this contract are absolute and must be followed exactly.*

_____20. The contract *forbids* this type of action.

Exercise 2

Contract Definitions

Match the contract terms with their definitions below:

_____1. binding contract	**a.** pressure put on someone preventing the person from acting independently
_____2. by private contract	**b.** a carrying out of the terms of the contract
_____3. performance	**c.** any unlawful threat or coercion used... to induce another to act [or not act] in a manner they otherwise would not [or would]
_____4. default	**d.** by private legal agreement
_____5. defect	**e.** something which was wrong in the contract
_____6. specific performance	**f.** failure to carry out the terms of an agreement
_____7. severance (U.K.) termination (U.S.)	**g.** court order to a person to carry out his obligations in a contract
_____8. rescission	**h.** ending of a contract of employment
_____9. undue influence	**i.** cancellation of a contract
_____10. duress	**j.** all parties signing the agreement are legally forced to do what is agreed upon

Exercise 3

Contract Defenses & Remedies

Fill in the gaps below with words from the table. Conjugate any verbs as necessary.

the inducement	**intention**	**fraud in the factum**	**rescission**	**void**
to induce	**factum**	**misrepresentation**	**damages**	**fraud in the inducement**
voidable	**discretionary**	**specific performance**	**remedy**	**injunction**

_____ means a false statement of fact made by one party to another party and has the effect of _____ that party into the contract. For example, under certain circumstances, false statements or promises made by a seller of goods regarding the quality or nature of the product that the seller has may constitute misrepresentation. A finding of misrepresentation allows for a _____ of _____ and sometimes _____ depending on the type of misrepresentation.

There are two types of misrepresentation in contract law, _____ and _____. Fraud in the _____ focuses on whether the party in question knew they were creating a contract. If the party did not know that they were entering into a contract, there is no meeting of the minds, and the contract is _____. Fraud in _____ focuses on misrepresentation attempting to get the party to enter into the contract. Misrepresentation of a material fact (if the party knew the truth, that party would not have entered into the contract) makes a contract _____.

It is possible to make a misrepresentation either by words or by conduct, although not everything said or done is capable of constituting a misrepresentation. Generally, statements of opinion or _____ are not statements of fact in the context of misrepresentation.

Both an order for _____ _____ and an _____ are _____ remedies, originating for the most part in equity. An injunction may be requested when the contract prohibits a certain action. Action for injunction would prohibit the person from performing the act specified in the contract.

Exercise 4
Contract-related Phrasal Verbs

abide by	agree to	avail (oneself) of	carry out	draw up
enter into	fall through	find out	invest in	iron out
leave out	look forward to	negotiate between	opt out	pay attention
put off	point out	put down (deposit)	rely on/upon	seek redress
serve on/upon	write off	break off	wind up	turn in

Fill in the sentences below with the phrasal verbs above. Use each only once. Remember to use the correct verb conjugation.

1. You must be _____ the end of this case. It was tough!
2. I need you to have this contract _____ by Friday at the latest.
3. All parties must _____ the terms of the contract.
4. I would like to _____ some important terms in this contract.
5. The complaint must be _____ the defendant with the summons.
6. The parties must _____ their differences in court.
7. My client _____ your client's promises to induce him to sign the contract.
8. The client has agreed to _____ the bad debt of the defendant.
9. You _____ accepting the offer too long. It has now lapsed.
10. The parties have chosen to _____ with the courts.
11. We use a 2-month _____ provision in the contract to avoid arbitration.
12. The negotiations _____ when neither party could agree.
13. The parties _____ the contract on June 21, 2010.
14. A person who has been wronged is entitled to _____ the courts.
15. When drafting a contract, it's important to _____ to client needs.
16. The court ordered the partnership to _____ their business.
17. We need to use this opportunity to _____ their bottom line.
18. As a party to the contract, you must _____ all of your obligations.
19. He decided to _____ some legal counsel. It was a wise choice.
20. That clause was _____ because the client didn't want it in the contract.
21. We cannot _____ that liquidated damages clause. It isn't adequate.
22. The deal _____ because the parties couldn't negotiate agreeable terms.
23. You must _____ your signed contract to Human Resources by Tuesday.
24. He _____ $50.00 as a sign of his good faith.
25. The court ordered the parties to _____ themselves in a mediation.

Exercise 5
Contract Synonyms – Verbs, Adjectives, Nouns

Match the synonyms on the left with the contract terms on the right.

_____1. to write	a. clause
_____2. a first copy	b. material
_____3. a final copy	c. to rescind
_____4. to sign	d. to void
_____5. to complete the obligations of	e. remedies
_____6. to break a (written) promise	f. to draft
_____7. to discharge	g. terms and conditions
_____8. (to be) responsible (for)	h. mandatory
_____9. obligatory	i. witness
_____10. of critical importance	j. signatory
_____11. not able to be withdrawn	k. to perform
_____12. person, business, or other entity	l. first draft
_____13. agreement	m. to execute
_____14. reparations	n. to breach
_____15. to take back	o. liable
_____16. to include	p. consent
_____17. provisions and standards	q. to incorporate
_____18. paragraph	r. final draft
_____19. person who signs	s. party
_____20. person who watches another sign	t. irrevocable

Exercise 6

Case Opinions - Definitions

Fill in the blanks with words from the table. Make sure to use plurals if necessary.

holding	reverse	dissent	rule of law	citation
case at bar	procedural posture	appeal	appellant	appellee

When a party loses in the trial court, he may (1.)_____ the decision of the court – that is, he can file a motion to have a higher court review the decision of the lower court. When a party files this motion, he is called the (2.)_____. The party who must repond to this motion is the (3.)_____.

If, after the case is heard in the higher court, the higher court disagrees with the ruling of the lower court, it can (4.)_____ that lower court's decision. If one of the judges in that higher court does not agree with the decisions of the other judges on the higher court panel, he can file a (5.)_____ which is his differing opinion. It does not change the ruling of the higher court, but sets out this judge's reasoning and support for why he does not agree with the other judges.

Usually, a case opinion from a common law country often has many (6.)_____ within it, or references to other cases. This is because common law courts must rely on the authority of higher courts and other cases to help them interpret the law. When a court refers to the (7.)_____ in its jurisdiction, it is referring to the laws that must be followed by the court. If a judge mentions the (8.)"_____", he is speaking of the case that is at issue in front of the court that day for its decision, not the cited cases it may be using to interpret the law.

A case opinion will often also have the (9.)_____ of the case, or a chronology of the case's history as it has moved through various courts and been subject to various court decisions. Finally, the case opinion has the (10.)_____ or the final decision of the court.

Exercise 7

CONTRACT REMEDIES - Definitions

Fill in the gaps below with a word from the table.

penalty clause	void	damages	specific performance	legal
equitable estoppel	rescission	injunction	liquidated damages	equitable

1. _____ is a remedy where the court orders a party to complete the terms of a contract.

2. A contract is _____ when it was not legal when made.

3. _____ is when both parties mutually agree to "undo" a contract.

4. _____ are an amount of money the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach.

5. _____ are the amount of money a party suffers as a result of a breach of contract.

6. A(n) _____ is an equitable remedy in the form of a court order that requires a party to do, or to refrain from doing, certain acts.

7. A(n) _____ is a type of liquidated damages clause that will not be enforced because its purpose is to punish the wrongdoer/party in breach rather than to compensate the injured party.

8. _____ remedies are discretionary by the court, always directed at a particular person, said to be based in "fairness" not necessarily a specific law.

9. _____ remedies are provided for by law and are available to a claimant as of right.

10. _____ precludes a person from denying or asserting anything to the contrary of that which has been established as the truth by his own acts or representations, either express or implied.

Useful verbs 4

Mixed tenses

ALL THE VERBS in the box relate to legal matters. Use them to complete the sentences. You may have to change the forms of the verbs to fit the grammar of the sentences. The first one has been done for you as an example.

arrange	blackmail	convict	corroborate	exonerate	find	forfeit	infringe
overturn	prohibit	promise	recover	~~refrain~~	sentence	sue	

1. He was asked to give an undertaking to *refrain* from political activity.
2. My client intends to appeal and I am sure that a higher court will _____ this sentence.
3. I can _____ Mr Waterman's alibi. At the time of the theft I saw him in Brighton.
4. The judge _____ him to three years imprisonment.
5. After the accident he _____ the company for £50,000 in damages.
6. She was _____ of manslaughter and sent to prison for eight years.
7. If you decide not to buy you will _____ your 25% deposit.
8. The court has _____ him guilty on all charges.
9. We believe that this production _____ our copyright as detailed below.
10. The company went out of business and the original investment was never _____.
11. We discovered that his secretary was _____ him with certain details about his private life.
12. You _____ to pay by August and it's now September. What's your explanation?
13. The law _____ the sale of alcohol to minors.
14. All the files are _____ in alphabetical order, so it's very easy to find.
15. The judge _____ the driver from all responsibility for the accident.

Extension. Choose five sentences and dictate them to a partner.

Based on the *Dictionary of Law*, 2nd Ed. 1994
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Phrasal verbs

PHRASAL VERBS ARE common in conversational English. Read the definitions on the right and use the phrasal verbs to complete the sentences. You will have to use some verbss more than once, and you may have to change the form of the verb to fit the grammar of the sentence. The first one has been done for you as an example.

1. The company ACT has been *broken* *up* into seven autonomous divisions.
2. He had a factory which manufactured cheap sports clothes which he _____ _____ as high-quality designer goods.
3. He _____ all of us _____ with his promise of quick profits and low risks.
4. He was caught _____ _____ to a clothes shop at night.
5. He _____ _____ the meeting with a vote of thanks to the chairman
6. I'm very busy on Wednesday: can I _____ our meeting _____ to Tuesday?
7. John is leaving in June and there will be a gap of one month before the new manager _____ _____.
8. Management and unions could not agree and negotiations _____ _____ at midnight yesterday.
9. Payment will be _____ _____ until the contract is signed.
10. Shares in ACT have increased in price by 35 pence with the news that they are to be _____ _____ by Giant PLC
11. The car was still under guarantee when it _____
12. The company was insolvent and the court ordered it to be _____ _____.
13. The share price _____ _____ well through the summer and then fell in September.
14. They are accused of _____ _____ a security van and stealing £45,000.
15. This watch was _____ _____ to me from my great-grandfather.
16. When he lost his job he _____ his savings _____ into opening a design studio.
17. You have to _____ £200 _____ now and then pay £100 a month for eighteen months.

Verbs & definitions

1. **break down:** to stop because of failure
2. **break in:** to go into a building by force in order to steal
3. **break off:** to stop a discussion or negotiation
4. **~~break up~~:** to divide (a company) into separate units
5. **bring forward:** to change to an earlier date
6. **hand down:** to give to the next generation through inheritance
7. **hold up:** (1) to rob from a bank or vehicle using weapons, (2) to stay at a high level, (3) to delay
8. **pass off:** to pretend something is not what it is to cheat a customer
9. **put down:** to pay as a deposit
10. **put into:** invest
11. **take in:** to trick, to deceive
12. **take over:** (1) to start to do something in place of someone else, (2) to buy a company
13. **wind up:** (1) to end a meeting, (2) to put a company into liquidation

Extension. Work with a partner. Test each other: One person closes the book, the other asks questions. For example: *"Tell me a verb which means 'to divide a company into separate units'"*

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Latin pair-up

MANY LATIN EXPRESSIONS are used in British law, for example *corpus delicti* is the proof that a crime has been committed. Match words from the two boxes, A and B, to make 15 legal expressions which fit the definitions in the list. Each expression should consist of a word from box A followed by a word from Box B. The first one has been done for you as an example.

Box A

~~BONA~~ CAVEAT COMPOS DOLI
HABEAS INTER INTER IPSO
OBITER PER PRIMA SUI TOTIES
VICE VIVA

Box B

ALIA CAPAX CAPITA CORPUS
DICTA EMPTOR FACIE FACTO
~~FIDE~~ GENERIS MENTIS QUOTIES
VERSA VIVOS VOCE

Definitions

1. In good faith *bona fide*
2. Among other things
3. The buyer is responsible for checking a purchase
4. Things which are said in passing
5. In the opposite way
6. By speaking
7. Sane
8. In a class of its own
9. As often as necessary
10. Between living people
11. A legal remedy against wrongful imprisonment
12. By this fact, in itself
13. Capable of crime
14. For each person
15. As things seem at first

Extension. Find three more Latin expressions in the dictionary and teach them to other students in the class.

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Name the crime 2

Defence

BELOW ARE 10 statements by defendants. Read the statements and say what crime has each one been accused of.

1 "I arrived home late and found that I'd forgotten my keys. I didn't want to wake my wife up, and I saw there was a ladder in the garden of the house next door . I got the ladder and climbed in. We've just moved house and I didn't realise I was in the wrong street...

2 "I was walking my dog when I saw the gun lying on the ground. I picked it up - it was still warm - and at that moment I saw the body lying in the long grass. I went across to look and it was my business partner. That's when the police arrived...

3 "I opened the bank account in a false name as a way to help my employer pay less tax- It's perfectly legal. I kept meaning to tell him, but somehow I just forgot. I bought the villa in France with my own money. It was an inheritance...

4 "OK, so there are a hundred and twenty-three copies of Four Weddings and a Funeral. That's perfectly true, but I had no intention of selling them. I'm a collector.

5 "Well this obviously isn't my suitcase. I've never seen these things before in my life. The monogram? Well, they are my initials, but that must be a coincidence. That's probably how the two cases got mixed up. After all, JA aren't very unusual initials. A photograph with me in it? My word, that's incredible! It must be someone who knows me...

6 "I didn't know she was still alive, I thought she'd died in a car accident. I couldn't believe it when I saw her walk into the room. Surely you don't think I did this just to get your money...?

7 "You misunderstand me. When I offered him the money I meant it as a gift. I know that life can be difficult for a young man on a police salary, especially if he has a family, young children etcetera. It isn't easy and I know that. I just wanted to help. I didn't expect him to do anything in return...

8 "After leaving the office I realised I'd forgotten my umbrella. I went back in to get it. When I went in I noticed that the photocopier was still turned on. It had been working very badly all day, and I decided to quickly see what was wrong with it before going home. I made a few test copies of documents that were in the office;. I didn't even look at what I was copying. The machine seemed to be working much better. I put the copies in my briefcase - intending to use the other side as notepaper. I don't believe in wasting paper. At that moment Mr Sanders came out of his office...

9 "I painted them for pleasure. I had no intention of deceiving people. I never said they were by other people. Yes, I did include the signatures of other artists but that's because I wanted them to be perfect copies...

10 "Mr Wills sent me the money to help me in my business venture - I'm trying to start a design agency. He sent me cheques every month for $1200. A couple of times he sent extra when I had special expenses. It was always understood that he would participate in the profits of the business when it was running. We didn't write anything down, it was an oral agreement, The photographs I have of him with his secretary have no connection with these payments.

Extension. Write a defence for another crime and show it to other people in your class. See if they can guess what crime you are thinking of.

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Abbreviations

ALL THESE ABBREVIATIONS are connected to the law. How many of them do you know? Write the full versions on the right. The first one has been done for you as an example. "Also known as" is used to give the different names when a criminal or terrorist uses more than one: *"Richard Williams, a.k.a. the Bayswater Bomber".*

1. a.k.a. *also known as*
2. AOB
3. c.o.d.
4. DA
5. e. & o.e.
6. e.g.
7. f.o.b.
8. FBI
9. FO
10. GBH
11. GNP
12. ID
13. Inc
14. IOU
15. JP
16. L/C
17. MEP
18. p.p.
19. PLC
20. PR
21. QC
22. recd
23. v.
24. VAT

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Who's speaking?

THE STATEMENTS BELOW are all taken from the same case. They were made orally in open court during the trial. Read them and decide who made each statement. For example, the first statement, number 1, was made by the counsel for the prosecution.

1 "I would like to remind you of the testimony of Mrs Ellen Barry. She told us that her husband phoned her to say that he had had a successful day. Now, Mr Barry was a drugs dealer, yet when the police arrived on the scene of the crime he had a total of £12.50 in his pockets. We also know that he had borrowed money from Mr Swan on a previous occasion and failed to repay it."

2 "He was getting angrier by the minute. He said he wasn't going to let me make a fool of him and then he took out a gun. I was astonished. He started waving it around and shouting. I turned to run away and he shot me in the leg."

3 "I apprehended Mr Swan on Standish Lane, a few minutes from the scene of the shooting . At the time of his arrest he had £1,000 and a handgun on his person. He was very distressed, but made no attempt to resist arrest."

4 "I was on my way home from the pub when I saw two men arguing. They seemed to be talking about money. They were very angry and both of them were shouting. I wasn't really listening to be honest. Suddenly I heard a shot. When I looked round one of them was lying on the floor and the other had disappeared."

5 "I went out to the bank at the end of the afternoon to deposit the money in my business account, but I arrived too late and the bank was closed. I kept the money with me when I went out that night,. I didn't want to leave it in the office overnight: we've had a couple of burglaries recently. I was carrying the gun for my own protection. It's licensed. When he attacked me I panicked. It was self-defence."

6 "Mark rang me from the pub at about seven o'clock. He said it had gone very well. I supposed he meant that the deal had gone through. He couldn't tell me on the phone. He said he was going to celebrate and he'd be home late."

7 "Mr Swan let me go home early. He said he was going to close up the office and go round to the bank."

8 "This is a very serious crime, and all the more shocking as it is committed by a man with a comfortable position in society. I find myself with no choice but to sentence you to eight years in prison. Had your victim not survived, which may be due as much to poor marksmanship as compassion, you would have found yourself facing a far longer sentence."

9 "We find the defendant guilty as charged."

10 "You have heard that Mr Barry was a habitual criminal, whereas my client was a respected local businessman. Does it seem to you probable that a respectable person, someone like yourselves, would go out with a gun to collect debts as my learned friend suggests?"

Extension. Can you reconstruct the story of the case from the statements?

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Translation[1]
English law of Contracts

Introduction
A contract is a legally binding agreement. An agreement occurs when two minds meet upon a common purpose. This "meeting of minds" is called *consensus ad idem*, i.e. consent to the matter.

1. Two main types of contracts

a) **Specialty contracts** (or contracts by deed under seal) are used for various transactions such as conveyances of land, a lease of property for more than three years, articles of partnership, settlements. The characteristics of a contract by deed are that its is : (1) signed, (2) sealed and (3) delivered. A specialty must be registered by a solicitor.
b) **Simple contracts** or "parol" contracts are informal contracts. They may be made in any form, orally, in writing, by telephone, telegram, or by implication from conduct (a person who takes a seat in a bus is entering into an implied contract to pay his or her fare). They must include some consideration.

2. Formation of a valid simple contract

The following elements are necessary:
a) Intention to create legal relations (animus contrabendi).
b) Offer and acceptance: there must be an offer made by one party and an unreserved acceptance of that offer by the other party. Silence is not considered as an acceptance.
c) Consideration: or the price for which the promise of the other is bought. Consideration must be present or future (executed or executory); it must not be previous to the contract itself (past consideration), except in the case of services rendered at the express request of the other party.
d) Certainty of terms. There are two types of terms:
    - Express terms (oral or written) must state clearly and precisely the rights and obligations of each party. Express terms are of two kinds:
        - conditions which go to the root of the contract;
        - warranties or terms of the contract which are collateral or subsidiary to the main purpose of the contract.
    - Implied or innominate terms: the contents of a contract include general rules which are not formulated (commercial local usages, customs or statutes), but to which the courts will give as much importance as to the express terms.
e) Capacity of the parties: the general rule is that any person may enter into a binding contract. Yet special rules affect infants and minors, insane and drunken persons, enemy aliens and corporations.
f) Legality of the object: a contract is illegal if it contravenes a statute, or the common law, or morality.
g) Genuine consent: the following elements may vitiate consent, 1) mistake: the general rule of common law is that mistake does not affect the validity of a contract. However, some kinds of mistakes, known as "operative" mistakes, undermine the agreement so that there is no true consent and render the contract

[1] DHUICK Bernard, FRISON Danièle, L'Anglais juridique, langues pour tous, Paris: Pocket, 1993.

void; 2) misrepresentation: a misrepresentation makes the contract voidable: the aggrieved party will have to go to court to have the contract declared void. It has to be active: silence does not amount to misrepresentation. There are three kinds of misrepresentation: innocent (when the defendant, in good faith, is unaware that his statement is wrong), negligent (when the defendant is unaware that his statement is wrong but is liable for not controlling its authenticity), fraudulent (when the defendant intentionally.

For a contract to be valid, all the above elements must be present. If one or more is absent the contract is void or voidable.

3. Privity of contract

As a general rule, a contract cannot be opposed to third parties. However, English law has admitted large exceptions to the principle which are known as agency and trust and necessarily imply third parties.

4. Discharged contract

A contract may be discharge by: a) agreement; b) performance; c) breach; d) frustration; e) operation of the law, for example, lapse of time; where it is entered into for a particular period of time a contract is discharged at the expiration of that period.

5. Document

UNFAIR CONTRACT TERMS ACT 1977

Section 2

(1) A person cannot by reference to any contract term or to a notice [...] exclude or limit his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Section 3

(1) this section applies as between contracting parties where one of them deals as consumer or on the other's standard terms of business.

(2) As against that party, the other cannot by reference to any contract term.

a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

b) claim to be entitled:

- to render a contractual performance substantially different from that which was reasonably expected of him, or
- in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Section 5

(1) in the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage

a) arises from the goods proving defective while in consumer use; and

b) results from the negligence of a person concerned in the manufacture or distribution of the goods,

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods.

6. Key sentences – Translate

1. Today, sealing a contract means that the solicitor affixes to the contract a paper wafer which is touched by the person making the deed.
2. Undue influence is a more subtle form of pressure than duress: it is exerted upon persons who are in a weaker position.
3. To be valid, a simple contract must include elements of written proof.
4. The terms of the contract determine the extent of the obligations that it creates.
5. Parties to a contract may agree on anything which does not contravene the law.
6. When a contract is enforceable the courts will lend their aid to the enforcement of the agreement.
7. Beware: an unenforceable contract is not necessarily invalid (void).
8. The contract is a specialty. (The contract was passed before a solicitor.)

9. *Le juge peut declarer un contrat résolu pour impossibilité d'exécution.*

10. *Au-delà d'un certain laps de temps, aucune des parties ne peut intenter une action portant sur le contrat.*

11. *S'il n'y a pas accord sur la chose, le contrat est nul de nullité absolue.*

12. *Le contrat a été écarté pour vice du consentement à la demande de la partie qui est de bonne foi.*

13. *Le demandeur conclut un contrat par lequel il achetait en pleine propriété au défendeur une maison.*

14. *Les contrats formels (actes notariés ou actes authentiques) sont utilisés pour un certain nombre de transactions, tels les transferts de propriété, les baux de plus de trois ans, les contrats d'association et les donations.*

15. *Certains contrats doivent être obligatoirement conclus par acte notarié, d'autres doivent être écrits, d'autres doivent comporter des éléments de preuve écrite pour être exécutoires.*

16. *Un engagement ne sera pas exécutoire que si les parties entendent lui donner un caractère juridique.*

8 ENGLISH LAW OF CONTRACTS
7. Vocabulary

acceptance : *acceptation*
  manifest acceptance : *acceptation active*
  unreserved acceptance : *acceptation sans réserve*
action : *procès*
  to bring an action : *intenter un procès au civil*
adequacy of consideration : *équivalence des prestations* ; le droit anglais ne la requiert pas dans un contrat
agreement : *convention, accord*
to avoid : *annuler* (un contrat)

to be bound : *s'obliger, s'engager*
breach (of contract) : *rupture (de contrat)*

co-contractant : *l'autre partie, le cocontractant*
condition : *clause fondamentale*
consensus (ad idem) : *accord sur la chose*
consent : *consentement*
  genuine consent : *consentement authentique, non vicié*
consideration : *cause, contrepartie, profit*
contract : *contrat*
to contract : *signer un contrat, contracter*
covenant : *contrat*

damages : *dommages et intérêts*
deed : *acte authentique, acte notarié*
defendant : *défendeur*
discharge : *résolution* (du contrat)
  discharge by agreement : *résolution par convention entre les parties*
  discharge by breach : *résolution par rupture de contrat*
  discharge by frustration : *résolution par impossibilité d'exécution*
  discharge by lapse of time : *résolution par prescription extinctive*
  discharge by performance : *résolution par exécution du contrat*
discharged : *résolu*
to disclose : *résoudre*
duress : *violence physique*

enforceable : *exécutoire*

to forbear : *s'abstenir*
frustration : *impossibilité d'exécution*

gentlemen's agreement : *accord de caractère amical*, sans valeur de contrat

illegal : *illicite*
invalid : *nul*

8 LE DROIT ANGLAIS DES CONTRATS
7. Vocabulaire

invitation to treat : *invitation à faire des offres, proposition à entrer en relation d'affaires sans conséquences juridiques* (envoi d'un catalogue...)

limitation : *prescription, limitation*
  limitation term : *clause prescriptive*

misrepresentation : *déclaration inexacte*
mistake : *erreur*
  operative mistake : *erreur opérante, erreur-obstacle*

obligation : *obligation*
offer : *offre*
offeree : *récipiendaire de l'offre*
offerer : *offrant*

party : *partie* (à un contrat)
plaintiff : *plaignant, demandeur*
privity (of contract) : *effet relatif du contrat*
promise : *promesse, engagement*
  definite promise : *promesse formelle*
proof : *preuve*
  written proof : *preuve écrite*

representation : *affirmation, déclaration*
to repudiate : *répudier* (un contrat)

seal : *sceau*
  contract under seal : *acte authentique, acte notarié*
to seal : *sceller, authentifier un contrat*
to set aside : *écarter* (un contrat)
settlement : *donation*
specialty : *contrat formel, acte authentique*

term : *clause*
  express term : *clause expresse*
  implied term : *clause implicite*
to terminate : *résilier*

undue influence : *violence morale, intimidation*

valid : *valable, exécutoire*
to vitiate : *vicier* (le consentement)
void : *nul*
  void *ab initio* : *nul de nullité absolue*
voidable : *annulable*

to waive : *renoncer à* (un droit, une requête)
waiver : *renonciation*
warranty : *clause collatérale, subsidiaire*

American Law of Contracts

1. Doctrine

The law of contracts deals with the enforcement of promissory obligations. Contractual liability derives from consent freely given in the form of a promise whether express or implied from the acts of the parties. Contractual liability derives from consent freely given in the form of a promise whether express or implied from the acts of parties. The courts will sometimes imply a promise ("implied in law" or quasi contract") to prevent unfair profit even in the absence of consent on the part of the party bound by it. Contract law applies to a wide range of agreements concerning employment, insurance, sale of goods, sale of land, services, etc., and to such varied parties as individuals, business organizations and governmental entities.

Contract law is more state than federal law although differences from state to state are generally notional. It is mainly case-law but more and more problems are now governed by statutes. Thus the Uniform Commercial Code provides for the formation of contracts for the sale of goods, and by the **Tucker Act 1887**, as amended, the United States government has waived its sovereign immunity in contract actions by accepting to appear in the federal courts.

A contract may be defined as a promise for the breach of which the law gives a remedy. Indeed the word "contract" applies to the series of acts by which the parties gave their agreement, to any executed document or to the legal relations which have resulted. For a promise to be enforceable (i.e. for the law to give a remedy) at least two criteria must be met: these are respectively the requirement of a writing and the requirement of a consideration.

The former derives from the **English Statute of Frauds of 1677** enacted throughout the United States and providing that certain types of contracts must be evidenced by a writing, such as contracts to sell goods above a minimum value, sales of land, contracts to be liable for the debt of another and contracts to be performed after a one-year period.

However most contracts to furnish services do not come under these provisions and are enforceable without a writing. Although the greatest part of the English Statute of Frauds was repealed in 1954, its abolition is not yet foreseeable in the United States.

The latter (consideration) is first and foremost something for which the promisor has bargained and which he has received in exchange for his own promise; this may be either another promise given in return – the contract is then known as bilateral – or another act given in return - the contract is then unilateral. However, there are a few instances of business promises in which the requirement of consideration is not met: for instance, the promise to pay for goods or services which have already been furnished at the time the promise is made; or the device (called "option") by which the offeree holds the offeror to his promise by paying him a nominal sum as consideration, and thus turns the rule according to which the offeror can revoke his offer at any time before its acceptance by the offeree. In some cases, even though there is no consideration, the offeror may be estopped by the courts from coming back on his promise when the offeree has relied upon it to his detriment. Finally a number of states have enacted laws by which an offer is irrevocable, even without consideration, if it is contained in a signed writing stating that it is irrevocable. Thus, there has been a tendency to remedy the deficiencies of the doctrine of consideration rather than to discard it.

In the United States, contracts, like statutes, are characteristically detailed and prolix. Those prepared by lawyers are often compounded of standard clauses, popularly known as "boilerplate", taken from other agreements kept on file or from form books. Even when a lawyer is not directly involved, the parties may use or incorporate by reference a standard printed form which has been drafted by a lawyer, perhaps for a particular enterprise, perhaps for an association of enterprises, or perhaps for sale to the general public.

This attention to detail may be due to a number of causes, including the standardization of routine transactions, the frequent involvement of lawyers in all stages of exceptional transactions, the inclination to use language which has been tested in previous controversies, and the desire to avoid uncertainty when the law of more than one state may be involved. All of these add to the general disposition of the case-oriented American lawyer to provide expressly for specific disputes which have arisen in the past or which might be foreseen in the future.

A related phenomenon is the widespread use of standard form "contracts of adhesion", such as tickets, leases, and retail sales contract, which are forced upon one party with inferior bargaining power. In recent years, courts and legislatures have become increasingly concerned with the effects which unrestrained freedom of contract may have in such situations. Courts which had always refused to enforce agreements contemplating crimes, torts, or other acts which were clearly contrary to the public interest, began, under the guise of interpreting the contracts, to favour the weaker party and in extreme cases to deny effect to terms dictated by one party even where the subject of the agreement was not in itself unlawful.

Legislatures enacted statutes fixing terms, such as maximum hours and minimum wages for employment, or even prescribing entire contracts, such as insurance policies, and gave administrative bodies the power to determine rates and conditions for such essential services as transportation and electricity; nevertheless, in spite of the erosion of the doctrine of freedom of contracts in many areas, the doctrine is still the rule rather than the exception.

3. Key sentences - Translate

1. The United States government has waived its sovereign immunity in contract actions.
2. It can be sued before the federal courts.
3. Existing statutes tend to weaken the doctrine of consideration.
4. The offeror cannot come back upon (revoke) his offer after its acceptance by the other party.
5. The courts will always protect the weaker party.
6. Nowadays, most transactions involve the participation of a lawyer.
7. American lawyers have a general disposition to include terms which provide for every possible circumstance.
8. The assignment of a contract involves the transfer of the rights to and the duties of performance.
9. The assignor in the case of a bilateral contract assigns the rights to performance and delegates his duties.

10. *Il a essayé de revenir sur sa promesse mais le tribunal l'en a empêché.*
11. *En cas de force majeure, le contrat sera résolu pour impossibilité d'exécution.*
12. *Le juge ordonna que tous ses biens soient confisqués.*
13. *Pour toute promesse, le promettant est in débiteur, avec une obligation à remplir, et celui qui reçoit la promesse est un créancier.*
14. *Si le contrat engendre une injustice, le juge peut décider d'accorder la rescision.*
15. *Le contrat est une promesse pour laquelle la loi offre des recours en cas de manquement.*
16. *La promesse est exécutoire quand sont rassemblés les deux éléments suivants d'un contrat : un document écrit et l'existence d'une contrepartie.*
17. *Le droit des contrats est essentiellement fondé sur la jurisprudence bien que de plus de problèmes soient réglés par le législateur.*
18. *Les accords concernant l'emploi, les assurances, la vente de marchandises, les transactions immobilières et les services sont régis par le droit des contrats.*

9 AMERICAN LAW OF CONTRACTS
4. Vocabulary

act of God : *cas de force majeure*
agreement : *accord, convention, engagement*
to assign : *céder, rétrocéder*
assignee : *cessionnaire*
assignment : *cession* **assignor** : *cédant*

beneficiary : *récipiendaire, bénéficiaire*
express beneficiary : *bénéficiaire désigné*
incidental beneficiary : *bénéficiaire incident*
to bind : *lier* **bound** : *lié*
breach : *manquement à, rupture*
breach of contract : *rupture de contrat, manquement à une obligation contractuelle*

case-law : *jurisprudence*
clause (of contract) : *clause, terme (d'un contrat)*
exemption clause : *clause exonératoire*
limitation clause : *clause limitative*
standard clauses : *contrat type*
conditions : *conditions*
concurrent conditions : *conditions réciproques*
implied conditions : *conditions tacites/implicites*
consent (of parties) : *consentement (des parties)*
consideration : *contrepartie*
rule of consideration : *règle de la contrepartie obligatoire*
contract : *contrat*
contract law : *droit des contrats*
bilateral contract : *contrat bilatéral*
lawful contract : *contrat licite*
unilateral contract : *contrat unilatéral*
unlawful contract : *contrat illicite*
freedom of contract : *liberté de contracter*
contractant : *contractant*
co-contractant : *cocontractant*
contractual : *contractuel*
covenant : *convention*

delegation : *délégation*
duty : *devoir, obligation légale*

to enforce : *exécuter*
enforceable : *exécutoire*
enforcement : *exécution*
to be estopped by the court : *être empêché par le tribunal*
estoppel : *l'estoppel* ; principe d'equity qui consiste à empêcher que la partie la plus faible soit victime des revirements d'opinion de l'autre partie
exception : *exception*

to force (a condition) upon one party : *imposer (une condition) à une partie*
to forfeit : *renoncer à*
to be forfeited (to) : *échoir à* (l'État)
forfeiture : *perte de biens par confiscation*

implicit : *implicite*
to imply : *déduire*

9 LE DROIT AMÉRICAIN DES CONTRATS
4. Vocabulaire

liability : *responsabilité civile*
contractual liability : *responsabilité contractuelle*
liable : *responsable* (civilement)
liable to damages : *passible de dommages et intérêts*

mandatory : *obligatoire*
material (fact) : *(fait) matériel ; important*
materiality : *importance, gravité*

obligation : *obligation*
promissory obligation : *promesse à caractère obligatoire*
obligee : *créancier*
obligor : *débiteur*
offer : *offre*
irrevocable offer : *offre irrévocable*
offeree : *récipiendaire de l'offre*
offeror : *offrant*
option : *option, réservation*
option to purchase : *promesse de vente*

party (to a contract) : *partie à un contrat*
performance (of contract) : *exécution (d'un contrat)*
decree of specific performance : *ordonnance d'exécution forcée*
precedent : *précédent*
promise : *promesse*
promisee : *celui qui reçoit la promesse, récipiendaire de la promesse*
promisor : *promettant*

to recover : *recouvrer*
recovery : *recouvrement*
action in recovery : *action en recouvrement*
release : *décharge*
remedy : *recours, réparation*
to rescind (a contract) : *annuler (un contrat)*
rescission : *rescision*
to revoke (an offer) : *révoquer, annuler (une offre)*
right : *droit*
rule : *règle, principe*
implicative/interpretative/suppletory rule : *règle de loi implicite/interprétative/supplétoire*
mandatory/compulsory rule : *règle de loi impérative, à caractère obligatoire*

sale of goods : *vente de marchandises*
subcontracting : *sous-traitance*
subcontractor : *sous-traitant*

term (of a contract) : *clause (d'un contrat)*
express term : *clause expresse/explicite*
implied term : *clause implicite*
unfair term : *clause abusive*
third party : *tiers*

(paper) wafer : *timbre sec*
warranty (US) : *garantie* (= GB : guarantee)
to waive (something) : *renoncer (à quelque chose)*
waiver : *renonciation* (à un droit)

22. CONTRACT LAW: VITIATING FACTORS

What are "vitiating factors"?

These are factors that either destroy (make void) or undermine (make voidable) an apparently valid contract. Where the contract is *void*, the parties must be returned to their pre-contractual position, a process known as **restitution**. Where the contract is *voidable*, the party seeking to avoid it will apply for **rescission**, again returning them to their pre-contractual position. Rescission is a discretionary, equitable remedy, and will *not* be granted where: (a) the contract has been affirmed; (b) substantial restitution is not possible; (c) a third party has acquired rights in the subject-matter in good faith and for value.

What is "lack of form"?

While most contracts are "simple" contracts (*i.e.* there are no formal requirements), some (*e.g.* those concerning land) must be in writing or evidenced in writing in order to be valid.

What is "duress and undue influence"?

Duress (whether physical or economic—*Universe Tankships v ITWF* [1983]) and undue influence (the abuse of a privileged position of influence) make a contract voidable.

What is "illegality" and "public policy"?

A contract is void if it is illegal in either its object (*e.g.* a contract to commit a crime) or its manner of performance (*e.g.* unlicensed trading). Contrary to the general position, any money/goods exchanged are *not* recoverable (*Parkinson v College of Ambulance* [1925]).

What is "mistake"?

There are *three* situations where a mistake by one of the parties will make the contract void:

(1) Mistake as to the nature of the subject-matter (but not mistake as to its quality) (*Raffles v Wichelhaus* [1864]).
(2) Mistake as to the existence of the subject-matter (*Strickland v Turner* [1852]).
(3) Mistake as to the identity of the other party, but *only* where the *precise* identity of the that party is crucial to the other's decision to enter the contract (*Cundy v Lindsay* [1878]; *Shogun Finance v Hudson* [2004]).

What is "misrepresentation"?

A misrepresentation is an untrue statement made during pre-contractual negotiations. Whether it is an operative misrepresentation, and the consequences if it is, depend upon the:

(1) **Nature of the statement**—it must be a statement of fact (not law, opinion, or intention. Generally, remaining silent cannot amount to a misrepresentation (*Fletcher v Krell* [1873]) except where: (a) it is a failure to notify a change in material circumstances (*With v O'Flanagan* [1936]); (b) it is a "half-truth", therby creating a false impression (*Nottingham Patent Brick and Tile Co v Butler* [1886]); the contract is one of utmost good faith (*e.g.* insurance contracts).
(2) **Nature of the inducement**—the misrepresentee must have relied on the truth of the statement in deciding to enter the contract (*Attwood v Small* [1838]; *Redgrave v Hurd* [1881]), though it need not be the sole factor in the decision (*Edgington v Fitzmaurice* [1885]).
(3) **Nature of the misrepresentation**—an operative misrepresentation makes the contract voidable. If it is fraudulent, the innocent party can also claim damages in the tort of deceit. If it is negligent, they can also claim damages under the Misrepresentation Act 1967. If it is innocent, they can claim damages in lieu of rescission under the Misrepresentation Act 1967.

24. CONTRACT LAW: DISCHARGE OF CONTRACT

How can a contract end?

A contract can end in *four* ways: performance, agreement, frustration, and breach.

What is "performance"?

A contract comes to an end when the parties have performed their obligations under it. Generally, performance must be exact and entire, except where:

(1) The contract can be sub-divided into smaller, identical contracts (*i.e.* is a severable contract), where the party in breach may nevertheless claim for those elements performed (*Ritchie v Atkinson* [1808]; *Atkinson v Ritchie* [1809]).
(2) The party in breach was prevented from performing their obligations by the other party (*Planche v Colburn* [1831]).
(3) Where the other party had a genuine choice to accept partial performance and did so (*Sumpter v Hedges* [1898]).
(4) Where one party has substantially performed their obligations, subject to only a minor defect, they may enforce the contract subject to a reduction to compensate for the defect (*Hoenig v Isaacs* [1952]; *Bolton v Mahadeva* [1972]).
(5) Where one party tenders/offers performance (other than payment of a debt) and the other party rejects it.

What is "agreement"?

Just as the contract was created by agreement, it may be ended by agreement. As with the original agreement, this must be supported by fresh consideration.

What is "frustration"?

Frustration is where **further performance** of the contract is either **impossible** (*Taylor v Caldwell* [1863]; *Jackson v Union Marine Insurance* [1874]; *Morgan v Manser* [1948]), **illegal** (the *Fibrosa* case [1943]), or **radically different** from that anticipated by both parties when the contract was made (*Krell v Henry* [1903]; *Herne Bay Steamboat Co v Hutton* [1903]; *Davis Contractors v Fareham UDC* [1956]), and the frustrating event was not due to the fault of either party (*Maritime National Fish v Ocean Trawlers* [1935]). Under the Law Reform (Frustrated Contracts) Act 1943, the consequences of frustration are:

(1) The contract is immediately discharged and the parties released from any further obligations.
(2) Money paid can be recovered.
(3) Money due but not in fact paid ceases to be payable.
(4) Expenses incurred can be recovered up to the limit of any sums paid/due to be paid.
(5) A party that has acquired a valuable benefit can be required to pay a reasonable sum for it.

What is "breach"?

A breach of contract occurs where one party fails to perform some or all of their obligations (*actual breach*), or gives a clear indication of an intention to do so (*anticipatory breach*—which gives rise to an immediate right to sue—*Hochster v De la Tour* [1853]). A breach of condition (*repudiatory breach*) gives the injured party a right to damages (see chapter 25) and the option to repudiate (regard as discharged) the contract. Breach of warranty (*mere breach*) gives rise to a right to damages only, and does *not* discharge the contract. Breach of an innominate term will be regarded as breach of condition where it substantially deprives the injured party of their anticipated contractual benefits, and as a breach of warranty where it has only minor consequences (*The Hansa Nord* [1976]).

25. CONTRACT LAW: REMEDIES

What are "damages"?

Damages are financial compensation for a legal wrong. In contract, the aim is to put the injured party in their anticipated post-contractual position (*Robinson v Harman* [1848]). A claim for damages can take *two* forms:

(1) **Liquidated damages**—this is where the contract specifies the amount to paid (or a formula for working it out) in the event of a particular breach. These are valid where they are a genuine attempt to estimate the likely loss, but not where they are a penalty clause designed to compel performance (*Dunlop v New Garage* [1915]). It will be regarded as a penalty clause where: (a) the specified sum is greater than any conceivable loss; (b) the breach is a failure to pay sums due and the damages specified exceed that sum; (c) the same sum is specified for both major and minor breaches.

(2) **Unliquidated damages**—this is a claim based on the actual loss suffered. The injured party may claim for: (a) losses (including consequential losses) that are a natural consequence of the breach; and (b) other losses that were known to be a possibility by both parties at the time the contract was made (*Hadley v Baxendale* [1854]; *The Heron II* [1969]).

The court is entitled to engage in a degree of *speculation* in calculating the actual loss (*e.g.* loss of a chance—*Chaplin v Hicks* [1911]). Also, the injured party is required to take all reasonable steps to *mitigate* (keep to a minimum) their losses (*British Westinghouse v Underground Electric Railways* [1912]).

What is "specific performance"?

This is a discretionary, equitable remedy that requires the party in breach to perform their obligations. It is rarely awarded (except in land transactions), and will not be awarded where:

(1) Damages are adequate (*Cohen v Roche* [1927]).
(2) The remedy would not be available to both parties (*e.g.* contracts with minors—*Flight v Bolland* [1828]).
(3) It would require constant supervision (*Ryan v Mutual Tontine* [1893]).
(4) The contract is for personal services (*Rigby v Connol* [1880]).

What are "injunctions"?

A prohibitory injunction may be awarded to prevent breach of an express negative obligation (*e.g.* a valid restraint of trade clause—*Lumley v Wagner* [1852]; *Warner Bros v Nelson* [1937]), but *not* where to do so would compel performance of other, positive obligations for which specific performance would not be granted (*Page One Records v Britton* [1967]).

DEFECTS IN THE CONTRACT :

- misrepresentation,
- mistake,
- duress and undue influence,
- illegality,
- incapacity

A number of different defects may affect the validity of a contract. These have differing legal consequences and may render a contract void, voidable or unenforceable. It is important to grasp the difference between these concepts.

A void contract = the defect is so serious that in the eyes of the law no contract ever came into existence. Even if both parties wish to enforce the contract this is not possible. If property has changed hands, ownership is not usually transferred and the property may be recovered.

An unenforceable contract = the contract is valid but is not enforceable against a vulnerable party (contractual incapacity)

A voidable contract = the defect is not serious enough to make the contract void, but the party whose right is infringed may choose to opt out the contract. It is considered valid unless one of the parties asks a court to « avoid » it (=declare it invalid). The most common circumstances under which a contract may be avoided come under different categories :

MISREPRESENTATION :

During pre-contractual negotiations, a false statement may be made, which induce a party to enter the contract.
A remedy in misrepresentation is available to the innocent party whether or not the statement became a term of the contract.
If it is a term of the contract, an action for breach of contract provides alternative remedies.
Misrepresentation makes the contract voidable.
The misrepresentee (the party to whom the false statement was made) is entitled to avoid the contract or to persist with it.
An actionable misrepresentation is :
1 a statement of fact which
2 is a material inducement to enter the contract.
STATEMENT OF FACT : this can be written, spoken, pictorial or may arise from other conduct
THE STATEMENT ACTED AS A MATERIAL INDUCEMENT : the misrepresentation must be an important influence, but does not have to be the only reason why the misrepresentee entered the contract. The misrepresentee must both know of the statement and rely on it.

The remedies available to the misrepresentee depend on the perceived state of mind of the misrepresenter at the point at which the statement was made:

- fraudulent misrepresentation : if the misrepresenter knows that the statement is untrue
- careless misrepresentation : a representer induces the claimant to enter into a contract, on the strength of a statement which the representer did not reasonably believe
- wholly innocent misrepresentation : even if a misrepresentation is made in good faith with no intention to deceive and without carelessness, the contract is rendered voidable. POSSIBLE REMEDIES : damages, rescission of the contract (= to return the parties to their pre-contractual position and this enables the misrepresentee to recover any money paid)

MISTAKE :

A mistake is made regarding the subject matter but the mistake is made in good faith. The contract will be rendered void. Such a mistake is said in law to be **operative** because it strikes at the root of the contract, effectively preventing any true agreement. In practice it is very rare.

Common mistake concerning the existence of the subject matter : both parties reasonably but wrongly believe that the subject matter exists at the time that make the contract.

Mutual mistake concerning the identity of the subject matter : both parties operate under different misapprehensions.

Unilateral mistake by one party regarding the identity of the other : one party is mistaken of the other. Mistaken identity usually arises from a fraudulent misrepresentation, which enables a fraudster (a »rogue ») to take possession of the victim's property. The contract is voidable for misrepresentation.

Unilateral mistake regarding the terms of the contract : parties will not usually be able to treat a contract as void by claiming that they were mistaken about the terms on which the contract was based. Exceptionally, the contract will be treated as void if the error would have been clearly evident to the other party, who will not be allowed to rely on it.

DURESS AND UNDUE INFLUENCE :

DURESS :

Duress is a common law doctrine, under which threats or use of violence to force a party to make a contract may make it voidable. In practice, physical duress is very rare.

Traditionally, the doctrine of duress encompassed only threats and violence against the person, but the courts extended the doctrine to cover **economic duress**. Such duress usually consists of threats by one party not to perform the contract with the other party unless the terms of the contract are varied in favor of the coercive party.
The following criteria are relevant to deciding whether the contract is voidable:

- the extent of the pressure employed.
- the level of protest evidenced by the aggrieved party.
- did the aggrieved party have any real choice about complying with the other party's threats ?
- was independent advice available to the aggrieved party ?

UNDUE INFLUENCE :

This is an equitable doctrine, applicable where one party abuses his or her personal influence or authority over another, to make that other party enter a transaction. If the influence is effective the transaction is voidable.

ILLEGALITY :

The rules governing illegal contracts are found in statute and common law.

CONTRACTUAL INCAPACITY :

MINORS :
Minors (people under the age of 18) are legally capable of making most kinds of contracts and may take steps to enforce them against the other party. The law protects minors by restricting the extent to which their contracts may be enforced against them. Some - like a contract to lend money to a minor - are never enforceable by the creditor; others are binding only to a limited extent.

MENTALLY IMPAIRED PERSONS :

The contractual capacity of a person who is mentally impaired is limited in two situations :

1 where the other party knew of the impairment

2 contracts for necessaries : a mentally impaired person is obliged to pay a reasonable price for necessaries when they are supplied by a seller who is aware of that person's mental state.

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