

THE LAW OF CONTRACT



HKU | LAW

Lecture 2: Offer
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9 September 2024

Plan for Today

- Offer and Acceptance





OFFER AND ACCEPTANCE

Contract Formation

- (1) Offer made by one party
- (2) Offer accepted by the other party
- (3) The parties intended to create a legal relation
- (4) The terms of the contract are sufficiently certain and capable of being enforced
- (5) There is consideration on both sides

Invitation to Treat

An invitation to treat is an invitation to bargain or negotiate. *It is not an offer.*

- You cannot create contractual obligations by accepting the terms of an invitation to treat.
- You could make an offer in response to an invitation to treat.



Invitation to Treat

Gibson v. Manchester City Council [1979] 1 WLR 294



Facts

- Plaintiff Gibson enquired as to the price the defendant was willing to sell the house under a purchase scheme and asked for details about mortgage facilities.
- Defendant replied on 10 February 1971:

I refer to your request for details of the cost of buying your Council house. The corporation may be prepared to sell the house to you at a purchase price of £2,275 less 20% = £2,180 (freehold).

The details which you requested about a Corporation mortgage are as follows:-

Maximum mortgage the Corporation may grant: £2,177 repayable over 20 years...

This letter should not be regarded as a firm offer of a mortgage.

If you would like to make formal application to buy your Council house, please complete the enclosed application form and return it to me as soon as possible.

Invitation to Treat

Gibson v. Manchester City Council [1979] 1 WLR 294



Facts

- Plaintiff completed and returned the application form, leaving the purchase price blank because he had questions about repairing the tarmac paths outside the house.
- Upon receiving defendant's answers to his queries, plaintiff wrote, stating "in view of your remarks I would be obliged if you will carry on with the purchase as per my application already in your possession".
- A political change resulted in the abrogation of the purchase scheme.
- Plaintiff sued alleging that a contract had already been concluded between him and the defendant.

Invitation to Treat

Gibson v. Manchester City Council [1979] 1 WLR 294



Held

- No contract had been formed.
- Diplock L.J.: It is “quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr. Gibson’s written acceptance of it. The words ‘may be prepared to sell’ are fatal to this; so is the invitation, not, be it noted, to accept the offer, but ‘to make formal application to buy’ upon the enclosed application form...”

Invitation to Treat

Storer v. Manchester City Council [1979] 1 WLR 1403



Facts

- Plaintiff Storer participated in the same purchase scheme described in *Gibson*. Unlike Gibson, however, Storer advanced to the stage where the town clerk wrote to him, saying:

“Dear Sir: Sale of Council House. I understand you wish to purchase your council house and enclose the agreement for sale. If you will sign the agreement and return it to me I will send you the agreement signed on behalf of the corporation in exchange. From the enclosed list of solicitors, who are prepared to act for you and advise you on the purchase, please let me know the name of the firm that you select, as soon as possible”.

Invitation to Treat

Storer v. Manchester City Council [1979] 1 WLR 1403



Facts

- Enclosed with the letter was a form detailing, among other things, the name of the purchaser, the address of the property, the price, the mortgage, amount, and the monthly repayments. The end date of the tenancy—and start date of mortgage payments—was left blank.
- Plaintiff completed the form and returned it. But the defendant's staff were busy, and the exchange of the signed agreements did not take place.
- As in *Gibson*, political turnover resulted in the abrogation of the purchase scheme.
- Plaintiff sued alleging that a contract had already been concluded between him and the defendant.

Invitation to Treat

Storer v. Manchester City Council [1979] 1 WLR 1403



Held (Denning M.R.)

- A contract was formed when the plaintiff returned the form.
- “The corporation put forward to the tenant a simple form of agreement. The very object was to dispense with legal formalities. One of the formalities — exchange of contracts — was quite unnecessary. The contract was concluded by offer and acceptance...”
- Although the date when plaintiff’s lease was to cease and his mortgage payments to begin was left blank, “the filling in of the date was just a matter of administrative tidying up, to be filled in by the town clerk with a suitable date for the changeover”.

Invitation to Treat

What distinguishes an offer from an invitation to treat? Courts look at:

- definiteness
- specificity
- completeness

There are also general rules applicable to

- displays of goods in shops
- advertisements
- auctions
- tenders

although attention must always be paid to the nature and content of the parties' communications.



Displays of Goods in Shops

“[I]n the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed”.

Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401 (Somervell L.J.)

Advertisements

The advertisement of a bilateral contract is generally an invitation to treat.

中 溪 織 業 廠
CHUNG KAI KNITTING FACTORY
MANUFACTURERS OF COTTON VESTS, SINGLETs & SPORT SHIRTS, ETC.
HEAD OFFICE: 7, CASTLE PEAK ROAD, KOWLOON, HONG KONG
BRANCH FACTORY: 236/238, FUK WING STREET
KOWLOON, HONG KONG
CABLE ADDRESS: "CHUNGKAI"
TEL. 58323

牌 牛 鬥
FIGHTING OX BRAND


標 商 手 水
SAILOR BRAND


FOUNTAIN PEN BRAND
標 商 筆 水 墨


標 商 飛 蟾
FLYING FROG BRAND


牌 桃 楊
CARAMBOLA BRAND


MERMAID
美人魚


EAGLE PAGODA BRAND
商 標 鷹 塔


OUR QUALITY IS EXCELLENT,
OUR PRICES ARE LOW AND
OUR PRODUCTS GIVE LASTING COMFORT.

Havant Dynamo Youth Theatre

SHERWOOD
The Adventures of
Robin Hood
By Ken Ludwig

DYNAMO YOUTH THEATRE PRESENTS
KEN LUDWIG'S
"SHERWOOD: THE ADVENTURES OF ROBIN HOOD"

Wednesday August 31st to Saturday September 3rd at 7.30pm
at The Spring Arts & Heritage Centre, Havant, ADULTS £9 UNDER 18'S £7

This amateur production of "Ken Ludwig's Sherwood: The Adventures of Robin Hood" is presented by arrangement with Concord Theatricals Ltd. on behalf of Samuel French Ltd. concordtheatricals.co.uk

But there are exceptions...

Advertisements

Lefkowitz v. Great Minneapolis Surplus Stores Inc.

86 NW2d 689 (Minn. 1957)

Facts

- Defendant advertised “1 Black Lapin Stole” for sale at \$1, the time of the sale being “Saturday 9.a.m.,” and the mode of the sale being “First Come First Served”.
- Plaintiff was the first person to present himself at the store at the appointed time.
- The store refused to sell the stole to the plaintiff, stating that by the ‘house rule,’ the offer was open to women only.
- Plaintiff sued to enforce the alleged contract.

9 A.M. DOOR JAMMERS

| | |
|---|------------|
| 50 Shopworn Football Helmets |\$1 |
| 150 Fitches Hair Tonic |1c |
| 6 Brand New Guaranteed Men's Wrist Watches |9c |
| 6 Brand New Guaranteed Powerscope Field Glasses |25c |
| 6 Brand New Guaranteed Miniature Cameras |19c |
| 100 Brand New Govt. Surplus Protective Covers |1c |
| 1000 Rolls High Quality Toilet Tissue |4/19c |
| 6 Pr. Damaged Leather Flight Pants |\$1 |
| 25 White Steel Civilian Defense Helmets |10c |
| 100 3-Pc. "Teen Miss" Cosmetic Sets |5c |
| 3 New Musical Lighters |50c |
| 25 Brand New Canvas Packs—Army Surplus | 25c |
| 6 Brand New Charcoal Grills |50c |
| 100 Pr. Brand New Navy Surplus Sunglasses |1c |
| 25 New Men's Suede Belts |5c |
| 50 Pr. Brand New Men's Leather Gloves |10c |
| 100 Pr. Men's New Dress Sox |5c |
| 10 Brand New Men's Flannel Robes |50c |
| 10 New Boys' Quilt Lined Bomber Jackets |\$1 |
| 50 Pcs. Men's Cargo Shave Stuff, Reg. \$1 |5c |
| 100 Brand New Glass Refrigerator Trays |10c |
| 25 Damaged Sport Shirts |25c |
| 25 Wool OB Scarves |5c |
| 10 Compasses |5c |
| 20 Watch Bands |1c |

★CAR COATS
ALL WOOL QUILTED LINED
BRAND NEW FIRST QUALITY
The Sensation of the Season! Absolutely the Newest Style Trend! Features include: Waterproof outer shell—Brilliant warm black lining and wood buttons. ALL SIZES! Be Here Early For These!

Big \$19.95 Value
Out They Go Saturday

11.88
SIZES 38 TO 46

THE STORE that's

Thermal Underwear
Developed and Used by the Navy for Cold Weather Wear
★NEW WONDERKNIT FABRIC SHIRTS & DRAWERS

\$5.95 VALUES
ALL SIZES

2.88
PER GARMENT

HIGH VALUES! LOW

★Brand New 1st Quality Reg. \$6.95 Goodyear
RUBBER RAINCOATS

The biggest value in USA on a brand new rubber raincoat. Sizes up to 50! Now at the same price! WHILE THEY LAST ONLY

3.99

★British Govt. S. Genuine Down F. **SLEEPING BAGS**

Cost the British Government \$45.00. 6 Down and feather. 64 inches length. 6 Windok. Shell. 6 Made for British government. 6 Comparable to bags selling for \$75 or more

1.99

ALL ★ ITEMS MAY

Just Received—Army Style
2-PC. CAM-O-FLAGE PARKA SUITS

Genuine U.S. ARMY cam-o-flage coloring applied to bib overall and parka combination. Just the thing for all pheasant and duck hunters. SEE THESE MONDAY. All sizes

7.77
Complete

ALL ★ ITEMS MAY

Reg. \$5.95 Quality-MEN'S WHITE **DRESS SHIRTS**

Brand New first quality fine count cotton "plum" brand dress shirts with neck collar. In SIZES TO FIT ANY MAN. IN MINNEAPOLIS. SEE THESE MONDAY. All sizes

2.88

★Brand New Reg. \$3.95 Value **RUBBER FOOTBALL**

Official size and weight. White with black vandy stripes.

1.99

Advertisements



Lefkowitz v. Great Minneapolis Surplus Stores Inc.

86 NW2d 689 (Minn. 1957)

Held

- A contract was formed when the plaintiff turned up at the store.
- “[T]he offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller’s place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant”.
- The defendant had no right to impose “new and arbitrary” conditions once the published offer had been accepted.

Advertisements

The advertisement of a unilateral—as opposed to a bilateral—contract is more likely to be classified as an offer.



SUNDAY, OCTOBER 15, 2017 • THE WASHINGTON POST

ADVERTISEMENT

ADVERTISEMENT

LARRY FLYNT AND HUSTLER® MAGAZINE
ANNOUNCE A CASH OFFER OF UP TO

\$10 MILLION

FOR INFORMATION LEADING TO
THE IMPEACHMENT
AND REMOVAL FROM OFFICE OF

DONALD J. TRUMP

CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

| | | | | | |
|--|---|--|---|--|--|
| COUGHS Cured in 1 week | CATARRH Cured in 12 hours. | HOARSENESS Cured in 12 hours. | THROAT DEAFNESS Cured in 1 to 3 months. | INFLUENZA Cured in 24 hours. | CROUP Relieved in 5 minutes. |
| COLD IN THE HEAD Cured in 12 hours. | ASTHMA Relieved in 10 minutes. | LOSS OF VOICE Fully restored. | SNORING Cured in 1 week. | HAY FEVER Cured in every case. | WHOOPING COUGH Relieved the first application. |
| COLD ON THE CHEST Cured in 12 hours. | BRONCHITIS Cured in every case. | SORE THROAT Cured in 12 hours. | SORE EYES Cured in 2 weeks. | HEADACHE Cured in 10 minutes. | NEURALGIA Cured in 10 minutes. |

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy.

£100 REWARD

WILL BE PAID BY THE

CARBOLIC SMOKE BALL CO.

to any Person who contracts the Increasing Epidemic,

INFLUENZA,

Colds, or any Diseases caused by taking Cold, after having used the **CARBOLIC SMOKE BALL** according to the printed directions supplied with each Ball.

£1000 IS DEPOSITED

with the ALLIANCE BANK, Regent Street, showing our sincerity in the matter.

During the last epidemic of **INFLUENZA** many thousand **CARBOLIC SMOKE BALLS** were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the **CARBOLIC SMOKE BALL**.

THE CARBOLIC SMOKE BALL,

TESTIMONIALS.

The DUKE OF PORTLAND writes: "I am much obliged for the Carbolic Smoke Ball which you have sent me, and which I find most efficacious."

SIR FREDERICK MILNER, Bart., M.P., writes from Nice, March 7, 1890: "Lady Milner and my children have derived much benefit from the Carbolic Smoke Ball."

Lady MOSTYN writes from Carlisle, Cary Crescent, Torquay, Jan. 10, 1890: "Lady Mostyn believes the Carbolic Smoke Ball to be a certain check and a cure for a cold, and will have great pleasure in recommending it to her friends. Lady Mostyn hopes the Carbolic Smoke Ball will have all the success its merits deserve."

Lady ESKINE writes from Spratton Hall, Northampton, Jan. 1, 1890: "Lady Eskine is pleased to say that the Carbolic Smoke Ball has given every satisfaction; she considers it a very good invention."

Mrs. GLADSTONE writes: "She finds the Carbolic Smoke Ball has done her a great deal of good."

Madame ADELINA PATTI writes: "Madame Patti has found the Carbolic Smoke Ball very beneficial, and the only thing that would enable her to rest well at night when having a severe cold."

The Originals of these Testimonials may be seen at our Consulting Rooms, with hundreds of others.

One **CARBOLIC SMOKE BALL** will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The **CARBOLIC SMOKE BALL** can be refilled, when empty, at a cost of 5s., post free. Address:

CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.



TESTIMONIALS.

The BISHOP OF LONDON writes: "The Carbolic Smoke Ball has benefited me greatly."

The MARCHIONESS DE SAIX writes from Padworth House, Reading, Jan. 13, 1890: "The Marchioness de Saix has daily used the Smoke Ball since the commencement of the epidemic of Influenza, and has not taken the Influenza, although surrounded by those suffering from it."

Dr. J. RUSSELL HARRIS, M.D., writes from 6, Adam Street, Adelphi, Sept. 24, 1891: "Many obstinate cases of post-nasal catarrh, which have resisted other treatment, have yielded to your Carbolic Smoke Ball."

A. GIBBONS, Esq., Editor of the *Lady's Pictorial*, writes from 172, Strand, W.C., Feb. 14, 1890: "During a recent sharp attack of the prevailing epidemic I had none of the unpleasant and dangerous catarrh and bronchial symptoms. I attribute this entirely to the use of the Carbolic Smoke Ball."

The Rev. Dr. CROCHETTER A. W. READE, LL.D., D.C.L., writes from Russell Square, Surrey, May 1890: "My duties in a large public institution have brought me daily, during the recent epidemic of influenza, in close contact with the disease. I have been perfectly free from any symptom by having the Smoke Ball always handy. It has also wonderfully improved my voice for speaking and singing."

AS PRESCRIBED BY
SIR MORELL MACKENZIE, M.D.,

HAS BEEN SUPPLIED TO

H.J.M. THE GERMAN EMPRESS.

H.R.H. The Duke of Edinburgh, K.G.
H.R.H. The Duke of Connaught, K.G.
The Duke of Fife, K.T.
The Marquis of Salisbury, K.G.
The Duke of Argyll, K.T.
The Duke of Westminster, K.G.
The Duke of Richmond and Gordon, K.G.
The Duke of Manchester.
The Duke of Newcastle.
The Duke of Norfolk.
The Duke of Rutland, K.G.
The Duke of Wellington.
The Marquis of Ripon, K.G.
The Earl of Derby, K.G.
Earl Spencer, K.G.
The Lord Chancellor.
The Lord Chief Justice.
Lord Tennyson.

Advertisements

Carlill v. Carbolic Smoke Ball Company

[1893] 1 QB 256, Court of Appeal

Facts

- Defendant placed the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter"

- Plaintiff, relying on the advertisement, bought and used the product as directed but subsequently caught influenza. She sued for the promised reward.

£100 REWARD

WAS RECENTLY OFFERED BY THE

CARBOLIC SMOKE BALL

To any person who contracted Influenza, Coughs, Colds, Catarrh, Asthma, Bronchitis, Throat Deafness, Croup, Whooping Cough, or any disease caused by taking cold according to the printed directions. Many thousand CARBOLIC SMOKE BALLS have been used, and three persons claimed the reward of £100, thus proving conclusively that this above-mentioned diseases.

THE CARBOLIC SMOKE BALL CO.

NOW OFFER

£200 REWARD

to the person who purchases a CARBOLIC SMOKE BALL and afterwards contracts any of the following diseases, viz. :—

| | | |
|-----------------|------------|----------------|
| Hoarseness | Diphtheria | Whooping Cough |
| Throat Deafness | Snoring | Neuralgia |
| Loss of Voice | Sore Eyes | Headache |
| Laryngitis | Croup | |

ing the Carbolic Smoke Ball. This offer is made (subject to condition, to be signed and deposited with the Company in London by the applicant before 31st March, 1893. This offer will remain open only until 31st March, 1893.

ne cause, they can therefore be cured by the remedy which stops the cause, viz. : CARBOLIC SMOKE BALL.

CARBOLIC SMOKE BALL.

family several months, making it the cheapest remedy in the world at the price

refilled and returned, post free, the same day, on receipt of Money or Postal

SMOKE BALL CO., LD.,

HANOVER SQUARE, LONDON, W.

ot: 196, Broadway, N.Y. CANADIAN Depot: 72, Front St., Toronto, Ontario.

Advertisements

Carlill v. Carbolic Smoke Ball Company

[1893] 1 QB 256, Court of Appeal

Holding (Bowen L.J.)

- The advertisement was an offer that the plaintiff accepted by using the carbolic smoke ball in the manner directed.
- To the argument that the advertisement was too vague to constitute an offer. Read in context,
 - the reward applied to future customers, not past customers
 - the immunity is to last during the use of the ball
- To the argument that the advertisement was puff, the advertisement stated that £1,000 was deposited at the bank to “shew[] [their] sincerity in the matter”.

Tenders and Auctions

Tenders

An invitation to tender is usually an invitation to negotiate and not an offer.

But a contractual duty to consider properly submitted tenders could arise.

Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council [1990] 1 WLR 1195

Auctions

If there is a reserve price, the auctioneer, by inviting bids, is inviting offers.

Bidders make offers and the highest offer is accepted on the fall of the hammer.*

If there is no reserve price, the auctioneer is taken as making an offer to sell which is then accepted by the highest bidder. *Barry v. Davies (Trading as Heathcote Ball & Co.)* [2000] 1 WLR 1962

*This common law rule is incorporated into the Sale of Goods Ordinance, s.60(2)

Contract Formation

- (1) Offer made by one party
- (2) Offer accepted by the other party
- (3) The parties intended to create a legal relation
- (4) The terms of the contract are sufficiently certain and capable of being enforced
- (5) There is consideration on both sides

Acceptance

An acceptance is “a final and unqualified expression of assent to the terms of an offer”.

Chitty on Contracts (2018)

Acceptance



Assent

- 1) must be final, i.e. not tentative
- 2) must be unqualified, i.e. no conditions or variations
- 3) must be objectively manifested—subjective assent is neither necessary nor sufficient
- 4) may be expressed through conduct

Subject to Contract

An acceptance that is made “subject to contract” is not unqualified (and hence not binding).

- Reliance is at the parties’ own risk. *A.G. of Hong Kong v Humphrey’s Estate (Queen’s Gardens) Ltd.* [1987] 1 AC 114 (no contract despite government’s reliance in demolishing existing staff quarters and refitting developer’s flats)
- But “subject to contract” may be waived if subsequent conduct demonstrates that the parties intended to be bound. *RTS Flexible Systems Limited v Molkerei Alois Muller Gmbh* [2010] UKSC 14 (while manufacturer initially proceeded based on a letter of intent, the parties eventually reached consensus on essential terms, performed and even varied the terms of their agreement)

Communication

As general rule, acceptances must be communicated to the offeror.

“Suppose...that I shout an offer to a man across a river...but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment...”

“Suppose...I make an offer to a man by telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that moment”

“In all the instances...so far, the man who sends the message of acceptance known that it has not been received or he has reason to know. So he must repeat it. But suppose that he does not know...”.

Entores v Miles Far East Corporation [1955] 2 QB 327 (Denning L.J.)

Communication

Some exceptions to the general rule:

❑ Waiver

- Note that waiver is more likely to be implied into a unilateral rather than bilateral contract. *See Carlill v. Carbolic Smoke Ball Company.*

❑ The Postal Rule

- An acceptance is effective when it is posted, not when it is received—if ever! *Household Fire Insurance v Grant* [1879] 4 Ex D 216.
- Note however that the revocation of an offer is effective only when it is received.
- Hence, a contract is validly entered into if an offeree's acceptance is posted before the offeror's revocation is received. *Byrne & Co v Leon Van Tien Hoven & Co* [1880] 5 CPD 344.



The Postal Rule

Holwell Securities Ltd v. Hughes

[1974] 1 WLR 155, Court of Appeal

Facts

- Plaintiffs were granted an option to purchase land. The agreement with the defendant provided: “THE said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof . . .”.
- By letter dated April 14, 1972, plaintiffs sought to exercise this option. Despite being posted in the ordinary way, the letter never reached the defendant.
- Plaintiffs argue that the option was properly exercised and a contract for sale and purchase constituted at the time the letter was posted.



The Postal Rule

Holwell Securities Ltd v. Hughes

[1974] 1 WLR 155, Court of Appeal

Held

- The parties did contemplate the exercise of the option by mail, a prerequisite to invoking the postal rule.
- But the language of the contract nevertheless precludes application of the postal rule. As the option was to be exercised “by notice in writing to the [defendant],” the mere act of posting the letter did not suffice.

The Postal Rule

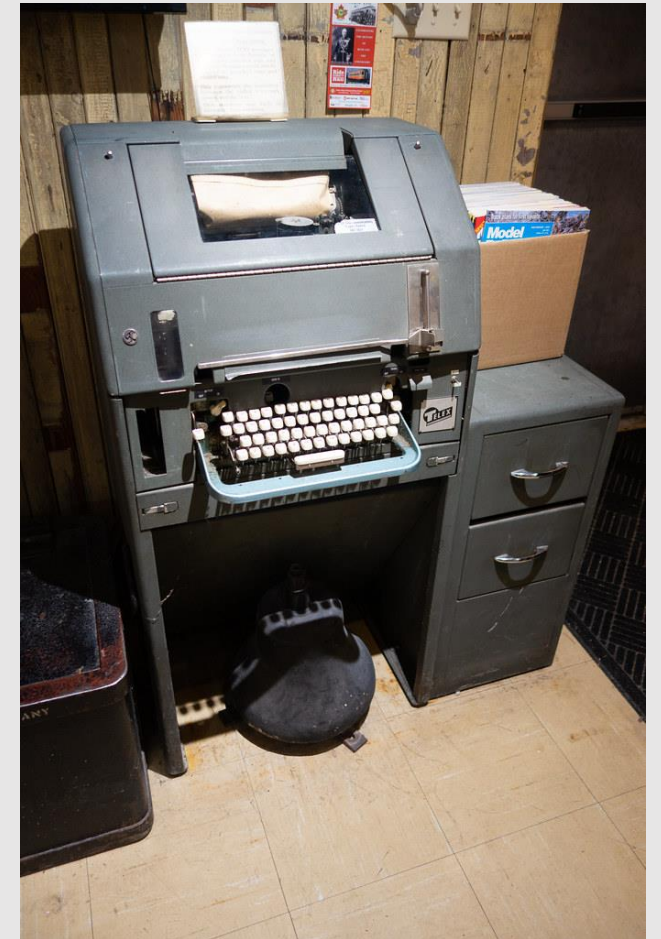
Can the postal rule be justified?

- Post office as agent of the offeror
 - *Bryne & Co. v. Van Tienhoven & Co.* (Lindley J): “When . . . these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or in other words, he has made the post office his agent to receive the acceptance and notification of it”.
- Prevents an infinite loop, *see Adams v. Lindsell* (1818) 1 B& Ald 681
- Favors offeree who may rely on the contract once acceptance has been posted
- Assumption of risk by the offeror who could have specified alternative modes of communication

Instantaneous Communications

The general rule, i.e. an acceptance concludes a contract when it is communicated to the offeror, applies to instantaneous communications.

- *Entores v Miles Far East Corp* [1955] 2 QB 327 (contract formed in London where acceptance by telex was received and not in Amsterdam where telex was sent). *See also Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34; *Susanto Wing Sun Co Ltd v. Yung Chi Hardware Machinery Co Ltd* [1989] 2 HKC 504.
- The postal rule is an exception made to facilitate commercial transactions where there is a substantial interval of time between when an acceptance is sent and when it is received.



Instantaneous Communications

What about emails?

- *David Baxter Edward Thomas and Peter Sandford Gander v BPE Solicitors (a firm)* [2010] EWHC 306 (Ch): “The ‘postal rule’ is an anomalous exception to the general rule, which is limited to its particular circumstances. It does not apply to acceptances made by some “instantaneous” mode of communication . . . in my view the same principle applies to communication by email, at least where the parties are conducting the matter by email, as the solicitors were in this case”.
- *Chwee Kin Keong v. Digilandmall.Com Pte Ltd* (Rajah JC): “... unlike a fax or a telephone call, [email] is not instantaneous”.

Assuming the postal rule does not apply, there is still the question of whether the contract is concluded when the acceptance is received or when it is read.

Instantaneous Communications

What constitutes receipt of an email? In Hong Kong, the Electronic Transactions Ordinance, s.19(2) provides:

“Unless otherwise agreed between the originator and the addressee of an electronic record, the time of receipt of an electronic record is determined as follows – (a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs – (i) at the time when the electronic record is accepted by the designated information system; or (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record comes to the knowledge of the addressee; (b) if the addressee has not designated an information system, receipt occurs when the electronic record comes to the knowledge of the addressee”

Prescribed Method of Acceptance

The offeror may prescribe a method of acceptance. An offer may, however, be accepted by other methods if

- the alternative method is “no less advantageous” to the offeror
 - here, it is necessary to discern the offeror’s purpose in prescribing the method of acceptance
- and the offeror has not made the form of acceptance mandatory, i.e. exclusive of all other methods

See Manchester Diocesan Council of Education v Commercial and General Investments Ltd [1970] 1 WLR 241

Silence as Acceptance

Can silence be construed as acceptance?

- Generally speaking, no. The offeror may not impose a duty to speak on the offeree.
- Not even if silence is the prescribed methods of acceptance and the offeree subjectively intends to accept the offer. *Felthouse v Bindley* [1862] EWHC CP J35.
 - Objectively, silence is consistent with both acceptance and rejection.

~_(\ツ)_/

Silence as Acceptance

Can silence be construed as acceptance?

- But there are circumstances where silence might be taken as acceptance if subsequent course of dealing establishes there was a consensus.
 - *Brogden v. Metropolitan Railway Company* (1877) 2 App. Cas. 666 (while defendants never communicated acceptance of contract for the purchase of coal, they behaved as though a contract had been concluded, ordering the maximum quantity under it and complaining about inexactness in the supply)
 - *Rust v. Abbey Life Assurance Co. Ltd* [1979] 2 Lloyd's Rep. 334 (plaintiff who received a property bond policy on terms different from those she proposed had previously handed over a cheque in defendant's favor and neither did nor said anything for seven months)

Acceptance in Ignorance of an Offer

Can an offer be accepted by someone ignorant of its existence ?

- Generally speaking, no. *See Williams v. Carwardine* (1833) 5 C&P 566
- McKendrick argues that an exception should be made in the case of unilateral contracts, where the performance being asked for has been tendered.
 - The rationale is that there is no detriment to the offeror or to the offeree.
 - But if the person accepting the offer must also be motivated by it, then ignorance necessarily precludes acceptance. *See R v. Clarke* (1927) 40 CLR 227 (person on trial for murder gave information about the true perpetrator 'exclusively in order to clear himself')

Termination of an Offer

- Rejection

- An offer that has been rejected is terminated and cannot be later revived by the offeree's purported acceptance

- Lapse of time

- An offer that specifies a time limit for acceptance cannot be accepted after the deadline has passed
 - An offer that does not specify a time limit for acceptance expires after a reasonable time

Termination of an Offer

■ Revocation

- An offer may be withdrawn any time prior to acceptance, provided such withdrawal is communicated to the offeree.
- Except that an offer of a unilateral contract may not be withdrawn once the offeree has commenced performance.
 - *Errington v. Errington & Woods* [1893] 1 QB 256 (father's estate may not revoke offer once son and daughter-in-law had started making mortgage payments understanding the property would be transferred to them once the loan balance was paid off)
- The withdrawal of the offer does not have to be communicated by the offeror. An offeree may not form a contract by accepting an offer that he or she knows through a third party is no longer open. *Dickinson v. Dodds* (1876) 2 Ch D 463

■ Death or Supervening Incapacity

Counter-Offers

- A counter-offer by an offeree is tantamount to a rejection of the original offer. *Hyde v. Wrench* (1840) 3 Beav 334
- It is important, however, to distinguish between an inquiry and a counter-offer.
 - Offer: “Mr. Fossick’s clerk shewed me a telegram from him yesterday mentioning 39s. for No. 3 as present price, 40s. for forward delivery. I instructed the clerk to wire you that I would now sell for 40s., nett cash, open till Monday”.
 - Counter-Offer: “I offer forty for delivery over two months”.
 - Inquiry: “Please wire whether would accept forty for delivery over two months, or if not, longest limit you would give”.

Stevenson, Jacques & Co v. Mclean (1880) 5 QBD 346

Battle of the Forms

The background of the slide is a dark, textured image. It appears to be a reproduction of a painting, possibly a historical battle scene. The scene is dimly lit, with a palette of browns, greys, and muted colors. In the center, there's a group of figures in what looks like 17th or 18th-century clothing, engaged in a struggle. One figure in a red cloak is prominent on the right side. The overall mood is one of conflict and chaos, which visually puns on the title 'Battle of the Forms'.

Buyer asks seller for a quotation.

Seller quotes a price, accompanied by a list of terms and conditions.

Buyer places an order, attaching a different list of terms and conditions.

Seller delivers the goods and sends an invoice referencing its list of terms and conditions.

Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

Facts

- On May 23, 1969, the plaintiff sellers offered to defendant buyers a machine tool at a price of £75,535, for delivery in ten months. On the reverse of the quotation were 16 conditions, including:
 - *“All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the buyer’s order.”*
 - *“Prices are based on present day costs of manufacture and design and having regard to the delivery quoted and uncertainty as to the cost of labour, materials etc. during the period of manufacture, we regret that we have no alternative but to make it a condition of acceptance of order that goods will be charged at prices ruling upon date of delivery.”*



Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

Facts

- Buyers replied four days later with an order that asked plaintiffs to “[p]lease supply on terms and conditions as below and overleaf.” The terms and conditions proposed by the buyers were different in various aspects from those of the quotation. In particular, the price variation clause was absent.
- On the foot of the order was a tear-off slip: “Acknowledgment: Please sign and return to Ex-Cell-O. We accept your order on the terms and conditions stated thereon—and undertake to deliver by—Date—signed.”



Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

Facts

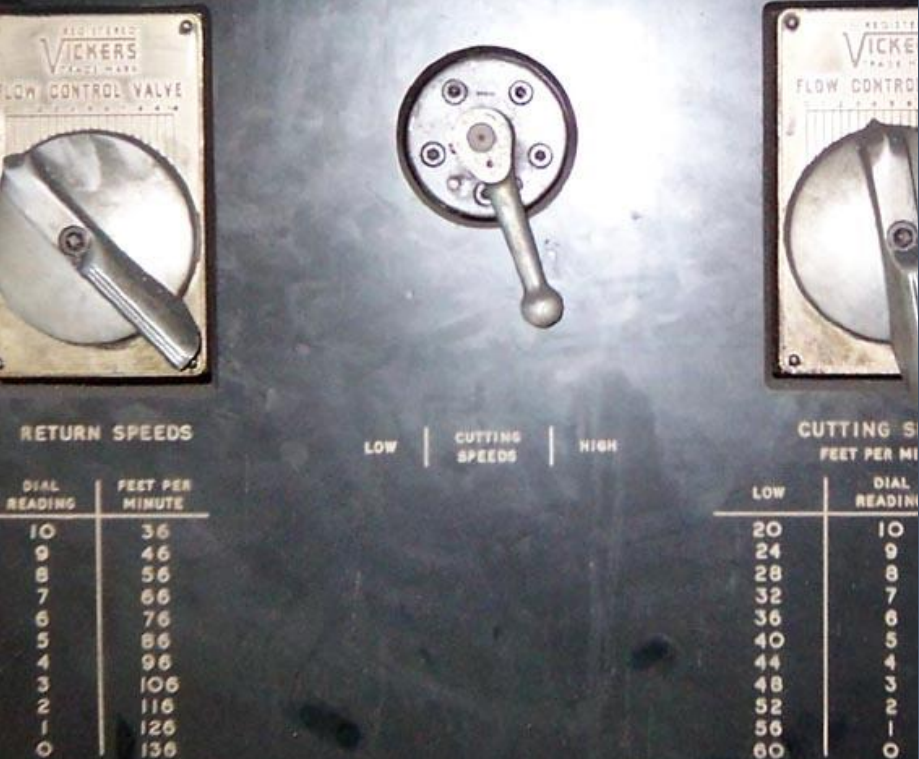
- On June 5, 1969, sellers replied to the buyers: “We have pleasure in acknowledging receipt of your official order dated May 27 covering the supply of one Butler Double Column Plane-Miller. This being delivered in accordance with our revised quotation of May 23 for delivery in 10/11 months, i.e., March/April 1970. We return herewith duly, completed your acknowledgment of order form.”
- The machine was ready around September 1970 and sellers sought to charge buyers an additional £2,892 due to the rise in cost between May 27, 1969, when the order was given, and April 1, 1970, when the machine ought to have been delivered. The buyers rejected the claim.



BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

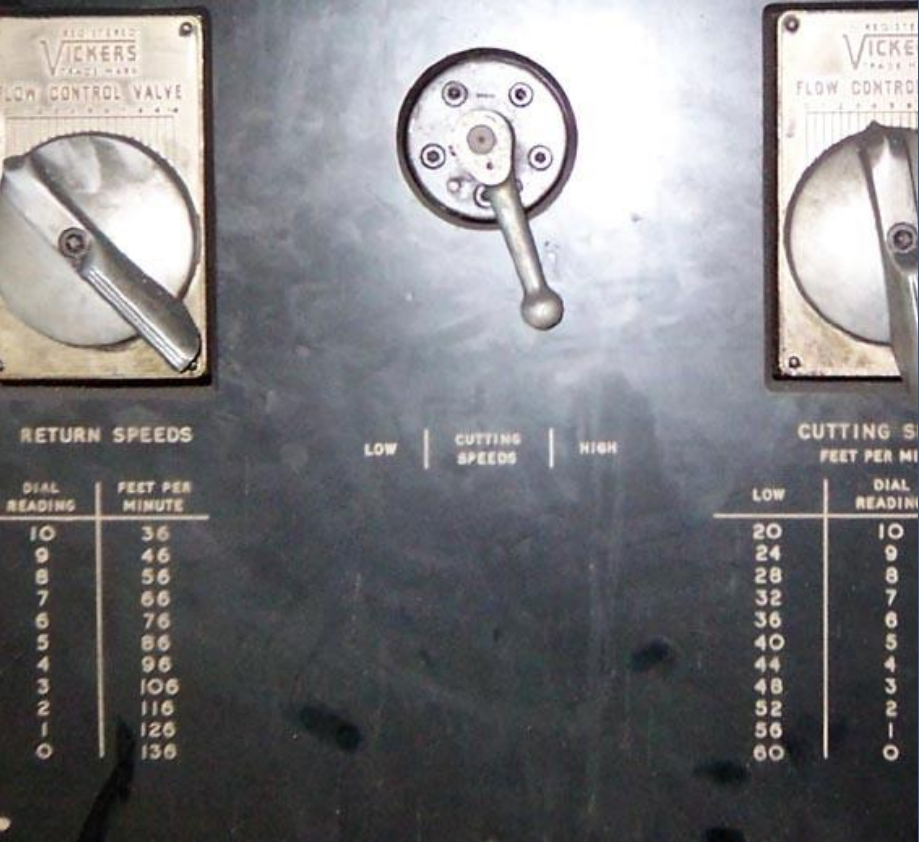
Held

- The contract between the parties was formed on the buyers' terms and conditions and did not include the price variation clause.
- The majority applies the mirror image rule.
- Sellers' quotation of May 23, 1969, was an offer which was rejected by buyers' order of May 27, 1969. This order was accepted in the two letters dated 4 and 5 June 1969, the latter enclosing the formal acknowledgement which said: "We accept your order on the terms and conditions stated thereon."
 - The reference to "[the sellers'] revised quotation of May 23" only identified the machinery and the price.

BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

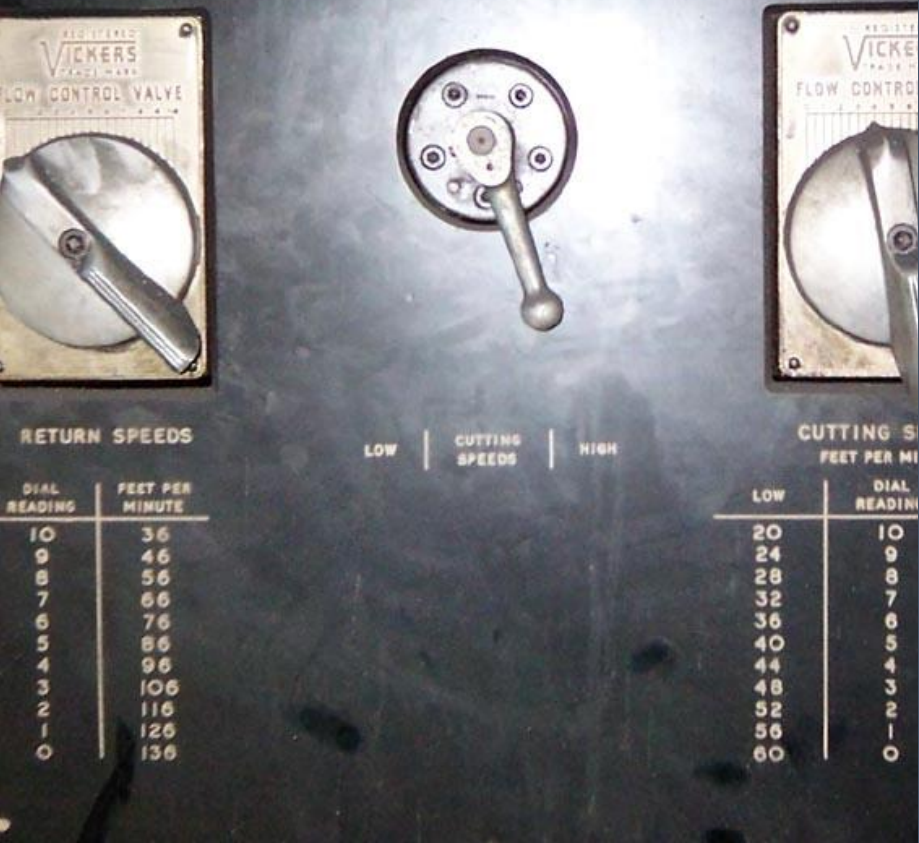
Held

- Denning MR: “[O]ur traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date . . . The better way is to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points—even though there may be differences between the forms and conditions printed on the back of them . . . Applying this guide, it will be found that in most cases when there is a ‘battle of forms,’ there is a contract as soon as the last of the forms is sent and received without objection being taken to it . . . The difficulty is to decide which form, or which part of which form, is a term or condition of the contract.”

BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



Battle of the Forms

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, Court of Appeal

Held

■ Denning MR:

- Last Shot: The party that puts forward the latest terms and conditions not objected to by the other party.
- First Shot: A buyer purporting to accept a seller's offer should not be able to impose different terms and conditions "if the difference is so material that it would affect the price" unless the attention of the seller was drawn to such difference.
- Knock Out: The terms and conditions of both parties are to be "construed together." If they cannot be "reconciled so as to give a harmonious result," the conflicting terms do not form part of the contract and any gaps are filled by reasonable implication.

Assignments and Readings

- Next Lecture
 - Date: 16 September 2024
 - Topic: Acceptance, Certainty
 - Readings: McKendrick, pages 121 to 142